FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 1
XA21/23

Lord President
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the remit from the Sheriff Appeal Court under section 112 of the Courts Reform (Scotland) Act 2014

in the cause

GALBRAITH TRAWLERS LIMITED

Pursuers and Respondents

against

THE ADVOCATE GENERAL FOR SCOTLAND (as representing the HOME OFFICE)

Defender and Appellant

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Pursuers and Respondents: Howie KC; Irvine; Burness Paull LLP
Defender and Appellant: Lindsay KC; Anderson Strathern LLP

10 January 2024

Introduction

[1] The sheriff at Campbeltown found the Advocate General, representing the Home

Office, liable to pay to the pursuers, a fishing company, damages of £284,227, plus interest, for losses which arose when the Home Office unlawfully detained three of the pursuers' fishing vessels between 2015 and 2016. The Advocate General contends that, owing to the particular circumstances of the case, the sheriff ought to have restricted his award to a nominal amount. That contention flowed, in essence, from the reasoning in *Parker* v *Chief Constable of Essex Police* [2019] 1 WLR 2238 (Sir Brian Leveson at para 104) that the test, when assessing damages in a wrongful detention case, is not to compare the claimant's position with what would have happened, but for that detention, but with what would have happened if the relevant authority had appreciated what they ought to have done to effect a lawful detention. This test, which was said to be the product of *R (Lumba)* v *Home Secretary* [2012] 1 AC 245, has been criticised both by the High Court of Australia (*Lewis* v *Australian Capital Territory* [2020] 271 CLR 192) and the Supreme Court of Ireland (*GE* v *Commissioner of the Garda Síochána* [2022] IESC 51). In order to determine the appeal, the court must decide whether *Parker* is in line with Scots law or whether it should follow the Australian and Irish jurisprudence.

The Immigration Act 1971

[2] Section 25 of the 1971 Act makes it an offence to do any act which facilitates a breach of immigration law by an individual who is not a UK national. When a person is convicted on indictment, section 25C allows the court to forfeit a vessel which has been used in connection with the offence. Prior to forfeiture, section 25D (as applied to Scotland) allows the vessel to be detained, as follows:

> "**25D Detention of ship …**

> (1) If a person has been arrested for an offence under section 25 … a senior officer or a constable may detain a relevant ship…
>
> (a) until a decision is taken as to whether or not to institute criminal proceedings against the arrested person for that offence; or
>
> (b) if criminal proceedings have been instituted against the arrested person—
>
> (i) until he is acquitted or … or the trial diet is deserted *simpliciter*;
>
> (ii) if he has been convicted, until the court decides whether or not to order forfeiture of the ship …
>
> (2) A ship … is a relevant ship … in relation to an arrested person, if it is one which the officer or constable concerned has reasonable grounds for believing could, on conviction of the arrested person … be the subject of an order for forfeiture made under section 25C.
>
> …
>
> (6) 'Court' means—
>
> …
>
> (b) in Scotland, the sheriff …
>
> (8) 'Senior officer' means an immigration officer not below the rank of chief immigration officer."

Background and previous decisions

[3] The Advocate General does not challenge the sheriff's finding that the vessels were detained unlawfully. He confines his appeal to a contention that only nominal damages ought to have been awarded. This is on the basis that the mistakes, which were made by the Home Office in detaining the vessels, were procedural or technical errors. Had the Home Office been aware of the correct method of detention, they could and would have lawfully detained the vessels. Therefore, the Advocate General argues, the unlawfulness of the detention did not cause the loss. The detentions could have been executed lawfully, and the same loss would have occurred if they had been. In order to understand this ground of appeal, it is necessary to look at the background to the detentions and the previous decisions of the sheriff and the Sheriff Appeal Court.

Home Office investigation and Mr Rennie's arrest

[4] In 2015, the pursuers owned a fleet of prawn fishing vessels, including the Amy Harris IV, the Sapphire IV and the Fear Not II. These vessels were worth, respectively, about £100,000, £520,000 and £100,000. The pursuers used the vessels to fish within UK territorial waters. In August of that year, the Home Office were engaged in Operation Void. This was an investigation into the facilitation of illegal working within UK waters by the fishing industry; notably that in Scotland. The Home Office team, which was based in Glasgow, was headed by Carolyne Lindsay, who held the rank of Her Majesty's Inspector for Criminal and Financial Investigations of the Home Office. The team included a police officer, Detective Constable Steven Livingstone, and an Immigration Officer, John, known as Jack, Linton.

[5] The Home Office investigated the pursuers as part of the operation. They suspected the pursuers of facilitating breaches of immigration law by employing Filipino workers on their vessels. The pursuers accepted much of what was ultimately reported by the Home Office to the Crown Office. They had sponsored Schengen Visas which had been applied for by nationals of the Republic of the Philippines at the embassies of the Netherlands and the Faroe Islands in Manila. The visas permitted entry into the Schengen Zone (which does not include the UK). The pursuers used their vessels, over time, to transport about twelve Filipinos from the Netherlands or the Faroes to the UK. The Filipinos worked on the vessels at various times between September 2014 and September 2015. They were, according to the pursuers, lawfully in the UK without leave because they were seamen (1971 Act, s 8). On 19 August 2015, during a routine port visit, Border Force Officers came across four of the Filipino workers who were working aboard the Amy Harris at Ardrossan. They were detained under the 1971 Act. The vessel was skippered by James Rennie. On 25 August

2015, he was arrested on suspicion of facilitating a breach of immigration law contrary to section 25 of the 1971 Act.

Detention of the Amy Harris

[6] On the day of Mr Rennie's arrest, DC Livingstone drafted a letter to him. This advised that, consequent upon his arrest, the Amy Harris "has/will be been detained" (*sic*) under section 25D of the 1971 Act. The justification for the detention, and those of the other two vessels, will be explored in due course. The letter ran in Mr Linton's name and gave his designation as an immigration officer. Mr Linton was only an "acting" Chief Immigration Officer. The letter did not disclose this. Mr Linton was on leave when the letter was drafted. He was unaware of it. On 26 August 2015, DC Livingstone emailed the letter to Campbeltown police station with instructions to serve it on Mr Rennie. He phoned Mr Rennie's solicitor to say that the Amy Harris had been detained. On the following day, DC Livingstone was told that the police had been unable to serve the letter. He agreed with Mr Rennie's solicitor that Mr Rennie would collect the letter from the police station. Mr Rennie did so at some point prior to 7 September. On 4 December, the pursuers raised proceedings under section 25C for the release of the Amy Harris. The Advocate General defended the action.

Detentions of the Sapphire and the Fear Not

[7] On 14 December 2015, John Galbraith, who was the controlling shareholder of the pursuers and the skipper of the Sapphire, was arrested on suspicion of breaching immigration control by facilitating unlawful working in UK waters. On 23 December, Mr Linton, along with police officers and Home Office officials, went to Mr Galbraith's home in Campbeltown. He served a letter on Mr Galbraith which stated that the Sapphire

and the Fear Not "have been detained" under section 25D. This time the letter was signed by Mr Linton who was designated as an "Acting" Chief Immigration Officer.

The criminal proceedings and release of the vessels

[8] Although Mr Rennie was arrested, he was not prosecuted. Mr Galbraith appeared on petition at Campbeltown sheriff court on 10 March 2016. Although the sheriff found in fact that an indictment was served on Mr Galbraith in due course, this may not be accurate. Proceedings were subsequently raised by way of a summary complaint and then abandoned on 14 November 2017. Parties were unable to assist the court on why the prosecution had been discontinued. The Home Office agreed to release the vessels subject to consignation by the pursuers of £30,000. This was lodged with the sheriff clerk and later repaid. The Amy Harris and the Fear Not were released on 26 February 2016 and the Sapphire on 18 August 2016.

The sheriff and the Sheriff Appeal Court on lawfulness

[9] The pursuers raised the present proceedings at Campbeltown sheriff court in 2018. They challenged the lawfulness of the detentions on the basis, *inter alia*, that Mr Linton was not a senior immigration officer and therefore (1971 Act, s 25D(8)) did not hold sufficient rank to effect a detention. They had a separate case of deliberate misuse of statutory powers (*Micosta* v *Shetland Islands Council* 1986 SLT 193) and one based upon negligence. The Advocate General defended the action on the basis that the "decision to detain" had been made by Inspector Lindsay, who was a senior immigration officer. He averred that she had had reasonable grounds for believing that the Amy Harris could, on Mr Rennie's conviction, be forfeited by the sheriff. This was covered by the pursuers' general denial. The letter of 25 August merely communicated Inspector Lindsay's decision to Mr Rennie. Alternatively,

because Mr Linton had been "acting up" as a CIO, he held the requisite rank. The Advocate General also tabled a somewhat convoluted defence which was based on the maxim *ex turpi causa non oritur actio* (a person cannot pursue an action based on his own illegal actings). The argument was that the detentions had prevented the vessels from operating with an illegal crew. The action proceeded to a debate before the sheriff.

[10] In his judgment of 10 February 2020, the sheriff noted (para [59]) that the pursuers had admitted that the crew had been illegally employed. The pursuers were not founding on that illegality. They were founding on the illegality of the detentions of the vessels. The only basis for such detentions would have been to ensure that forfeiture could follow a conviction on indictment. Allegations of facilitating illegal entry had not been established. The Crown had accepted that the alleged offences did not justify solemn proceedings. It was not suggested that, after the detention of the crew, the vessels would engage in the lawful pursuit of fishing with other unlawfully employed crews.

[11] The sheriff allowed the misconduct case to go to proof, but determined that the negligence averments were irrelevant. He agreed with the pursuers that the lawfulness of the detentions was not dependent upon who might have made an earlier decision to detain, but on who carried out the detentions. Detention involved control of the vessel passing to the state (judgment para [94]). For that to happen, the detention had to be communicated to the person in control of the vessel. What mattered was who communicated the decision. The statute required the detaining officer to have reasonable grounds for believing that the vessel was liable to detention under section 25D. It was not maintained that any constable (eg DC Livingstone) had made the detentions. The Advocate General's position was that Inspector Lindsay had made the decision to detain, but not that she had carried out the detentions themselves. There was nothing which suggested that Mr Linton had applied his

mind to whether reasonable grounds existed. There were no averments about the appointment and the functions of an acting CIO. Detentions were analogous to arrestment of property on the dependence of an action, for which there was strict liability. For these reasons, the detentions were *ultra vires* and unlawful. The relative declarators were granted.

[12] On 15 April 2021, the Sheriff Appeal Court upheld (2021 SLT (Sh Ct) 211) the sheriff's decision in large part, subject to one issue of fact. The Advocate General's averments based on the maxim *ex turpi causa* were irrelevant. The Advocate General had accepted that the detentions had been effected and that Inspector Lindsay had made the decision to detain. However, he had denied the pursuers' averments about by whom and how the detentions were carried out. Section 25D made no provision for detention by an "Acting" senior officer. If the detentions had been effected by Mr Linton, they were *ultra vires* and unlawful and thus the Advocate General was liable for any losses. Evidence was therefore required to determine: (i) whether Mr Linton had carried out the detentions; (ii) causation; and (iii) *quantum*. A proof before answer was allowed on these matters. The declarators granted by the sheriff were recalled.

[13] The SAC confirmed (at para [49] *et seq*) that the purpose of detention was to provide security in the event of an order for forfeiture being made. It was akin to an arrestment on the dependence of an action. It was not for the purpose of preventing crime. Detention, according to the SAC (at para [67]), could be effected by the "delivery of letters". There was no power to board vessels under the 1971 Act, and so the delivery of letters, which gave notice to the owners or skippers, was an effective means.

The sheriff's decision following the proof before answer

How and by whom the detentions were effected

[14] On 12 December 2022, having heard the proof, the sheriff found in favour of the pursuers. Mr Linton had indeed effected the detentions. It is useful to look at the testimony of Inspector Lindsay in order to understand what happened. She said that she had been involved in discussions which had led to the detention of the Amy Harris, following upon the arrest of the Filipino crew at Ardrossan. Subsequently:

> "… there was a number of discussions around tactical options in terms of the investigation, and that led up to the decision to detain the vessels".

In the discussion about exercising the power of detention, "… that was one of the tactical options that was presented to me". Inspector Lindsay made the decision to detain because, "… that was the best course of action, to try and drive compliance …". The mode of detention was to be a letter in an agreed form which was to be served on Mr Rennie by the police at Campbeltown.

[15] Inspector Lindsay explained that, if she had been told that an acting Chief Immigration Officer, such as Mr Linton, did not have the power to detain the Amy Harris, she would have signed the letter herself. If it had been necessary for her to have served the letter herself, she would have done so. In relation to the Sapphire and the Fear Not, Inspector Lindsay had been told that they had been "put up for sale". Her opinion was that there was "an attempt to dissipate assets". She did not seek legal advice. She was not aware of any other members of the team having done so. She had asked the Crown Office about "proactive restraint". They did not think that that would be successful. She decided to detain the vessels. The relevant letter was signed by Mr Linton and served by him on

Mr Galbraith. Inspector Lindsay said in cross that she was unaware of the values of the vessels.

[16] The sheriff reasoned (at para [99]) that detention called for a decision to detain, a communication of that decision to the relevant person and a passing of control from that person to the state. An oral communication may suffice in urgent situations. The detaining officer required to believe that, if the arrested individual were to be convicted, the vessel could be forfeited. That belief had to be based upon objectively reasonable grounds. Once satisfied that detention was permitted, the officer should draft, sign and serve a detention letter on, or at least orally communicate the detention to, the vessel's owner or his agent. The officer should state the nature of his authority to detain. In cases of urgency, police constables could be requested to assist. If they were asked to do so, they too would require to satisfy themselves that there were reasonable grounds for detention.

[17] No such procedure was followed in respect of the Amy Harris. What procedure there had been was "deplorably irregular" (para [100]). No detaining officer had been present in the port where the vessel was berthed. The detention letter was unsigned. Although Mr Linton was ignorant of its existence, it ran in his name. It was not served on the pursuers. The cumulative acts of the Home Office created a "simulacrum" of a regular detention, but one which had been irregularly executed and without warrant. The procedure, which had been followed in respect of the Sapphire and the Fear Not, was less problematic, but it was still flawed. Those detentions had been effected by Mr Linton's service of the letter on Mr Galbraith at his home. Mr Linton believed that he had the power to detain. His actions were in line with internal Home Office guidance. His belief about his powers was honest, genuine and reasonable. The misconduct case failed. However, the correct interpretation of section 25D had been resolved by the Sheriff Appeal Court;

Mr Linton was not a senior officer in terms of the legislation. Since Mr Linton had effected the detentions, they were unlawful. As the SAC had also determined, comparison with arrestment on the dependence was appropriate. The Advocate General was liable for any losses caused by the detentions.

Causation and quantum

[18] There was no dispute that the detentions had caused loss to the pursuers. The dispute was about how that loss should be quantified. The sheriff rejected the Advocate General's argument that damages should be restricted to a nominal amount of £1.00. That argument relied on the application of a line of authority on false imprisonment in England in which the detainees had not suffered patrimonial loss (*R (Lumba)* v *Home Secretary*; and *R (Kambadzi)* v *Home Secretary* [2011] 1 WLR 1299). Here there had been patrimonial loss. In any event, these authorities had not been applied in Scotland. Any reference to them (*NS* v *Secretary of State for the Home Department* 2015 SC 295; and *Shehadeh* v *Secretary of State for the Home Department* 2014 SLT 199) had been *obiter*. The Scottish decisions were that compensatory damages would normally be payable in all but highly exceptional cases (*NS* at para [40]).

[19] The wrongful imprisonment cases in England were inconsistent with *Bell* v *Black and Morrison* (1865) 3 M 1026. *Bell* made clear that, where a warrant had been issued unlawfully because the judge did not have the power to grant it, the party who executed the warrant was liable for the consequences. Using the arrestment analogy, a relatively minor flaw could invalidate a warrant. The question was not what the position would have been if the diligence had been properly executed. The Home Office:

> "… had a flawed understanding of what was required to effect a Section 25D detention. Yet the court [had been] invited to proceed on a counter-factual

> hypothesis in which they had a correct understanding, and thus to presume that in that hypothetical alternative situation all would have been done correctly" (para [114]).

No such presumption was provided to non-state arresters. Extending a greater degree of indulgence to state actors would conflict with *Entick* v *Carrington* (1765) 19 State Tr 1030, in which it was said that the Crown's agents stood in the same position as its subjects.

[20] There were policy considerations which counted against the restriction of any award to nominal damages. It would mean that there was no real remedy for the wrongful conduct. Lack of a deterrent would foster an undesirable culture of impunity. As a check on the power in section 25D, which was capable of causing great and potentially irreparable damage to businesses and livelihoods, Parliament had entrusted it only to senior officers. That safeguard must be capable of being relied upon by affected parties.

[21] As a result of the detentions, the pursuers suffered financial losses of £284,227. This amount comprised: (i) loss of profit of £118,238; (ii) management time, diverted from revenue-raising activity, of £1,400; (iii) loss of profit as a result of deterioration of the Amy Harris caused by non-use whilst detained in the amount of £27,865; (iv) repairs to the Amy Harris of £3,854; and (v) a loss of £132,870, which arose from the respondents being forced to sell a fishing licence in February 2016 in order to meet their debts. Had they not required cash urgently, the pursuers would have retained the licence until 2018, when its market value had risen by that amount. The sheriff separately granted decree for payment of £8,397.97, being the legal expenses incurred in order to secure the release of the vessels.

Submissions

The Advocate General

[22] The sheriff erred in failing to restrict damages to a nominal amount. If they had been

aware of the correct interpretation of the statute, the Home Office could have, and would have, exercised their power under section 25D lawfully. The only error related to the use of Mr Linton's name on the detention letters. All of the other requirements had been satisfied. The skippers had been arrested for offences under section 25. There were reasonable grounds for believing that, if the skippers were convicted, the vessels would be subject to forfeiture.

[23] The sheriff erred in holding that the line of authority, which had been relied upon by the Advocate General (*R (Kambadzi)* v *Home Secretary*; *OM (Nigeria)* v *Home Secretary* [2011] EWCA Civ 909; *R (Lumba)* v *Home Secretary*; *NS* v *Secretary of State for the Home Department*; and *Bostridge* v *Oxleas NHS Foundation Trust* [2015] Med LR 113), should be distinguished. The law differentiated between those who would have suffered the detriment in any event, and those who would not. The pursuers had not sustained any substantive loss as a consequence of the procedural failings. This approach had been adopted in relation to: the unlawful detention of a mentally disordered patient (*Bostridge* at paras 23-26); unlawful detention in Scotland (*NS*); and unlawful arrest (*Parker* v *Chief Constable of Essex Police*). The test was not one of inevitability but probability (*OM (Nigeria)* at para 23). The relevant principle was that, although procedural failings rendered detention unlawful, they did not of themselves, merit substantial damages (*Parker* at paras 89-104). There was a limit in that it had to have been possible for the detention to have been effected (*R (Hemmati)* v *Home Secretary* [2021] AC 143, at paras 111- 112). The present case fell within that limit.

[24] The pursuers did not argue, nor did they lead evidence, that a senior officer or a constable could not have lawfully detained the vessels. Rather, they said that the power under section 25D had been exercised by someone who was not a senior officer or constable. The court had to consider what would have happened if the delict had not been committed.

There was no point of principle which required damages to be approached differently from that of the detention of a person. Liberty of a person had generally been afforded greater protection by the law than property rights. If unlawfully detained persons were only entitled to an award of nominal damages, the same considerations should apply to property owners.

[25] There was no basis for the sheriff's assertion that the claimants in the Advocate General's authorities had not suffered patrimonial loss. The issue of patrimonial loss was not determinative. The *Lumba* line of authority did not extend a greater degree of indulgence to public officials. It applied equally to private individuals. It involved the straightforward application of well-established principles of causation. There was no difficulty in reconciling *Lumba* with *Bell* v *Black and Morrison*. The difference was that, in *Bell*, the warrants could never have been issued lawfully. The policy considerations raised by the sheriff had been rejected in *Lumba* and *Kambadzi*.

[26] The evidence demonstrated that the power to detain the vessels could have, and would have, been exercised lawfully. The unchallenged evidence of Inspector Lindsay established that, if she had been aware that it was necessary for her to draft, sign and serve the letters on the skippers personally, she would have done so. The court should use this unchallenged evidence to make additional findings in fact.

The pursuers

[27] The authorities relied upon by the Advocate General were neither binding nor germane to, and were distinguishable from, the present case. The legislation was different. The present case involved infractions of rights in property. It was based on patrimonial loss, through deprivation of an asset with an economic value (*One Step (Support)* v *Morris-Garner*

[2019] AC 649 at para 110). It mattered not that the deprivation could have been achieved lawfully; it was not. In all forms of the wrongful detention of property, substantive damages ought to be awarded (*The Mediana* [1900] AC 113). The sheriff found that the pursuers had sustained a real loss.

[28] The Advocate General's argument was that, even if the Home Office had laboured under a complete misapprehension as to the law, and conducted themselves in accordance with that misapprehension, causation was to be approached as though there had been proper compliance. There was no common approach in cases of delict. It varied according to the basis and purpose of the liability (*GE* v *Commissioner of An Garda Síochána* [2021] 2 ILRM 441 at para 102). An award could be made for a delict involving an infraction of property rights, even although the wrong had caused no financial loss (*One Step*). If the wrong caused a loss, compensation could still be payable even if that loss could have been inflicted in the absence of the wrong (*MVF 3 APS* v *Bestnet Europe* [2017] FSR 5 at paras 79 – 82; *United Horse Shoe and Nail Co* v *Stewart & Co* (1888) 15R (HL) 45 at 46 and 50). If a common approach to causation were required, adopting a hypothetical comparator did not achieve that. Causation had to be approached as a matter of fact looking at what would otherwise have happened (*Lewis* v *Australian Capital Territory* at paras 39, 94 and 179-182).

[29] The detentions involved a substantive error; detention by a junior immigration officer. Damages for a delict, which was founded on the fact that a defender had acted unlawfully, were not to be computed as though he had actually acted lawfully. *Parker* and *Hemmati* considered what was legally possible; whether or not that was something which had been appreciated by those involved. Scots law rejected that approach. *Parker* had been criticised in Australia and Ireland for its circularity, for being founded on contradiction and

for diminishing the principle of legality and negating the cause of action for wrongful imprisonment (*GE* [2021] at paras 92 and 148).

[30] Adopting the *Kambadzi* approach would offend against the constitutional principle that the Crown and its subjects stood on the same footing (*Robinson* v *West Yorkshire Chief Constable* [2018] AC 736). A private individual was not protected from the consequences of an invalid arrestment (*Dramgate* v *Tyne Dock Engineering* 1999 SLT 1392). It was not accepted that only nominal damages were due for damage which could have been caused lawfully (*Bell*; *Anderson* v *Ormiston* (1750) Mor 13949; *Gibsons* v *Murdoch*, 18th June 1817, FC; *Aarons & Co* v *Fraser* 1934 SC 137; *The United Horse Shoe and Nail Co*; Erskine, *Institutes*, (8th ed) III.1.14). In contrast to England, in Scotland egregious cases could not be made subject to an award of exemplary damages. The absence of a substantive remedy would result in a culture of carelessness by officials. The *Kambadzi* approach would fail to honour the principle that there can be no wrong without a remedy (*ubi ius, ibi remedium*).

[31] If the nominal damages rule applied, the pursuers were still entitled to substantive damages. The purpose of the statutory power of detention was to obtain security for the forfeiture of the vessel. The evidence did not disclose that the Home Office had any basis for thinking that there was any need for such security. The Amy Harris was a fishing boat operating inshore, in and out of British ports. It could not be concluded that, if the Home Office had done everything it ought to have done, the Amy Harris would still have been detained.

Decision

[32] When a wrong has been committed, the court will order the wrongdoer to compensate the person affected by assessing what, in monetary terms, will put that person

back into the same position as he would have been in had the wrong not occurred. This is a well-known, longstanding principle of the law of damages (*Livingstone* v *Rawyards Coal Co* (1880) 7 R (HL) 1, Lord Blackburn at 7, followed in *MVF 3 APS* v *Bestnet Europe* (2017) FSR 5, Floyd J at para 79; cf *Hutchison* v *Davidson* 1945 SC 395, Lord Russell at 404). It was this principle which was applied in *Bostridge* v *Oxleas NHS Foundation Trust* [2015] Med LR 113. In *Bostridge*, it was said (Vos LJ at paras 20-23, following *R (Lumba)* v *Home Secretary* [2012] 1 AC 245, Lord Dyson at para 93), that, in a detention situation, if a person would have been detained anyway, or would have continued in detention, only nominal damages would be payable. It is important to qualify that, as was done in *Bostridge* (Vos LJ at para 21, citing Lord Kerr in *Lumba*), by emphasising that the substitute detention would have to have been a lawful one. In *Bostridge*, the outcomes which would have occurred in *Lumba* and *R (Kambadzi* v *Home Secretary)* [2011] 1 WLR 1299, had the unlawful acts not occurred, were described (Vos LJ at para 23) as "obvious". In *Kambadzi*, the answer to the critical question of "what would have happened in fact if the [wrong] had not been committed" (Vos LJ at para 23) was that the claimants would still have been detained. They had then suffered no actual loss. In *Lumba*, that factual question was remitted for determination by the High Court. Thus far the court agrees.

[33] Applying these straightforward principles, the question here is what, in fact, would have happened if the vessels had not been wrongfully detained. The sheriff was not prepared to find in fact that they would have been detained lawfully. On the contrary, he considered that the Home Office had a flawed understanding of what was required in order to detain a vessel. He was unable to accept that, had the Home Office properly understood what was required, they could and would have lawfully detained the vessels. The sheriff

was well entitled to reach this view and to find in fact, as he did (ff 25), that the wrongful detention had had a "severely detrimental effect on the [pursuers'] financial situation".

[34] It appears from the evidence of Inspector Lindsay that the decisions to detain were tactical ones which were designed to "drive compliance". That is not a lawful ground for detention. Section 25D makes it clear that the only purpose of detention is to enable the court to make a forfeiture order. Such an order is a financial punishment. For there to be reasonable grounds for believing that it is in prospect, the person detaining the vessel must have in mind: the nature of the crime, notably its seriousness; the likely penalty in financial terms; and the value of the vessels and any other assets owned by the potential accused. There was no evidence that any form of analysis of these issues or balancing exercise was carried out by the Home Office in order to determine whether detention was required so that forfeiture could follow. The conclusion must be, as a matter of fact, that, had Inspector Lindsay signed and served the letters herself (see *infra*), a detention may have followed, but it too would have been unlawful.

[35] The analysis carried out so far follows the well-known principle of determining simply what would have happened if the unlawful act had not occurred. In *Bostridge*, the claimant was schizophrenic, but he had been detained unlawfully. The answer to the question, of what would have happened if he had not been unlawfully detained, was supplied by his expert psychiatrist who said that he would have been lawfully detained, given his mental state. A difficulty arises if a gloss is put on this exercise of determining the fact of what would have happened. This occurred to a degree in *Bostridge* when, having set out the correct test, the Court of Appeal added (Vos LJ at para 26) that the claimant suffered no loss not because he would have been lawfully detained anyway, but because his detention would still have occurred if the authorities had been aware of their error. This

type of approach became more acute in *Parker* v *Chief Constable of Essex Police* [2019] 1 WLR 2238.

[36] *Parker* involved the arrest of a celebrity by a police surveillance officer, who had been instructed by a senior colleague to effect the arrest, but who did not himself have reasonable grounds for doing so (see *O'Hara* v *Chief Constable of RUC* [1997] AC 286; cf *Borland* v *HM Advocate* 2016 SCCR 8). His senior colleague, who did have grounds to make the arrest, had been held up in traffic. The judge at first instance (Stuart-Smith J) had found as fact that, if the celebrity had not been unlawfully arrested by the surveillance officer, he would have been unlawfully arrested by another such officer, who would also not have had the requisite grounds for suspicion. Substantive damages would be avoided, not where the claimant could have been lawfully arrested but where in fact he would have been (*Parker* at para 64; the so-called counterfactual).

[37] Sir Brian Leveson carried out an extensive review of the facts found at first instance before examining in detail the *dicta* of Lords Dyson and Kerr in *Lumba* and Lady Hale and Lord Kerr in *Kambadzi*. He concluded:

> "104 The test therefore is not what would, in fact, have happened had [the officer] not arrested [the celebrity] but what would have happened had it been appreciated what the law required. To Stuart-Smith J this appeared circular: to assume lawfulness was to assume what was sought to be proved. However, the counterfactual scenario envisaged by Lord Dyson JSC and the accompanying majority in *Lumba* did not require the court to assume the lawfulness of the procedure whereby the detention was effected. Lying behind the decision in *Lumba* therefore is the principle that although procedural failings are lamentable and render detention unlawful, they do not, of themselves, merit substantial damages."

Sir Brian continued (at para 107) by stating that the arrest would have been lawful if the police had appreciated what was required by way of reasonable grounds:

> "The fact that there was no evidence about what would have happened is not to the point … it is clear that if either [surveillance officer] had been alert to the *O'Hara* obligations, either the arrest would have awaited [the senior officer] or she would

> have sufficiently briefed [the arresting officer] (or another officer present at the scene)."

The Court of Appeal (Sir Brian at para 108) found that, had the police acted lawfully, the celebrity would have been detained lawfully, even although Stuart-Smith J had found in fact that a lawful detention would not have happened.

[38] The UK Supreme Court revisited this area in *R (Hemmati)* v *Home Secretary* [2021] AC 143 in which Lord Kitchin stated (at para 112) that only nominal damages would flow if it were established that the wrongfully detained person *could* have been lawfully detained.

[39] The analysis in *Parker*, as derived from *Lumba* and *Kambadzi*, was the subject of scrutiny in *Lewis* v *Australian Capital Territory* (2020) 271 CLR 192. The court at first instance had found in fact that the claimant, who sought damages for the discontinuance of his weekend periodic detention on the grounds of procedural unfairness, would inevitably have suffered the same fate. He was not entitled to substantive damages. The High Court of Australia agreed. The approach following *Lumba* was to compare the position in which the claimant would have been, had the wrongful imprisonment not occurred (Gageler J at para 38; Gordon J at paras 65-69).

[40] However, (*ibid* Gageler J at para 39):

> "It cannot simply be assumed that a power to detain that *could* have been exercised lawfully *would* have been exercised lawfully if that power had not in fact been exercised unlawfully; and it cannot simply be assumed that all conditions precedent to the enlivening of a statutory duty to detain would have been met."

In reaching that view, Gageler J had regard to both *Parker* and *Hemmati* (see footnote 80). Gordon J preferred the reasoning of Stuart-Smith J in *Parker*; commenting (at para 94) that:

> "The correct counterfactual in the assessment of loss and damage is what would have happened if the [wrongful act] had not been committed".

Edelman J agreed (at para 178), adding that:

> "The 'but for' or counterfactual approach 'directs us to change one thing at a time and see if the outcome changes' ... The change is the removal of the wrongful act. If the loss would lawfully have occurred but for the wrongful act then the wrongful act was not necessary for the loss. The counterfactual approach thus involves a hypothetical question where no other fact or circumstance is changed other than those which constituted the wrongful act."

He added (at para 182):

> "If the counterfactual approach in *Parker* were applied generally then it would … result in nominal damages in most cases of honest but unlawful imprisonment … The correct counterfactual approach, which removes only the wrongful act, does not require the court to ask what would have happened if it had been appreciated what the law required".

[41] A similar view was taken in *GE* v *Commissioner of An Garda Síochána* [2022] IESC 51. The Supreme Court of Ireland commended (at paras 13 and 30) Murray J's analysis in the Court of Appeal that *Lumba* "fitted 'clumsily' into the counterfactual model that typically applies in the context of the 'but for' test." This was because it presumed a circumstance in which the loss was avoided through a hypothesis whereby a new event should enter the matrix; a non-wrongful act by the entity which had acted unlawfully.

[42] The court accepts the outcomes in both *Lumba* and *Kambadzi*. Although the present case is resolved on the basis that it has not been found in fact that, had the Home Office appreciated the tests for lawful detention, a lawful detention would have followed, the court disagrees with the reasoning in *Parker* in favour of that in Australia and Ireland. The correct counterfactual is simply what would, on the balance of probabilities, have happened; not what might or could have happened. The remitted appeal will be refused. The court affirms the interlocutor of the sheriff at Campbeltown dated 12 December 2022 (as revised by interlocutor dated 9 January 2023).

Postscript

Detention

[43] Although it was not an issue which fell to be determined in the appeal, the court was anxious to understand the Home Office's view on what is required to detain a vessel under the Immigration Act 1971, assuming that they did have reasonable grounds for believing that the vessel could be forfeited by the court in due course. As the Sheriff Appeal Court correctly observed (at para [65]) detention "involves a serious incursion into the property rights of the owner or charterer". Yet the SAC had (at para [67]) "little difficulty in accepting the … proposition that detention can be effected by delivery of letters" from a senior immigration officer or a constable to the owners or the skippers. The reasoning behind this appears to have been partly because the SAC accepted that the Home Office had no power to board the vessel. The SAC derived support from *Bristol Airport* v *Powdrill* [1990] Ch 744 to the effect that no particular procedure or form was required, but there had to be some form of overt act, such as a notice, designed to prevent an aircraft from taking off. No doubt that is correct.

[44] It would be surprising if detention could be effected in the absence of the authorised person attending upon the vessel and declaring either orally or, preferably and in any event subsequently, in writing that the vessel was thereby detained and informing whoever appeared to be in control of the vessel, which may or may not be the skipper or owner, the source of the authority to carry out the detention and the reason for it. That detention has occurred ought to be apparent to anyone who might intromit with the vessel. By analogy with the arrestment of a ship on the dependence of an action, some form of notice ought to be attached to a prominent part of the vessel and intimated to the harbourmaster.

Nominal Damages

[45] One significant feature in the case has been the Home Office's view that any error on their part has been only procedural or technical. The court does not agree. Even if it had been established that the pursuers' vessels would inevitably have been detained, the detention of commercial vessels by a person, who is not authorised to do so, must be regarded as a serious matter; and the purported detention of the Amy Harris by an immigration officer who was unaware of a letter issued in his name even more so. In such a situation, the wrongful act would have merited an award of damages given that it would have caused at least inconvenience to the pursuers.

[46] Care must be taken when adopting the term "nominal damages" to cover this type of situation. The availability of damages in wrongful retention situations, even when no patrimonial loss is proved, was made clear in *Aarons & Co* v *Fraser* 1934 SC 137 (LJC (Aitchison) at 140 following *Webster & Co* v *Cramond Iron Co* (1875) 2 R 752, LP (Inglis) at 754 and adopting *The Mediana* [1900] AC 113, Halsbury LC at 117). Although in *The Mediana*, the Lord Chancellor referred to nominal damages, he pointed out that nominal damages for the infringement of a right did not mean small damages. In *United Horse Shoe and Nail Co* v *Stewart & Co* (1888) 15R (HL) 45, the House of Lords reversed the decision of the First Division and restored the Lord Ordinary's award of substantive damages. Had they not done so, the Division's award of damages for inconvenience of £50 (see Lord Mure at (1886) 14 R 266 at 278) would have stood. That is the equivalent of about £8,000 in modern terms. The award in *Aarons*, which was not described as nominal, but general (actual or special damage not having been proved), was only £10, but that was in 1933; being worth about £1,000 now. Similarly, the entitlement of an award for trouble and inconvenience in *Webster* was described (at 755) as something more substantial than nominal and set at £10 in 1875;

now about £1,500. Had the court awarded only nominal damages it would have measured those in thousands of pounds and not in the shape of a £1.00 coin. The resultant figure ought to serve as a modest deterrent of unlawful detentions.