

Neutral Citation Number: [2018] EWHC 427 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

CO/311/2018

Royal Courts of Justice

Date: Tuesday, 13th February 2018

Before:

RICHARD CLAYTON QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

MOOGE

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

MR J BUNTING (instructed by Duncan Lewis) appeared on behalf of the Claimant.

MRS J GRAY (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

THE DEPUTY JUDGE:

- 1 The claimant in this case is a Somali national who arrived in the United Kingdom in 1989. He was granted refugee status by the Secretary of State in 1990 and indefinite leave to remain on 11th January 1985. This claim concerns alleged unlawful detention from 25th August 2017 until 7th February 2018.
- 2 The claimant has a poor offending record. On 17th July 2009 the claimant was convicted for an offence of possession of a false instrument for use in a fraud and theft, for which he was sentenced to 12 months' imprisonment. On the conditional release date of his sentence, which was on 15th January 2010, the claimant was transferred to immigration detention. On 15th December 2010 the Secretary of State purported to sign the deportation order in respect of the claimant, doing so in the mistaken belief that he was Mohammed Ali Aden. The Secretary of State asserted that Mr Aden had been refused asylum on 11th February 2002. The claimant appealed against the deportation order on 22nd December 2010 and the defendant reviewed the claimant's case, and having accepted he had been granted refugee status in 1990, withdrew the automatic deportation decision of 30th July 2009.
- 3 On 18th June 2015 the claimant was sentenced to 4 and a half years' imprisonment following his conviction for possession of a class A drug with intent to supply. On 26th August 2010 the claimant was due to be released on licence. Instead, he was detained by the defendant under the Immigration Act powers. This again appeared to be based on a mistaken belief that the claimant is Mohammed Ali Aden. Monthly progress reports dated 17th November 2017 and 15th December 2017 prepared by the Secretary of State's officers refer to the claimant as Mohammed Ali Aden and also refer to him having failed or refused to leave the United Kingdom when required to do so.
- 4 The claimant applied to the first-tier tribunal in October 2017. The bail summary relied upon by the Secretary of State to oppose bail again contained references to the immigration and offending history of Mohammed Ali Aden as well as the claimant. The claimant withdrew that application and reapplied in December 2017. At that hearing the Secretary of State said his removal from United Kingdom was imminent and that he was subject to deportation order, and the claimant was again refused bail.
- 5 The claimant then instructed solicitors in connection with this case on 18th December 2017. Pre-action letters were sent to the defendant by solicitors on 11th January 2018 and 18th January 2018. They provoked no response. The claimant was in fact released from detention on 7th February 2018.
- 6 Proceedings were issued under the urgent application procedure on 22nd January 2018. The application for expedition and abridgement of time was considered on the papers by Mrs Justice Laing on 23rd January 2016 when she adjourned the case to a rolled-up hearing to be heard and gave various case management directions.
- 7 The case comes before me today as an unlawful detention claim. Mr Bunting very kindly took me through various documents making good his case. The Secretary of State was constrained not to make any direct submissions on liability and in those circumstances, I do find that the claimant was unlawfully detained. Because the case comes before me as a rolled-up hearing, I therefore grant permission to move for judicial review. I grant a declaration that the claimant was unlawfully detained from 25th August 2017 to 7th February 2018 and I adjourn the damages claim to be heard before the county court.

THE DEPUTY JUDGE: Is there anything else?

MR BUNTING: Two short matters my Lord if I can. The first is likely to be less controversial.

Can I have an order for detailed assessment of the claimant's costs?

THE DEPUTY JUDGE: You may have a detailed assessment.

MR BUNTING: The claimant secondly seeks his costs of today's hearing on an indemnity basis.

I recognise that that is an unusual submission.

THE DEPUTY JUDGE: It is. You will have to take me through it some more if you want to pursue it.

MR BUNTING: The claimant's skeleton argument sets out the basis upon which an indemnity in costs----

THE DEPUTY JUDGE: I am afraid, you will remind me what it is because I did not bring mine with me.

MR BUNTING: I am so sorry. The claimant's skeleton argument seeks indemnity costs for three reasons. The first is that the defendant failed properly to engage with the pre-action protocol procedure in this case and the skeleton argument refers to a case from the Technology and Construction Court which provides that that is a reason why indemnity costs can be made. The second is that the defendant attempted to continue to justify the claimant's detention even after its illegality had been brought to the defendant's attention, and in particular I rely on the monthly detention reviews in January and February, which is why in part I took your Lordship through the evidence with some care this morning. The third reason is that the defendant has failed to set out any defence at all on liability in this case and has put us through the expense and difficulty of admittedly a reasonably short hearing this morning but it has taken time to go through significant lumps of correspondence and documents to make good the claimant's case. All of that ought to have been unnecessary if the defendant had, as the claimant invited the defendant to do in correspondence on Friday last week and yesterday, to concede illegality and on that basis to agree to a transfer to another court.

Effectively, the position that we are in is that the defendant has not put forward any defence at all to the unlawful detention which your Lordship has found, and in those circumstances, not only should costs follow the event but costs ought to be granted on the indemnity basis to reflect the difficulties that we have all been through as a result.

Unless I can assist your Lordship any further, those are the submissions on costs.

THE DEPUTY JUDGE: Thank you.

MS GRAY: My Lord, in relation to the question of costs the Secretary of State's position is to invite you to reserve the costs to be assessed by the county court judge. The reason I say

that is because for the reasons I gave you this morning, notwithstanding my learned friend's submission that this is a very simple case, it clearly is not because of the very, very complicated factual matrix behind this man's criminal history and his assumption, we say, of different aliases which may generate the reasons as to why you have now made this decision. That is a matter that needs to be really carefully investigated by the Secretary of State, and in my submission that opportunity has not yet arisen for her to do so. I took you to the disclosure exercise, 1,500 pages, which is before you today. That was not completed, even with best of efforts until Friday afternoon. A lot of people were put on it. Of course, what is involved in this is obtaining information from all sorts of different files going back to the 1990s.

THE DEPUTY JUDGE: Right.

MS GRAY: In so far as my learned friend invites you to find that the Secretary of State's conduct in this matter has been sufficient to award costs on an indemnity basis, I invite you to find that it is not, for the reasons that I gave you this morning, and that every endeavour has been made to comply with the court's directions and to furnish the court with the necessary information.

He points to the pre-action protocol and our response to that. Again, I make the similar submission that really and truly, given the time -- I think the pre-action protocol was issued, I think, on 11th January 2018. The claim was issued on 22nd. The response was issued by the respondent on 23rd, I believe. My learned friend takes issue with the degree to which we have engaged with the issues in the response to the pre-action protocol, but again, it requires a detailed factual analysis of what was actually going on. Of course, if this case worker was of the view that he was Aden and that in fact his immigration history did not show what he was claiming it showed, then that may be the reason that this has happened in the first place. This all needs to be investigated, in my submission, and it is not appropriate in those circumstances to award indemnity costs against the defendant and in fact it would be better, because all those matters are still in issue. There may be a possibility even that only nominal damages will be awarded, because you were taken this morning to the deportation letter that is been issued now on 6th January and at the moment the Secretary of State has not made the case that she could have detained and could and would. All those matters, of course, go to damages.

For all those reasons I would invite you not to make an indemnity costs award against the defendant. If costs are to be awarded it should be on the standard basis, but for the reasons I have given you, I would suggest it is better for the assessment to be made by the county court judge.

THE DEPUTY JUDGE: Thank you.

MR BUNTING: My Lord, what is simply not in dispute is that we have won the judicial review aspect of this case. We have done so in circumstances in which the defendant has never pleaded any defence, still less an arguable one, and in which the Secretary of State has continued to detain even after the illegality has been brought to the Secretary of State's attention.

I recognise that there may be issues of fact in relation to damages, as my learned friend says, but none of that affects your jurisdiction to award an order for costs in the claimant's favour on the standard basis, given that costs ought to follow the event. We have been put to a lot of work and we have been successful in what we sought. It is also sufficient to justify an award of indemnity costs for the reasons I have given. (Inaudible).

THE DEPUTY JUDGE: I would award costs to the claimant to follow the event. I am not inclined to leave the assessment to a county court judge so I put that to one side, reject it.

So far as the indemnity cost basis application is made, that is a very rare kind of award to make in judicial review proceedings. Whilst it appears that the defendant's treatment of the case is not entirely satisfactory, I do not take the view that they have approached it in such a grave and inappropriate manner that it would warrant an award for indemnity costs. The submission I have received have been very brief indeed in support of that submission but in my judgment nothing has been identified which would warrant such an exceptional course as the one suggested.

I therefore award costs of the claimant on the standard basis and thank you both for your submissions during the course of the morning.

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This transcript has been approved by the Judge.