

Flawed decision-making and false imprisonment damages

21/01/2016

Personal Injury analysis: Doughty Street's Mark Henderson considers the case in which a flawed decision by the Home Office to detain a young asylum seeker lead to the claimant being awarded damages totalling £23,292.50 with uplift.

Original news

Tarakhil v Home Office [2015] EWHC 2845 (QB), [2015] All ER (D) 194 (Oct)

The Queen's Bench Division found that the claimant, an unaccompanied Afghan minor who had arrived in the UK in 2008, had never been under any obligation to leave the UK and was not capable of being lawfully removed. He was an important witness in a murder trial as subject to an agreement by the police not to be detained or removed. On that basis the claimant's detention in an Immigration Centre was wrongful and he was entitled to damages in the overall award of £19,250.

What was the key factual background to the claim?

The claimant came to the UK in 2008 as an Afghan unaccompanied child seeking asylum. He was refused asylum but granted discretionary leave until he was seventeen-and-a-half years old, which he then applied to extend. While waiting for a decision from the Home Office (HO), he witnessed the homicide of someone he knew. Shortly afterwards his application to extend leave was refused but, due to his solicitors going into administration, no appeal was lodged on his behalf. The HO noted that he could not be detained until Kent Police gave consent because he was a significant witness in the murder case, so he was granted temporary admission. The claimant subsequently gave extensive evidence for the prosecution which was accepted and the perpetrator was convicted. Shortly thereafter, a fresh claim made by new solicitors was refused, but accepted to have merit and he was given a new appeal to the First-tier Tribunal (FTT). That appeal was dismissed, and he applied for permission to appeal to the Upper Tribunal (UT). Before that application was decided, file records disclosed to the claimant under the Data Protection Act 1998 (DPA 1998) revealed that it was decided to remove the claimant on a group charter flight to Afghanistan on 31 January 2012, apparently based on a misunderstanding of when his appeal rights would be exhausted. Only after he was detained for that purpose on 19 January 2012 did the HO realise that although he had been refused permission by the FTT, he had a right to renew to the UT which meant that he could not be removed on the charter flight as planned. However, having now detained him, it decided not to release him while it awaited the result of his application for permission and in the hope of removing him on the next group charter flight in a few weeks. It was only after he was granted permission to appeal by the UT that the HO released him from detention on 9 February 2012.

The claimant ultimately lost his appeal and returned to Afghanistan but his solicitors were able to keep contact with him to pursue his claim for damages for unlawful detention, personal injury damages for the psychiatric effect of his detention (based on a report obtained before he was removed), and aggravated damages for the high handed way that he was detained and in which his claim was dealt with throughout by the HO.

How did the HO defend the detention and are there any lessons to be drawn?

The HO contended that the detention was lawful because:

'There is no obligation to wait until an applicant is appeal rights exhausted before he is detained, whether by reason of *Hardial Singh* [*R v Governor of Durham Prison, Ex parte Singh* [1984] 1 All ER 983] principles or under the [detention policy].'

As such:

'The decision to detain and maintain detention pending the outcome of the PTA application was therefore justified in the circumstances, having regard to the Claimant's immigration history, including his clandestine entry into the UK and his recent failure to report...'

However, after obtaining a number of extensions to serve evidence, the HO said that it would not lead any evidence after all. The claimant contended that this appeared fatal to its defence. The HO then applied to file late witness evidence very shortly before the trial, to which the claimant objected. At an interim hearing, the HO was refused permission to rely on evidence except in so far as it summarised the documents.

The HO maintained its defence that the detention was justified by absconding risk arising from his immigration history and previous failure to report, and by the possibility of removing him on another charter flight within a matter of weeks if his permission application was refused. However, the only evidence about why it was decided to detain him was the partially disclosed contemporaneous documentation indicating that the decision to detain on 19 January 2012 was specifically made because he had been selected to be removed on the group charter flight to Afghanistan fixed for 31 January 2012.

This was therefore a not uncommon situation where the HO plans to remove someone and detains them in readiness, but when the planned removal fails, the HO does not release them and instead claims that there are other grounds justifying detention. That raises the question of whether those other grounds were really considered sufficient to detain the person.

That is a question that cries out for evidence. The HO failure to lead proper evidence in this case reflects a persistent problem with which the courts have dealt over a number of years. In *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, [2010] All ER (D) 185 (Apr):

'[The Court of Appeal's] attention was drawn to the Home Secretary's policy of according anonymity to officials who deprived a person of his liberty and declining to call them as witnesses to explain their conduct...[I]t is difficult to understand the policy of attempting to give officials anonymity and of exempting them from giving an explanation, as those who make decisions that deprive a person of his liberty should not be permitted to claim anonymity and be shielded from explaining their conduct to a court. It is moreover difficult to see how such a policy is consistent with the rule of law in a democracy.' (paras [79]–[80])

Years later, in *R (on the application of Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45, [2014] All ER (D) 186 (Jan) the Court of Appeal again noted 'the absence of any evidence on behalf of the Secretary of State...to explain her decision-making in this case' (para [79]). Counsel for the Home Secretary 'urged the court not to punish the Secretary of State for not filing evidence, and referred to the scarcity of resources, the heavy litigation burden on the Secretary of State, and the need to prioritise resources on those currently detained' (para [80]). The court replied that there was no question of punishing the HO, but equally, it could not expect to be afforded a privileged position in litigation by avoiding the ordinary consequences of a failure by a litigant to lead evidence. Indeed, where the HO elects not to call available witnesses in a case such as this, '[t]he basis for drawing adverse inferences of fact against the Secretary of State...will be particularly strong' (Beatson LJ in *Das*, para [80], adopting reasoning of Sales J). While that judgment drew on the duty of candour in judicial review proceedings, these are essentially public law challenges brought by way of civil claims, where the failure to lead proper evidence is all the more important since it has the effect of shielding the basis upon which the decision makers actually authorised detention from enquiry by way of cross-examination at trial.

In this case, the HO neither led useful evidence nor, it appears, conducted any proper disclosure exercise. The only documentary evidence emanating from the HO was that obtained under DPA 1998. The judge observed that:

'The defendant called no evidence and served one witness statement which was of no value since it was provided by a witness who had no personal knowledge of the case and merely exhibited documents and summarised their contents...Furthermore, the defendant did not disclose many disclosable documents which were potentially helpful to the claimant. All these failings meant that the defendant essentially had no case save by way of comment and inference about the claimant's case.' (para [33])

The case is also a good example of the court rejecting the HO's ex post facto justification of detention, often advanced by way of pleadings and submissions unsupported by proper evidence. It highlights the value of objecting to late or no evidence from the HO in such cases, and referring the court of the guiding authorities on this practice, and, most importantly, of the consequences that should follow—the court will draw adverse inferences of fact against the HO.

What was notable about the basis on which the detention was found to be unlawful?

Most unlawful detention claims involving public law error are challenging breaches of specific provisions of published detention policy, particularly relating to categories who are unsuitable for detention. However, this case illustrates the proposition that any public law error material to the decision to detain will render the detention unlawful. The Supreme Court held in *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 4 All ER 1 that to be material, 'the breach of public law must bear on and be relevant to the decision to detain' (Lord Dyson, para [68]).

The court determines public law errors on ordinary principles of judicial review, rather than deciding for whether detention is justified (as it would where detention was challenged under *Hardial Singh* principles). It must therefore be established that the HO's assessment is irrational rather than simply wrong. However, that can have the benefit of making it harder for the HO to seek to evade the consequences of a flawed decision making process by arguing that detention was, quite apart from the decisions actually made, appropriate on the facts.

As indicated, the HO in this case argued that the decision to detain pending the outcome the final decision on permission to appeal was 'justified in the circumstances' in light of the claimant's immigration history and failure to report. It contended that:

'The suggestion that such a decision was not open to a reasonable decision-maker, implicit in the allegation of material public law error, is, in the circumstances, unsustainable.'

That reflects a common misconception. Lord Dyson said in *Lumba* that 'if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity' (para [66]). *Wednesbury* irrationality is not limited to perversity. It includes failure to have regard to all relevant factors and to disregard all irrelevant factors. The HO was wrong to equate this with a 'suggestion that such a decision was not open to a reasonable-decision maker'. The HO's position is contradicted by Lord Dyson's holding in *Lumba* that:

'The Secretary of State must prove that the detention was justified in law. She cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made.'

The decision to detain the claimant was in order to remove him on a particular group charter flight. He could not in reality be removed on that flight. The HO therefore relied on an erroneous and therefore irrelevant factor and/or failed to have regard to a relevant factor (in particular the claimant's time limit for renewing his permission application which would not permit his removal on the charter flight). The claimant also argued that the HO had failed to comply with its Tameside duty to make adequate enquiry to ascertain the correct position.

The judge found that the decision to detain was flawed. The HO's argument that it was open to a reasonable decision maker to detain the claimant before his appeal rights were exhausted because of his history and the possibility of a future charter flight removal missed the point. That was not, as a matter of fact, the reason he was detained.

The HO devoted substantial effort to establishing that its reviews during the course of the claimant's detention were rational in themselves. But it did not matter. If the decision to detain was irrational then subsequent reviews flowed from an unlawful starting point.

Did the HO dispute entitlement to damages even if the detention was unlawful?

The HO also argued that:

'In any event, if, which is denied, there was any such error, it would have been open to a reasonable decision-maker, directing himself by reference to the relevant policy, to detain the Claimant such that the Claimant would only be entitled to nominal damages.'

That again illustrates a common misconception. In order to defeat a claim for substantial damages, it is not sufficient to show that a decision to detain could rationally have been made on other grounds. The HO must first establish as a matter of fact that it would have detained the claimant on these grounds. The question is one of causation. If the claimant would not in fact have been detained on other grounds, then it matters not whether a hypothetical decision to detain him on those other grounds would have been rational and lawful.

The claimant argued that the HO's failure to lead evidence that the claimant would have been detained for other reasons meant that her case on causation could not succeed. The judge awarded substantial damages.

How did the judge approach the quantum of damages for false imprisonment?

The judge started with the original guideline quantum authority for false imprisonment damages, and the only authority to give guidance on an initial daily rate. That is *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, [1997] 2 All ER 762 which stated that '[a]s a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000' with the daily rate reducing thereafter. Allowing for inflation, the guideline for the first 24 hours is about £5,000. The judge also had regard, among others, to *R (on the application of MK) v Secretary of State* [2010] EWCA Civ 980, [2010] All ER (D) 26 (May) where the Court of Appeal raised the basic award for 24 days' unlawful detention to £12,500, which the judge treated as equivalent to £14,420 adjusted for inflation.

The judge observed that:

'The claimant was, from the outset in this case very conscious that his detention was unlawful and the shock clearly profoundly affected him.' (para [52])

This led him to make a substantial award for 21 days detention of £14,250, almost the same as that awarded in *MK*.

What lessons can be drawn from the other heads of damage awarded in the judgment?

The psychological effects of detention are of course relevant to the quantum of basic damages for false imprisonment. However, the judgment also illustrates the value of obtaining medical evidence to support a discrete personal injury claim for psychiatric damage, even if the damage attributable to the detention is moderate.

The judge concluded in this regard that 'he was clearly deeply shocked by his initial detention with symptoms of anxiety and fear of both detention and deportation and displayed clear signs of Adjustment Disorder with anxiety features' (para [53]) and, following the Judicial College Guidelines, made an award of £3,000 for personal injury damages.

The case is also a useful illustration that at least a modest award for aggravated damages will be appropriate for conduct on the part of the HO that is far from out of the ordinary. In *Thompson* and *Tsu*, the Court of Appeal said that '[w]e consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000'. That is roughly £1,700 allowing for inflation.

The claimant relied upon the HO's failure to offer any proper explanation of the decision to detain him and pointed to the HO's continued flouting of emphatic judicial guidance dating back to 2010 (*Muuse*, above) about the need to lead evidence in such cases to explain the detention. The judge agreed that aggravated damages of £2,000 should be awarded, stating that:

'In this case, the defendant repeatedly failed to address the legal constraints to detaining the claimant, persistently failed to explain why it was detaining him despite his on-going appeal process and failed to address his status as a prosecution witness...or the fact that...he could not be placed on the flight...Furthermore, the defendant did not serve any admissible evidence in either witness statement or documentary form and its records of the reasons for detention and continued detention were sparsely and wholly inadequately documented.' (para [55])

In addition, the judge accepted that the *Simmons v Castle* 10% uplift applied to aggravated damages as well as basic damages for false imprisonment and personal injury damages (para [56]) (*Simmons v Castle* [2012] EWCA Civ 1288, [2013] 1 All ER 334). It is sometimes questioned whether the uplift applies to aggravated damages but it should apply since they remain compensatory damages (unlike exemplary damages). The claimant therefore received a 10% uplift on his damages of £19,250 (basic damages of £14,250, personal injury damages of £3,000, and aggravated damages of £2,000).

Are there any other lessons that can be drawn from the case?

It is an example of the value of making reasonable Part 36 offers. The claimant made an early Part 36 offer which was not accepted, and which he beat at trial. He also beat a later, liability only offer. Consequently, he was entitled to 'an additional amount' of 10% of the total awarded in the judgment (ie including the 10% *Simmons v Castle* uplift)—see CPR 36.17(4). The order therefore provided for a total award of £23,292.50.

He was also entitled under the same rule to be awarded costs on the indemnity basis from the point at which the deadline for accepting the Part 36 offer expired along with 'interest on those costs at a rate not exceeding 10% above base rate'. Although the 'additional amount' is set at 10% of the total award, the enhanced interest is expressed as 'not exceeding 10% above base rate' and it is not indicated how the actual rate is to be set. The purpose of the provision is to impose a financial sanction on the defendant for failure to accept a reasonable Part 36 offer in order to increase the risk to defendants to something closer to the risk to claimants of rejecting a Part 36 offer. It is intended to incentivise claimants to make, and defendants to accept, a reasonable Part 36 offer. That means that the maximum 10% above base is appropriate unless particular circumstances compel a lesser figure. Although there is no authority discussing the point, judges usually take this approach, as this case illustrates—interest on costs was ordered at 10.5%.

The rule also provides for enhanced interest on damages. However, the authorities confine this sanction to heads of damage that already merit some award of interest, which will ordinarily exclude false imprisonment damages since they are intended to encompass losses up until the date of judgment.

The court must make these orders in favour of a claimant who has beaten his Part 36 offer 'unless it considers it unjust to do so'. This is an exception to the ordinary consequences of beating a Part 36 offer, and requires something out of the ordinary. It does not give the court a general discretion to depart from the normal consequences because it thinks they are too harsh to the defendant or too generous to the claimant. It is for the defendant to establish that the normal orders discussed above are unjust in the particular case and a court must so find. Relevant factors are set out at CPR 36.17(5). It is not sufficient that the defendant had reasonable grounds for rejecting the offer, or the claimant only just beat his Part 36 offer.

Mark practises in public, human rights and EU law. Specialisations include unlawful detention, asylum and immigration, freedom of expression, media and information law, and community care. He appears regularly in the Court of Justice of the EU and the European Court of Human Rights. He is a former Legal Aid Barrister of the Year.

Mark Henderson and Jed Pennington at Bhatt Murphy acted for the successful claimant in Tarakhil v Home Office.

Interviewed by Barbara Bergin.

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