



Neutral Citation Number: [2018] EWCA Civ 2801

Case No: B2/2017/1579

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Central London County Court
His Honour Judge Saggerson
C12YJ616

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2018

Before :

LORD JUSTICE SIMON
and
LORD JUSTICE COULSON

Between :

Jetinder Singh Khosa
- and -
The Secretary of State for Justice

Appellant

Respondent

The Appellant was unrepresented and appeared in person/via videolink
Mr Hugh Flanagan (instructed by Government Legal Department) for the Respondent

Hearing date: Thursday 13th December 2018

Approved Judgment

Lord Justice Coulson :

1. The appellant is a serving prisoner. He commenced these proceedings on 21 January 2016. The details of his claim were set out in a “List of Facts” and a separate document entitled “Grounds”. The underlying facts ranged from allegations of indecent assault by named prison officers to much more general allegations involving Articles 3, 6, 8 and 10 of the European Convention.
2. On 30 January 2016, the claim was struck out on the papers by DDJ Travers. The appellant sought an oral hearing which took place on 13 September 2016 before DDJ Skelly. He refused to set aside the order striking out the proceedings. The appellant appealed. On 14 December 2016, HHJ Faber granted permission to appeal against the order of DDJ Skelly, and the appeal came before HHJ Saggerson on 6 March 2017. In his careful judgment, HHJ Saggerson allowed the appeal in part and reinstated the claim in so far as it related to the specific allegations (8 in total) of indecent assault against named prison officers. In explaining this decision, Judge Saggerson said:

“5. Mr Khosa, as I have indicated, appeals to me today, and unusually perhaps, for a case in which the judgment of the two Deputy District Judges is very much engaged on the facts alleged by Mr Khosa, I am allowing this appeal and reinstating the claim for the following reasons. First, it strikes me as plain that the substance of Mr Khosa’s claim, which can be derived from the first sentence of a handwritten list of facts that he submitted to the court, along with this claim, is that he was indecently assaulted on seven occasions by one named prison officer, and on a single occasion by a second prison officer, on routine rubdowns in the segregation unit on the main wing at Full Sutton prison.

...

8. It has to be said that is most unlikely now to be able to recover such CCTV footage and, ultimately, a judge is going to have to decide the facts of this case on factual evidence without the assistance of CCTV. However, in my judgement, it is quite plain, bearing in mind that this is a serving prisoner acting for himself, that the bare essentials of a cause of action are disclosed on the claim form and on the accompanying documents. Much might be said about particularisation and detail but, in my judgement, it is clear that Mr Khosa has stated in terms that he has been eight times assaulted by prison officers. That is a cause of action known to law, it is a cause of action that is sustainable without proof of special damage, and it does give rise, at least in theory, to a claim for general damages for annoyance, stress, humiliation and degradation, as he puts it.

...

11. Whatever one's literal interpretation of what the words say on the claim form with or without the two additional documents, it is, in my judgment, one of those cases where there are other compelling reasons why this appeal should be allowed, and this matter should be allowed to proceed to trial, provided, of course, there are no further procedural hiccups that are attributable to Mr Khosa himself. The compelling reasons is this: whatever one thinks of the merits of Mr Khosa's actions and whatever the results of internal enquiries, it is, in my judgement, ill-advised, other than in the plainest of cases, to strike out an action such as this, where someone has specifically made eight specific, serious allegations against serving prison officers and is not allowed to be heard. This is not a licence for any number of prisoners to make wild and unsubstantiated allegations against prison officers or other employees of the state. However, where somebody's claim, such as Mr Khosa's, is struck out on grounds that relate to lack of particularisation, rather than a lack of a cause of action, it risks the litigant being left with a burning and continuing sense of injustice."

3. Judge Saggerson refused to reinstate the other claims. His reasons are summarised in paragraph 12 of his judgment as follows:

"12. We all know that, in these cases particularly, even after a trial on the facts, a burning sense of injustice, real or imaginary, may still persist. Nonetheless, it strikes me as important that, save where a claim is manifestly unsustainable the court should not be too quick to look for technical reasons to prevent a litigant being heard. Therefore, for these reasons, I am allowing this appeal, and I am reinstating the action. I will give directions and, in this case, the directions that I give, which I will put in a written order myself, will cover the way in which this action will proceed. It will also limit the claim to claims for damages for assault and battery. It is quite clear that claims under Article 6, 8 and 10 of the European Convention on Human Rights, as incorporated into English Law under the Human Rights Act 1998, are manifestly unsustainable, but they are just mistaken labels for what this litigant wishes to argue in the context of the alleged assaults, and the same is true of misfeasance in a public office. If those actions were to proceed, they would have to be pleaded in a much more sophisticated way and they are unnecessary, in my judgement, as adding nothing to the essential gravamen of this man's claims, which is that he was indecently assaulted."

4. The order made by the judge was in the following terms:

"1. The Claimant's appeal is allowed in part as set out below.

2. The Claimant's claim is reinstated so far as it relates to 8 (eight) allegations of indecent assault in respect of the 2 identified prison officers in the List of Facts and Grounds and the claim is to proceed in respect of these allegations only without the need for the Claimant to file or serve an amended Claim Form or Particulars of Claim. The "List of Facts" and "Grounds" do together stand as the Particulars of Claim.

...

5. The Claimant's causes of action are actionable *per se* (that is without the need to prove actual damage). Accordingly, no provision is made for expert medical evidence. If the Claimant seeks to rely on expert medical evidence in respect of condition and prognosis of any identifiable physical or mental injury the Claimant must make application to the Court identifying the relevant medical expert on whose evidence reliance is to be placed.

6. The claim is limited in value to a global maximum of £20,000 unless otherwise ordered by the Court and will be case managed and tried proportionately in accordance with this limitation."

5. The order therefore made clear that it was only the indecent assault allegations that were being permitted. Everything else remained struck out. The order went on to set out detailed directions which anticipated a hearing to deal with pre-trial directions in August 2017. Accordingly, but for this appeal, the trial in this matter could have been heard in the autumn of 2017.
6. However, the appellant was unwilling to take Yes for an answer and sought permission to appeal against the decision of Judge Saggerson. He was aggrieved that the judge had not reinstated all of his claims. Accordingly, he appealed again, this time to the Court of Appeal.
7. The only ground on which the claimant was granted permission to appeal to this court was in relation to the claim under Article 3. On that, the appellant is right to say that Judge Saggerson did not expressly refer to Article 3 in his judgment (see paragraph 3 above). The rest of this judgment therefore deals solely with that claim. All the other claims have now been rejected by four different judges and cannot be raised again.
8. The claim in respect of Article 3 was set out by the appellant in these terms:

"It is the claimant's case the defendants acted in breach of Article 3: Prohibition of Torture: "no one shall be subjected to torture or inhuman or degrading treatment or punishment". The claimant was subjected to physical and mental torture over a period of time whilst at HMP Full Sutton by the defendants who had a duty of care to the claimant."

9. No other particulars of any kind are set out in either the ‘List of Facts’ or the ‘Grounds’ in support of this claim under Article 3. It is entirely unparticularised. It is precisely the sort of unparticularised claim which Judge Saggerson ruled could not be advanced by the claimant because it was, to all intents and purposes, impossible for the respondent to respond to it. It was simply too vague to allow a fair determination of the issues. To that extent, taking the judgment and the order together, Judge Saggerson was plainly of the view that there was no difference between the Article 3 claim and any of the other claims which remained struck out.
10. On this appeal, the Article 3 claim is advanced by the appellant by reference to three short witness statements from other serving prisoners, Thackrah, Melville and Neville. The first difficulty with these statements is that they were not before Judge Saggerson. It is not generally appropriate to consider an appeal against a judge’s order by reference to material that was not available to the judge. There has been no application to rely on this late evidence and no proper explanation as to why these statements were not provided to Judge Saggerson. Today the appellant also referred to two further witness statements (from Dominic Downs and Carl Dobson) but since it was common ground that no-one had seen those statements, they cannot be taken into account in any event.
11. All of this is more than just an empty procedural point. I note that the three witness statements purport to be dated 4 January 2017, 23 December 2016 and 21 December 2016 respectively. That was well before the hearing in front of Judge Saggerson. So, these statements were available but not provided to the judge. In those circumstances, it is not appropriate to have regard to these statements in considering this appeal.
12. However, even if that were wrong, I do not consider that these statements address the fundamental difficulties which led Judge Saggerson to strike out the Article 3 claim and the remainder of the appellant’s claims. The statements do no more than suggest that, at an unspecified date, the applicant had marks on his face. None of these witnesses saw how those marks came to be there. Accordingly, they do not provide any proper evidence in support of the unparticularised complaint of breach of Article 3. So even if I was wrong to exclude the statements, and regard should be had to the statements for the purposes of this appeal, the result would still be the same.
13. For all these reasons, I would refuse this appeal. I repeat my regret that, if the appellant had got on with his claim following Judge Saggerson’s order in his favour, this matter would long since have been resolved. The greater the delay in dealing with these allegations, the greater the risk to the appellant, who has the burden of proof, that the claims will be incapable of proof.

Lord Justice Simon:

14. I agree. The appeal will accordingly be dismissed.