



**THE COURT OF APPEAL
CIVIL**

**UNAPPROVED
NO REDACTION NEEDED**

**Court of Appeal Record No. 2018/264
High Court Record No. 2013/4516P**

**Whelan J.
Power J.
Murray 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 Murray delivered on the 10th day of November 2021

1. The unapproved judgment in this matter issued on 16 April 2021 under the title '*GE v. The Commissioner of an Garda Síochána*' ([2021] IECA 113). There, I rejected the claim advanced by the defendants on the basis of the decision in *R(WL) (Congo) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 that where a plaintiff establishes that he or she has been unlawfully confined, a defendant

will defeat any consequent claim for compensatory damages in an action for false imprisonment if it can be shown that had the plaintiff not been unlawfully detained he or she could and would have been lawfully detained. At the conclusion of that judgment I expressed the provisional view that the order made by the High Court for the costs of the proceedings before that Court should stand, and that the plaintiff should recover all his costs of the appeal. Whelan J. and Power J. agreed with that judgment.

2. The defendants have delivered written submissions contesting this provisional view. They point out that the plaintiff had before the Court a cross appeal, in which he was unsuccessful. That cross appeal was against those aspects of the High Court judgment in which Faherty J. had taken into account certain credibility issues arising from the plaintiff's evidence when assessing the damages to which the plaintiff was entitled. The plaintiff had contended that the damages to be awarded to him ought to have been increased because the trial Judge wrongly took into account her view that the plaintiff had in the course of the trial tendered evidence that was false.
3. I rejected that contention on the basis that where the Court was assessing damages for the tort of false imprisonment it was necessarily assessing the impact upon the particular plaintiff of the detention and was entitled in the course of that assessment to have regard to the veracity of the plaintiff's evidence. I also noted that it was relevant to a claim for damages incorporating an element to protect a plaintiff's reputation or to reflect the stigma associated with his arrest that he had given false evidence to the Court in the course of the proceedings. For those reasons I could see no reason to interfere with the trial Judge's various findings in relation to the plaintiff's credibility and the conclusion that this had a bearing on the level of compensatory damages in the case.

4. That being so, the defendants are entitled to a deduction on the costs awarded to the plaintiff to reflect the fact that the plaintiff brought, and failed in relation to, his own cross appeal. However, having regard to the fact (a) that the cross appeal formed but a small part of the oral and written submissions and (b) that there was a close connection between the cross appeal and the more general issues arising in the defendant's appeal as to the factors to be taken into account in the assessment of damages for the tort of false imprisonment, the reduction should be limited to 10% of the total costs. Therefore the plaintiff should be awarded 90% of the costs of this appeal.

5. A second matter arises from the unapproved judgment. As I have noted, the plaintiff's name was anonymised in that judgment, as it had been in the High Court. I infer that the trial Judge adopted this course of action having regard to s. 26 of the International Protection Act 2015. It provides as follows:

(1) The Minister and the Tribunal and their respective officers shall take all practicable steps to ensure that the identity of applicants is kept confidential.

(2) A person shall not, without the consent of the applicant, publish in a written publication available to the public or broadcast, or cause to be so published or broadcast, information likely to lead members of the public to identify a person as an applicant.

6. In *MARA (Nigeria) v Minister for Justice and Equality* [2014] IESC 71, [2015] 1 IR 561 ('*MARA*') Charleton J. explained that the effect of s. 19 of the Refugee Act 1996 (the predecessor of s. 26 of the 2015 Act) was as follows:

'[t]he plain and unambiguous result of the wording is, clearly, that once a person has applied for refugee status that they retain anonymity with regard to any litigation relevant thereto in perpetuity. Should there be unrelated litigation, such as a factory accident, that protection remains and, while the tort case may be reported normally, any mention of any prior failed application for refugee status may not be reported publicly.'

7. Prior to the release of the unapproved version of the judgment in this matter, the Court corresponded with the parties as to their position in relation to anonymity. The response of the State was that it did not believe the proceedings should be anonymised. The plaintiff's response was that his counsel advised that there was no need or basis for anonymising the judgment of this Court. This led the Court to believe that the plaintiff did not object to being named in the published judgment. The Court nonetheless preserved his anonymity in the title to the unapproved judgment reflecting the approach adopted in the High Court, further corresponding with the plaintiff as regards the question of anonymity in advance of release of the final approved judgment. That correspondence drew the attention of the plaintiff to the provisions of s. 26 of the 2015 Act and sought assurance that he was consenting to being identified in accordance with s.26(2).

8. On this occasion the response of the plaintiff's solicitors was that the plaintiff's preference was that he did not wish to be identified in the proceedings and that on this basis he *'does not consent to the disclosure of his identity'*. The effect is that the provisions of section 26(2) must be complied with.

9. Upon this communication being drawn to the attention of the defendant's solicitors they expressed the desire to deliver short written legal submissions on the issue of anonymity. The Court acceded to that request, and short but extremely helpful submissions were duly delivered by the State. They make five points.
10. First, they rightly emphasise the importance of the guarantee in Article 34.1 of the Constitution that, save in such special and limited cases as may be prescribed by law, justice shall be administered in public. Second, and again correctly, they say that there is no jurisdiction to grant an application to permit a litigant to proceed without disclosing his or her true name to the public. Third, they note the provisions of s. 29 of the Refugee Act 1996, the judgment of Charleton J. in *MARA* and his comments as cited above.
11. However, and fourth, they observe that this action did not relate to any application for asylum that the plaintiff may have made, that the events concern his entering into the State from Northern Ireland, being refused leave to land, being arrested and that in these circumstances there is no lawful basis for excluding the application of Article 34.1 of the Constitution. Finally, the defendants observe that there are other proceedings in which the plaintiff has been involved in which his name was not anonymised.
12. Dealing with these last two points in reverse order, the fact that the plaintiff has been named in other proceedings does not affect the position of this Court in addressing whether he is entitled to anonymity in this action. The provisions of s. 26 are clear, and the Court must apply them. This Court must approach this judgment on its own terms, while noting both that the judgments to which the defendants refer predated the decision in *MARA* and that neither refers to any application being made to the relevant Courts that the judgments be anonymised.

- 13.** I have, however, given careful consideration to the issue of whether the nature of these proceedings – which as the defendants correctly submit are not concerned directly with the plaintiff's application for international protection – are of such a kind that the provisions of s.26 do not apply to them. I have concluded that they are not.
- 14.** The judgment delivered in the appeal refers at numerous points to the fact of the plaintiff's application for asylum. This was relevant not merely to the plaintiff's own background and the context of his presence in the jurisdiction and arrest but was central to the questions raised by the defendants in the course of the plaintiff's trial as to his credibility. The cross-examination of the plaintiff in the course of the trial was, as I recorded it at paragraph 9 of my judgment, largely directed to issues of credit, much of it going back to the circumstances of the plaintiff's application for asylum and the information given by him to the authorities for that purpose. That application and the cross examination featured prominently in the High Court judgment (and therefore in the summary of that judgment in the appeal ruling). The judgment on the cross appeal could not have been comprehensibly (and certainly not comprehensively) formulated without referring to the asylum application. The issues addressed in that part of the judgment dealing with the cross appeal are interrelated with, and cross referenced to, my consideration of the factors to be taken into account in assessing damages for the tort of false imprisonment, these in turn being an integral part of my consideration of the principal issue in the case.
- 15.** This means that this Court is now, having regard to the position latterly adopted by the plaintiff, faced with two alternatives in ensuring compliance with s. 26. One is to anonymise the judgment as the plaintiff requests. The other is to name the plaintiff and

remove any reference to the fact of his application for asylum from the approved judgment when it is issued. Each alternative implicates different aspects of the administration of justice in public. One involves with-holding the plaintiff's name from the public, the other removing reference to aspects of the history of the case which the Court believes important to understanding the factual context to and legal basis for Court's conclusions in, the appeal.

- 16.** It is my firm view that the first alternative is the least intrusive on the right of the public to the administration of justice in public and the most consistent with the constitutional scheme. It is, for the reasons I have explained, not possible to provide a complete and coherent account and explanation of the legal issues in the appeal while removing any such reference. It is, therefore, in this case more important that the public obtain a full account of the legal and factual basis for the Court's conclusions on the issues arising in the case than it is that the plaintiff is named. In this regard I observe that the High Court judgment was anonymised without any apparent objection.
- 17.** Whelan J. and Power J. are in agreement with this judgment and the orders I propose.