Neutral Citation Number: [2022] EWCA Civ 1073

Case No: CA-2021-003264

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Sir Andrew Nicol (sitting as a Judge of the High Court)
[2021] EWHC 3026 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2022

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE DINGEMANS
and
LORD JUSTICE PHILLIPS

- -

Between :

CHOWDHURY MUEEN-UDDIN	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Respondent**

- -

Jacob Dean (instructed by **Carter-Ruck**) for the **Claimant**
Anthony Hudson QC, Ben Silverstone and Robbie Stern (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 9 and 10 June 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10.45 hrs on 28 July 2022.

Lord Justice Dingemans :

Introduction

1. This is an appeal from the order dated 15 November 2021 of Sir Andrew Nicol, sitting as a Judge of the High Court ("the judge"). The judge had struck out, as an abuse of process, claims for libel and for breach of the General Data Protection Regulation ("GDPR") and Data Protection Act 2018 ("DPA 2018") brought by the appellant and claimant Chowdhury Mueen-Uddin against the respondent and defendant Secretary of State for the Home Department ("the Secretary of State").

2. The claims arise in respect of a report by the Commission for Countering Extremism ("the Commission") entitled "Challenging Hateful Extremism" ("the report"). The report which runs to 144 pages was published both in hard copy and online on 7 October 2019. The Commission is a non-statutory expert committee of the Home Office which was formed to study, report and advise the Government on the threat of extremist behaviour.

3. The material part of the report which gave rise to the claims in libel and data protection is set out at page 54 of the report. In the text of the report there was reference to violence against Muslim bloggers who were showing support for the fact that a senior Jamaat-e-Islami leader had been convicted of war crimes committed during the war of independence in 1971. It is common ground that this was a reference to the Bangladesh war of independence in 1971. In the 144 page report, at page 54 and footnote 158 it was stated that "links between those responsible for the violence in 1971 and JI in the UK including community leadership in East London are well established. Chowdhury Mueen Uddin, former vice chair of the East London Mosque and who helped found the Muslim Council of Great Britain, was found guilty of crimes against humanity following a trial in absentia." There was a link to Channel 4 coverage of this conviction in 2013 on a webpage headed "British Muslim leader sentenced to death for war crimes", which webpage itself had a link to further coverage.

4. It appears that some 80 copies of the report were published in hard copy, and the report was downloaded in pdf form some 4,982 times. At paragraph 10 of the Amended Particulars of Claim it was pleaded that Mr Mueen-Uddin had been contacted by numerous colleagues and associates who had read the report and the allegations about him contained within it. No further details about this were given in Mr Mueen-Uddin's witness statement.

5. In a judgment dated 16 February 2021 Tipples J. held that the natural and ordinary meaning of the hard copy and online reports was that Mr Mueen-Uddin: "was one of those responsible for war crimes committed during a War of Independence in 1971; and had committed crimes against humanity during a 1971 War of Independence in South Asia". The claim made under the GDPR and DPA 2018 was that statements made in the report were not accurate and therefore infringed the accuracy principle, and there was a separate claim that the data was not processed for permitted purposes.

Some relevant background

6. The judge summarised relevant facts in his judgment and the parties helpfully produced a chronology of relevant events and produced extracts of relevant newspaper reports.

Mr Mueen-Uddin was born in East Pakistan, which is now Bangladesh. He became a journalist and reporter for the "Daily Purbadesh".

7. In 1965, when he was a student, Mr Mueen-Uddin joined the Islami Chatra Sangha ("ICS"). He was publication and publicity secretary of ICS until 1969.

8. Bangladesh achieved independence from Pakistan in 1971 in what the judge described as a violent and bloody process. In the final nights of the Bangladesh War of Independence, which ended on 17 December 1971, prominent Bengali professors, doctors, lawyers and journalists (collectively referred to as "the intellectuals") were rounded up in Dhaka city by members of a group known as Al-Badar which was supporting the Pakistan army fighting against an independent Bangladesh. 18 of the intellectuals were murdered.

9. Mr Mueen-Uddin left Bangladesh on 28 December 1971. He said he became aware that allegations had been made by an individual that he was a member of Al-Badar and responsible for the abduction and killing of the intellectuals. Mr Mueen-Uddin said he did not know why he had been accused of the murder of the intellectuals. Mr Mueen-Uddin did not feel safe in Bangladesh, and so he left.

10. It is only fair to record at this stage of the proceedings, before a defence has been pleaded or Mr Mueen-Uddin has served a reply to the defence, that Mr Mueen-Uddin denies any involvement with the murder of the intellectuals. Mr Mueen-Uddin says that he had been a member of the ICS. ICS was understood by many to be the student wing of Jamaat-e-Islami ("JEI"), which opposed the establishment of Bangladesh. Mr Mueen-Uddin said he had resigned his membership in June 1971 after the Pakistan military had launched a crackdown against pro-independence activists in March 1971 which Mr Mueen-Uddin said should have been condemned by the ICS but which the ICS had said nothing about. Mr Mueen-Uddin said he was opposed to Bangladesh separating from Pakistan, but he did not take part in any violence.

11. From 22 December 1971 newspaper articles were published in Bangladesh accusing Mr Mueen-Uddin of having been involved in the murder of the intellectuals. From January 1972 these reports were being published around the world, including in the New York Times on 3 January 1972.

12. In 1973 Bangladesh established the International Crimes Tribunal pursuant to the International Crimes (Tribunals) Act 1973 enacted by the Bangladesh Parliament. The International Crimes Tribunal was to provide for the detention, trial and punishment of persons responsible for genocide, crimes against humanity, war crimes and crimes committed in Bangladesh in violation of customary international law.

13. Mr Mueen-Uddin travelled via India and Nepal and arrived in the UK in June 1973. He said he reported to the Home Office that allegations had been made against him. He said he was interviewed by the Home Office, but nothing was found to support the allegations made against him and he was encouraged to apply for British citizenship. Since 1973 Mr Mueen-Uddin has been living in London as an active and engaged member of British society. He visited Bangladesh on a number of occasions from 1982. He became a British citizen in 1984.

14. In 1995 in a Channel 4 Dispatches programme called "War Crimes Files" Mr Mueen-Uddin was accused of taking part in the murder of the intellectuals. There were interviews with eye witnesses. It is apparent from the supplementary bundle that this was still available on You Tube on 10 February 2013, and paragraph 32 of the first witness statement of Jackie Omeni of the Government Legal Department ("GLD") suggests that the programme is still hosted on a website. The programme makers said that they would pass on the evidence that they had collected against Mr Mueen-Uddin to the Attorney-General and the Metropolitan Police War Crimes Unit. The War Crimes Unit wrote by letter dated 18 July 1996 stating that although it had been concluded that the UK authorities did have jurisdiction in respect of any grave breaches of the 1949 Geneva Conventions, Bangladesh had primary jurisdiction. The information was passed on to authorities in Bangladesh.

15. Mr Mueen-Uddin commenced a libel action against Channel 4. He stated, however, in his witness statement for this action that "I did not have the financial resources at the time to pursue the case to trial, which therefore ended without either side paying the other's costs".

16. In 1997 a First Information Report, or complaint, was made in Bangladesh to the police in Ramna, Dhaka to the effect that Mr Mueen-Uddin was involved in the killing of the intellectuals. It does not appear that any action was taken at that time as a result of the report.

17. As appears above, the International Crimes Tribunal was a domestic Bangladesh Tribunal, and it had the power to impose the death penalty. The International Crimes Tribunal was dormant for many years. Following an election of the Awami League in 2009 the International Crimes Tribunal in Bangladesh was reinvigorated. The strict rules of evidence were disapplied by statute for proceedings before the International Crimes Tribunal and it was provided that the International Crimes Tribunal could rely on newspaper reports.

18. Mr Mueen-Uddin was told that he was being investigated in Bangladesh. These developments were reported in the Daily Telegraph on 15 April 2012 under the heading "Leading British Muslim leader faces war crimes charges in Bangladesh". In the article Mr Mueen-Uddin's denials of any involvement in any abductions was reported, together with the Chief Investigator's comments that there was prima facie evidence that Mr Mueen-Uddin was involved in a series of killings of intellectuals. The Bangladesh Law and Justice Minister was reported to have said that Mr Mueen-Uddin "was an instrument of killing intellectuals".

19. Mr Mueen-Uddin said that he was not contacted during the investigation by anyone about the allegations, and he had not been contacted by the Bangladeshi authorities during the preceding 40 years following his departure from Bangladesh. Mr Mueen-Uddin instructed English-based counsel to represent him and Mr Mueen-Uddin made public statements about his innocence and raised concerns about the investigation process.

20. On 2 May 2013 the International Crimes Tribunal accepted charges against Mr Mueen-Uddin alleging that he was involved with the murder of the intellectuals and a warrant for Mr Mueen-Uddin's arrest was issued. Mr Mueen-Uddin said the warrant was never delivered to his address in the UK or his old home in Bangladesh. Mr Mueen-Uddin

became aware that notices had been published in newspapers in Bangladesh requiring him to appear before the International Crimes Tribunal.

21. Mr Mueen-Uddin decided not to appear at the International Crimes Tribunal. A lawyer in Bangladesh was appointed to represent Mr Mueen-Uddin in his absence, but that lawyer did not contact Mr Mueen-Uddin. There had been international criticism of the International Crimes Tribunal and the fairness of its procedures by, among others, United Nations bodies. Reports were published stating that the legislative framework for the International Crimes Tribunal fell short of recognised standards. There were also criticisms of misconduct by prosecutors and judges of the International Crimes Tribunal, and reliance was placed before this court on various articles in newspapers and periodicals to that effect.

22. Mr Mueen-Uddin was tried by the International Crimes Tribunal from 15 July to 30 September 2013 for the murder of the intellectuals. By a 453 paragraph judgment dated 3 November 2013 Mr Mueen-Uddin was convicted of the murders of the intellectuals constituting the offence of crimes against humanity. The murders were found to be part of the attempts to stop the creation of the state of Bangladesh. The judgment starts by reciting that in the nine month war of liberation some three million people were killed, 250,000 women were raped and over 10 million people were forced to take refuge in India. Some 23 lay witnesses gave evidence, but it seems from the judgment of the Tribunal that it was only in relation to charges 6 and 7 that family members claimed to have seen and recognised Mr Mueen-Uddin leading the gang of perpetrators. Mr Mueen-Uddin was described as "operation-in-charge" of Al-Badar, and he was identified by a person referred to by Masuda Banu Ratna or PW1. After the intellectuals had been rounded up by the Al-Badar gang, they were driven to the outskirts of the city and murdered.

23. The judgment of the Tribunal also referred to evidence given by Atiqur Rahman to the Channel 4 Dispatches programme at paragraph 112. It appeared that Mr Rahman worked as a journalist with Mr Mueen-Uddin. Mr Mueen-Uddin asked Mr Rahman for his address, but Mr Rahman, fearing that Mr Mueen-Uddin might harm him, gave a false address. After independence a hit list of journalists to be targeted by those opposed to the formation of the state of Bangladesh was found. This included Mr Rahman's name and the false address that he had given to Mr Mueen-Uddin. The defence advanced on behalf of Mr Mueen-Uddin at the International Crimes Tribunal was that although there had been an abduction of intellectuals, the crimes had been carried out by the Pakistani army and not Mr Mueen-Uddin. This defence was rejected by the International Crimes Tribunal. Mr Mueen-Uddin was sentenced to death by the Tribunal.

24. On 3 November 2013 there were numerous reports of Mr Mueen-Uddin's conviction and it is apparent from the evidence of Ms Omeni that videos of this coverage are still available. The judge below recorded that Mr Mueen-Uddin's Wikipedia entry introduces him as a "convicted war criminal for the killing of Bengali intellectuals in collusion with Pakistan army at the time of Bangladesh liberation war". Mr Dean, on behalf of Mr Mueen-Uddin, pointed out that Wikipedia entries could be easily changed.

25. The Telegraph article dated 3 November 2013 was headed "British Muslim leader sentenced to death in Bangladesh". The report set out that "according to prosecutors, Mr Mueen Uddin was a key figure in the al-Badr militia, one of many Islamic death

squads which opposed the countries freedom movement fighting for an independent Bangladesh against Pakistani forces". The Tribunal's conclusions about Mr Mueen-Uddin were set out. The Telegraph also reported that "Mr Mueen Uddin's lawyers protested his innocence, claiming he had been convicted in a political show trial". At the hearing in this court Mr Dean suggested that it was likely that no proceedings were taken by Mr Mueen-Uddin in respect of the Telegraph article because of what he referred to as reporting privilege. In that respect the Defamation Act 1996 was amended by section 7(3) of the Defamation Act 2013 to provide absolute privilege for reports of "any court established under the law of a country or territory outside the United Kingdom" so long as they were fair and accurate and published contemporaneously. The report published by the Commission giving rise to these proceedings was published in October 2019 and was online from October 2019 to March 2020. This was not contemporaneous with the reports of the Tribunal proceedings in Bangladesh. I should record that there was some reference in the oral submissions to other defences, for example qualified privilege and publication on matter of public interest, pursuant to section 4 of the Defamation Act 2013 (which replaced the *Reynolds* defence), but these other possible defences are not engaged by the issues on this appeal.

26. In December 2017 Interpol issued a red notice in respect of Mr Mueen-Uddin, but this was withdrawn after an application made on behalf of Mr Mueen-Uddin on 9 November 2018.

27. The report was published on 7 October 2019. A letter of claim was sent on 12 December 2019. The online version of the report was edited to remove the footnote that referred to Mr Mueen-Uddin on 20 March 2020.

28. Proceedings were issued and served in June 2020. The meaning of the relevant part of the report and footnote was determined by Tipples J. on 16 February 2021. The Particulars of Claim were amended to reflect the determined meanings on 2 March 2021 and in April 2021 the Secretary of State announced her intention to strike out the proceedings.

29. The application was issued on 13 May 2021. There were witness statements from: Jackie Omeni, of the GLD who made two statements; Mr Mueen-Uddin, who made two statements; and Adam Tudor of Carter-Ruck. Ms Omeni said in her first witness statement that, among other defences, that the Secretary of State currently intended to advance a defence of truth to the libel.

The judgment below

30. The hearing before the judge took place on 21 October 2021 and he gave judgment on 15 November 2021.

31. The judge summarised the claim before setting out the factual background from paragraphs 6 to 18. The judge then set out the procedural background before turning to the application to strike out the claim as an abuse of process at paragraph 35. The judge summarised the relevant principles of law relating to abuse of process set out in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 ("*Hunter* abuse") from paragraphs 36 to 81 together with the respective submissions of the parties.

32. At paragraph 82 the judge concluded that the proceedings were an abuse of process and should be struck out. He set out his reasons at paragraph 83 of the judgment in sub-paragraphs (i) to (xiii). In doing so the judge took account of the previous publications to the effect that Mr Mueen-Uddin was a war criminal for the purposes of assessing whether there was an abuse of process, but the judge did not decide whether those publications might be relied on in mitigation of any damages for libel.

33. The judge addressed *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946 ("*Jameel* abuse") from paragraphs 84 to 89 of the judgment and concluded that it was an appropriate case to exercise the *Jameel* jurisdiction to strike out the claim.

34. The judge did not therefore address the application for reverse summary judgment, and struck out the claim for the reasons given.

Grounds of appeal and respective cases

35. Mr Mueen-Uddin sought and was granted permission to appeal on seven grounds of appeal. An application was made to rely on an eighth ground of appeal which was heard de bene esse at the hearing before this Court. The Secretary of State filed a Respondent's Notice to affirm the decision.

36. The grounds of appeal on behalf of Mr Mueen-Uddin are that: (1) The finding that the claim would bring the administration of justice into disrepute, and was therefore a *Hunter* abuse, was wrong as a matter of law and principle, as it relied on the judgment of a foreign criminal court. (2) The Judge erred in law by failing to apply the *Hunter* requirement that the claimant must have had "a full opportunity of contesting" the previous decision, and wrongly placed reliance on the lack of an appeal by the Appellant from the decision of the ICT. (3) The Judge was wrong not to confine the fairness limb of *Hunter* to a party being vexed twice. (4) If, contrary to the above, fairness does play a role in *Hunter* abuse outside the unfairness to one party in being vexed twice in the same matter, it was wrong in principle and on the facts to strike out the claim as unfair to the Respondent. (5) The Judge's reliance at paragraph 83(x) of the judgment on other continuing publications to similar effect as the publication complained about was an error of law and ignored the evidence as to the nature and effect of those publications. (6) The judgment does not provide any sufficient basis for the exercise of the *Jameel* jurisdiction. The judgment placed emphasis only on the length and cost of the trial rather than applying the correct test as to whether the claim could be adjudicated in a proportionate way, and downgraded the importance for the Appellant in vindicating his reputation on the basis of the error of law identified above. (7) It was wrong to extend the findings of *Hunter* and *Jameel* abuse to the claims under Articles 6 and 10 of the GDPR, based on a misunderstanding of the issues which would arise under those claims, which do not include the accuracy of the allegation made by the Respondent. (8) The Judge was wrong as a matter of law to dismiss as "of little consequence" the fact that the Respondent, being a public authority, does not have any right under article 10 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). This is because the *Jameel* abuse jurisdiction is primarily founded on the Court's obligation under the Human Rights Act 1998 to dismiss defamation claims which are so trivial that their continuation would involve a disproportionate interference with the defendant's rights under article 10 of the ECHR. The Secretary of State did not have such rights, and as such, the *Jameel* jurisdiction

must be approached with caution when invoked by public authorities and exercised in only the most exceptional circumstances, which do not exist in this case.

37. The Respondent's Notice contended that the claim should be struck out in accordance with the principles in *Jameel* for the additional reasons that Mr Mueen-Uddin's conviction before the International Crimes Tribunal of the murder of 18 individuals and the notoriety of that conviction can properly be relied on by the Secretary of State in mitigation of damage and, in addition to the reasons set out at paragraphs 84-89 of the judgment below, render the maintenance of the claim disproportionate and/or "not worth the candle".

38. It is apparent that many of the grounds of appeal overlap. Grounds 1 to 5 relate to *Hunter* abuse, grounds 6 and 8 and the Respondent's Notice relate to *Jameel* abuse, and ground 7 relates to the data protection claim. Given the overlap of the grounds, and because the point raised in the proposed eighth ground of appeal is a point of law only which has been fully addressed by the parties, I would give permission to Mr Mueen-Uddin to amend his grounds of appeal to rely on this ground of appeal.

39. Mr Dean, on behalf of Mr Mueen-Uddin, and Mr Hudson QC on behalf of the Secretary of State, made oral submissions in support of their written submissions. I am very grateful to Mr Dean and Mr Hudson, and their respective legal teams, for the helpful written and oral submissions.

Some relevant law on *Hunter* and *Jameel* abuse of process and evidence about previous reputation

40. The starting point is that everyone has the right to a fair hearing to determine their civil rights. In *Johnson v Gore Wood & Co* [2002] 2 AC 1 at page 22c Lord Bingham stated that "the rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court…". A court must be conscious that the effect of striking out a claim for abuse of process denies a claimant the opportunity to have their claim determined on the merits. The draconian nature of the power is a point emphasised in the recent decision of the Court of Appeal in *Municipio De Mariana v BHP Group (UK) Limited* [2022] EWCA Civ 951. That decision was published after the hearing before this Court. This Court did not invite submissions from the parties on *Municipio De Mariana* because it did not alter the law in any material respects.

41. However the right of access to court is subject to limitations. Some of these are found in rules of substantive law concerning res judicata, including cause of action estoppel and issue estoppel. Some of the limitations are found in procedural powers to prevent an abuse of the Court's process. These substantive and procedural limitations have the common purpose of limiting abusive and duplicative litigation and protecting the process of the court.

42. The court has the inherent power to prevent misuse of its procedure where the process would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people, see *Hunter* at page 536. It was common ground that the pursuit of litigation for an improper purpose

might also engage issues of abuse of process, but as this type of abuse of process was not a basis for the judge's decision, it is not necessary to address it. Lord Diplock said "the circumstances in which abuse of process can arise are very varied … it would … be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kind of circumstances in which the court has a duty … to exercise this salutary power." In that case Lord Diplock summarised what has become known as *Hunter* abuse as being "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in which the intending plaintiff had a full opportunity of contesting the decision by which it was made".

43. A full opportunity of contesting proceedings may include proceedings affected by the negligence of a legal representative, see *Smith v Linskills (a firm)* [1996] 1 WLR 763. Relevant factors include whether there is a virtual impossibility of fairly retrying at a later date the issue of what was before the court on the earlier occasion. Fresh evidence after the first proceedings might change the complexity of the case. The fact that the first proceedings were criminal proceedings might be relevant.

44. The circumstances in which abuse of process can arise are very varied and are not limited to fixed categories. There is no hard and fast rule to determine whether abuse exists. The court is required to weigh the overall balance of justice. It might be noted that the overriding objective of the procedural rules is to enable the court to deal with cases justly. There have been a number of summaries of the law relating to abuse of process, see for example *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 at paragraph 38 and *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646 at paragraphs 39 to 48. Those summaries have emphasised the private interest of a party in not being vexed twice by litigation, the public interest of the state in the finality of litigation, and that the power to strike out exists where justice and public policy demand it and is not restricted by narrow rules. It is established that the court must engage in a close merits based analysis of the facts. The fact that the parties may not have been the same in the two proceedings is not conclusive because the circumstances may be such as to bring the case within the spirit of the rules, compare *Arthur JS Hall v Simons* [2002] 1 AC 615 at 701. It has been said that it will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see *In re Norris* [2001] UKHL 34; [2001] 1 WLR 1388 but this is not unknown, see *Tinkler v Ferguson* [2020] EWHC 1467 (QB); [2020] 4 WLR 89, affirmed on appeal [2021] EWCA Civ 18; [2021] 4 WLR 27.

45. In *Jameel* the court struck out a libel claim as abusive where the claim disclosed no real or substantial tort and where "the game would not be worth the candle". There would be cases where the damage was so trivial that the interference with freedom of expression could not be said to be necessary for the protection of the claimant's reputation. This is another practical illustration of the court's power to prevent an abuse of process. It is necessary to assess what the litigation is worth to the claimant and the cost (in every sense of the word) of the litigation. Such cases are to be distinguished from valid claims of small value and cases where vindication is of importance to the claimant. In such cases the court should only conclude that continued litigation would

be abusive where a way cannot be found to adjudicate the claim proportionately, and courts have power to control costs to attempt to ensure that they are proportionate.

46. In *Karpov v Browder* [2013] EWHC 3071 (QB); [2014] EMLR 8 Simon J. took account at paragraph 90 of the widespread dissemination of the libel (that the claimant had been criminally complicit in the death of Sergei Magnitsky) in other publications, when determining whether the continuation of the proceedings would serve the legitimate purpose of protecting the claimant's reputation. This was because, on the realities of that case, any finding of the court would not affect the inclusion of the claimant's name on the Magnitsky list. In this case similar issues about the effect of this publication on the claimant's reputation arise, even apart from issues about whether, because of admissible evidence of bad reputation in mitigation of damages, the litigation might not be worth the candle.

47. It is established that evidence of a general bad reputation is admissible in mitigation of damages in actions for defamation, see Gatley on Libel and Slander, 12th Edition at 33.30. This is because the law recognises the right of every person to have the "estimation in which" they stand unaffected by false statements to their discredit, but the damage which that person has sustained depends on the estimation in which they were previously held. The evidence of the claimant's general reputation must be "in the relevant sector" of the claimant's character which is affected by the libel. The standard, if somewhat dated, example of what is meant by "relevant sector" is that damages for a false allegation of treachery will not be mitigated by proof of a reputation for loose morals. Evidence of subsequent bad character is not, in general, admissible to reduce damages. This is because that evidence may, itself, have been infected by the libel which is the subject matter of the claim. Evidence of particular acts of misconduct cannot be relied on in mitigation of damages. This is because the admission of such evidence would generate satellite litigation which would not have much of a bearing on the issue of whether the claimant's reputation had been damaged by the libel.

48. In general, evidence of publications to the same effect as the publication complained about, is inadmissible evidence in mitigation of damages, see *Dingle v Associated Newspapers* [1964] AC 371, and *Lachaux v Independent Print* [2019] UKSC 27; [2020] AC 612 at paragraph 24. In *Dingle v Associated Newspapers* the Town Clerk of Manchester had been (wrongly) accused by a Parliamentary select committee of engineering, through a proposed private Bill, the purchase of a cemetery company at a discounted rate by the Corporation of Manchester. The proceedings of a select committee could be fairly reported under the privilege of section 3 of the Parliamentary Papers Act 1840. However the newspaper had gone beyond a fair and accurate report of the proceedings and had added its own "spice" to the reporting. It was held that the judge (who, unusually at that time, had heard the claim and assessed damages instead of a jury) had erred in taking account of the fact that the Town Clerk's reputation had been wrongly, but without legal remedy, damaged by earlier privileged reports of the select committee proceedings. It seems, from the reports of the argument, that there were concerns that allowing prior reports of privileged proceedings to reduce damages might lead to the unacceptable result that a Member of Parliament could destroy a person's reputation under absolute Parliamentary privilege, step outside Parliament (and the privilege), repeat the defamatory allegation thereby inviting the wronged person to bring libel proceedings, and then defend the proceedings on the basis that, although the allegation might be untrue, the claimant had no reputation worth

protecting. It was noted, at page 406 of the report, that evidence of a claimant's bad reputation was a grave matter but that if months had gone by after an uncontradicted report, especially if succeeded by other publications, that could be proved against the claimant. It is apparent that defendants have been permitted to plead and rely on, to mitigate damages, unchallenged reports affecting the claimant's reputation in the relevant sector. Lord Denning pointed out the difference between isolating damage from a publication, and the inadmissible tarnishing of a reputation from privileged reports of the select committee.

49. In any event the general rule about ignoring for the purposes of mitigation of damages, the dissemination of the libel in other proceedings, does not extend to "previous convictions" which are "in a class by themselves", see *Goody v Odhams Press Limited* [1967] QB 333 at 340. In that case Lord Denning MR suggested that the case of *Hollington v Hewthorn* [1943] 1 KB 587, in which he had appeared for the unsuccessful party, had created a strange rule (page 339) before finding that relevant previous convictions were admissible as evidence to show that the claimant's reputation had been adversely affected. This was on the basis that "what better guide can there be to his character and reputation than his previous convictions?". The newspaper in that case was therefore held to be entitled to adduce in mitigation of damages the fact that the claimant, who was suing over an article which accused him of being involved in the Great Train Robbery, had been convicted and sentenced for the robbery. This decision shows that convictions which are not covered by the Civil Evidence Act 1968, and it is common ground that the Civil Evidence Act 1968 does not extend to foreign convictions, might still be relevant. The existence of the criminal conviction, in whichever jurisdiction it occurred, is not being relied on for the judge's opinion about the underlying facts, but for the fact of the conviction which may have an important effect on reputation.

50. Foreign convictions have been the basis for finding an abuse of process in the past, see *El-Diwany v Hansen* [2011] EWHC 2077 (QB) and *King v Grundon* [2012] EWHC 2719 (QB). *El-Diwany* was a case where the claimant had been convicted of harassment in courts in Norway and brought libel proceedings in respect of an article, mainly published in Norway but also published in England and Wales, in which that had been reported. An application to strike out the proceedings as a *Hunter* abuse was made. Sharp J (as the President of the Queen's Bench Division then was) recorded at paragraph 70 that although the claimant's conviction by a foreign court was not conclusive evidence in the defamation proceedings that he had committed the offence, because section 13 of the Civil Evidence Act 1968 applied only to UK convictions, the Court was entitled to have regard to his convictions, in particular in the light of admissions which had been made by the claimant. The proceedings were struck out. It is right to record, as Mr Dean had noted, that there were particular features of that case including limitation.

51. *King v Grundon* concerned a case where a former English barrister and member of Middle Temple had been convicted after a seven week trial in New Zealand before a judge and a jury of conspiracy to unlawfully detain a person and possession of a pistol otherwise than for some lawful, proper and sufficient use. As a result of that conviction (which was affirmed on appeal by the Court of Appeal of New Zealand and special leave to appeal to the Privy Council was refused), a Disciplinary Tribunal of the Council of the Inns of Court disbarred the claimant. Sharp J. struck out the claim as a "paradigm

example of a claim to which the principles of the *Jameel* abuse apply", see paragraph 35. That was because it was fanciful to suppose that, in the light of the claimant's conviction and his subsequent disbarment and the reporting that followed, the claimant had a reputation in the relevant sector capable of being vindicated by the proceedings. It was held that although the defendant could not rely on the claimant's conviction in New Zealand as conclusive proof, the court was entitled to have regard to the findings of a court of competent jurisdiction on an application to strike out for abuse of process, see paragraph 38. The proceedings were struck out. Mr Dean highlighted that those proceedings were a *Jameel* and not *Hunter* abuse.

52. Mr Dean relied on *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233 as a case where Flaux J held at paragraph 164 that, absent issue estoppel, a collateral attack on the decision of a foreign court did not amount to an abuse of process of the Court in England and Wales and so there was no *Hunter* abuse. The decision in *Standard Chartered Bank* that there was no abuse of process was upheld by the Court of Appeal on appeal, but Longmore LJ made it clear at paragraph 41 that there could be an abuse of process without issue estoppel, although such cases would, in general, be rare, and it was necessary to look at the detailed facts of the case. In my judgment the decision in *Standard Chartered Bank* is a practical illustration of when a decision of a foreign civil court will not give rise to a *Hunter* abuse. Flaux J had found that there was no relitigation of an issue (because the issue had not been decided) and continuing the proceedings would not bring the administration of justice into disrepute. It might also be noted that the foreign court decision in *Standard Chartered Bank* was not the decision of a criminal court.

53. The question of whether proceedings are an abuse of process is binary, the proceedings are either an abuse of process or they are not, compare *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823 at paragraph 24. However as the decision will involve balancing a number of factors, a court will only interfere if: the judge took into account immaterial factors; omitted to take account of material factors; came to a conclusion which was not open to the judge; or came to a conclusion that was plainly wrong, see *Stuart v Goldberg Linde* at paragraph 81.

Judge was right to find that the libel proceedings were an abuse of process

54. In my judgment, in the very particular circumstances of this case, the judge was right to find that the proceedings brought by Mr Mueen-Uddin against the Secretary of State were an abuse of process for the reasons that the judge gave. I would uphold the judge's finding even though the practical effect is that Mr Mueen-Uddin will not be able to pursue these proceedings and attempt to obtain vindication of his reputation from the Secretary of State. This was a case where *Hunter* abuse of process overlaps with *Jameel* abuse of process. There are a number of particular factors or features of this case which make the proceedings abusive.

55. The first factor is the fact that Mr Mueen-Uddin has been convicted of the murder of the intellectuals before the International Crimes Tribunal in Bangladesh. I accept the important points made by Mr Dean about the rules of evidence applied by that Tribunal. The fact that Mr Mueen-Uddin could not appear in person in Bangladesh before the Tribunal because of the risk of a death sentence, and the international criticism of the procedures of the Tribunal are also very relevant. The Tribunal did address weaknesses

inherent in the hearsay evidence before it. There is no evidence showing that Mr Mueen-Uddin attempted to contact counsel appointed to represent him in Bangladesh so that he might provide a witness statement to the Tribunal, or give remote evidence from overseas. Mr Dean noted that Mr Mueen-Uddin did not have the benefit of the protections of article 6 of the ECHR but Mr Dean did not address whether there were comparable guarantees in the Bangladesh constitution. I accept that the fact that Mr Mueen-Uddin was not able (in practice) to appear in person before the Tribunal impacted on his opportunity to defend himself, as set out in ground two of the grounds of appeal, and I accept that the Secretary of State was not a party to the proceedings before the Tribunal, as set out in ground three of the grounds of appeal. These are, however, relevant factors to be considered but they do not mean that these proceedings cannot be an abuse of process. If Mr Mueen-Uddin's criminal conviction before the International Crimes Tribunal was the only basis for alleging an abuse of process, that might not have been sufficient, but it did not stand alone.

56. The second factor is that it is apparent from the matters set out above that Mr Mueen-Uddin's reputation since he left Bangladesh at the end of December 1971 has been that he was involved in the murder of the intellectuals. This was reported in Bangladesh and internationally. That, of itself, might not have been enough to affect Mr Mueen-Uddin's reputation because Mr Mueen-Uddin became a British citizen and an active member of British society. However in 1995 Channel 4 had broadcast its Dispatches programme in which Mr Mueen-Uddin was publicly accused of being involved in the murder of the intellectuals. Such a programme generated substantial publicity and although Mr Mueen-Uddin commenced proceedings to vindicate his reputation, he did not pursue them. It is apparent that thereafter in England and Wales, Mr Mueen-Uddin's reputation was that he had been involved in the murder of the intellectuals in Bangladesh in 1971. In my judgment that evidence was properly taken account of when considering whether the proceedings would serve any actual purpose in vindicating Mr Mueen-Uddin's reputation, compare *Karpov v Browder*. This is relevant to a consideration of *Jameel* abuse, and whether the proceedings will be worth the candle. Mr Dean is right that the *Jameel* abuse was based on a consideration of the importance of freedom of expression as protected by article 10 of the ECHR. This point, however, only goes so far because, as Mr Dean fairly recognised, article 10 of the ECHR rights are engaged for those who would read the report, and freedom of expression has long been protected by the common law. Whether the combination of the conviction before the International Crimes Tribunal, and the unrebutted and continuing effect of the publication of the Channel 4 Dispatches programme to the effect that Mr Mueen-Uddin was a war criminal, would have been enough to make these proceedings an abuse of process, does not arise for decision, because these factors do not stand alone.

57. The third factor is that this action concerns footnote 158 on page 54 of a 144 page report entitled "Challenging Hateful Extremism". I accept that the statement set out in paragraph 10 of the Amended Particulars of Claim (see paragraph 4 above), namely that Mr Mueen-Uddin had been contacted by numerous colleagues and associates who had read the report and allegation about him contained within it is to be treated as proved for the purpose of this application, but it is fair to note that these must have been individuals who had an unusually developed interest in "Challenging Hateful Extremism" (because there are not many persons who will read footnotes in such a Government report without such an interest) and these are persons who are therefore overwhelmingly likely to have been aware of Mr Mueen-Uddin's conviction by the

International Criminal Tribunal in Bangladesh and the contents of the Channel 4 Dispatches programme. It is relevant to record that the online version of the report was amended to delete the footnote, because this meant that there was no continuing publication of the allegations.

58. The fourth factor is that, in my judgment it will be impossible to obtain a fair hearing of the Secretary of State's defence of justification. This is because of the length of time since the murder of the intellectuals in December 1971, which was over 50 years ago. It is right to acknowledge that the International Criminal Tribunal in Bangladesh had a hearing some 40 years after the event but it was apparent from the report of the judgment that many of the relevant witnesses were dead, and as Mr Dean had already pointed out, that Tribunal relied in part on sources of evidence such as newspaper reports. It is apparent that there may still be a live eye witness, as appears from the report of the proceedings before the International Crimes Tribunal, and there will be at least some hearsay evidence, by way of recorded interviews from the Channel 4 Dispatches programme, which is available. If the proceedings continue there will be the wretched spectacle of a judge attempting to do his or her honest best to determine whether the allegations against Mr Mueen-Uddin are true or substantially true without much live evidence. Whatever the judge concluded would not lead to a vindication of Mr Mueen-Uddin's reputation, and this is because those who do not accept the result will point to the absence of relevant witnesses and evidence. A proper time to vindicate Mr Mueen-Uddin's reputation would have been at the time of the Channel 4 proceedings. I accept that the Secretary of State chose to publish the relevant footnote in the report from the Commission in 2019, and I also accept that the court would be able to case manage the hearing and attempt to control costs, but experience shows that the costs of investigating such matters, let alone determining them, are likely to be very substantial, even with judicial control.

59. Some reference was made at the hearing to the case of *Aldington v Miloslavsky* which, because the very large award of damages in that case ended up in the European Court of Human Rights as *Tolstoy Miloslavsky v United Kingdom* [1996] EMLR 152. In that case there had been an exploration, some 40 years after the event, of Lord Aldington's responsibility for the repatriation of Cossack and Yugoslav prisoners of war. However in that case it was apparent that the defendants intended to repeat the libel and indeed had engineered a situation, by distributing a leaflet to parents of a school, where the claimant felt compelled to bring proceedings. In this case, by contrast, the Secretary of State removed the footnote from the online version of the report, and Mr Mueen-Uddin does not seek an injunction. This underlines the fact specific nature of the inquiry when considering whether there is an abuse of process.

60. The fifth factor is that, in these circumstances for the reasons given above, the continuation of the proceedings would be manifestly unfair to the Secretary of State because it would not be possible to have a fair hearing of the defence of justification. In this case this also means that the continuation of the proceedings would bring the administration of justice into disrepute, because it will not be possible to have a fair hearing of the defence of justification. Further, given the evidence about Mr Mueen-Uddin's reputation, the proceedings are not worth the candle of pursuing them.

61. This leaves the data protection claims. It is established that claims for data protection can be run in parallel with a defamation claim, see *Prince Moulay Hicham v Elaph Publishing* [2017] EWCA Civ 29; [2017] 4 WLR 28. The judge identified that the

claims for accuracy raised substantially the same matters as the claim for defamation and were an abuse for the same reasons that the defamation claim was an abuse. Mr Dean accepted that there was an overlap between the libel proceedings and the accuracy claims made in the data protection claims but he emphasised that there were separate complaints about the way in which the data had been processed, and whether it had been processed for a lawful purpose. The difficulty with this submission is that in order to make a fair assessment of whether the data was lawfully processed, it will be relevant to determine whether the statements were accurate. This is because it will be relevant to the "public interest" in publishing, see article 6(1)(e) of the GDPR and section 8(d) of the Data Protection Act 2018. Further these were not proceedings brought to determine the data protection claims on their own divorced from the underlying claims about libel and accuracy, no doubt because it was recognised that such proceedings would not be worth the candle.

Judgment of Phillips LJ

62. I have had an opportunity to read and consider the judgment of Phillips LJ in draft, but it has not altered my conclusion about the determination of this appeal. I should briefly explain my reasons.

63. Libel is a cause of action which provides the means for defending reputation. It is therefore critically concerned with the damage to the reputation of the claimant caused by the relevant publication. The evidence of Mr Mueen-Uddin's general reputation in the relevant sector before the publication which is the subject of this claim is that he was a war criminal. He had left uncontradicted the Channel 4 Dispatches Programme called "War Crimes Files", referred to in paragraph 14 above, which was first published in 1995 and which continued to be published. *Dingle* had made it clear that if months had gone by after an uncontradicted report, that might be proved against the Claimant, see paragraph 48 above. Phillips LJ suggests that it was understandable that Mr Mueen-Uddin did not pursue the proceedings because of costs. So it may be, but it did not mean that the uncontradicted reports were not relevant to Mr Mueen-Uddin's reputation.

64. Further Mr Mueen-Uddin had been convicted by the International Crimes Tribunal in Bangladesh. This is relevant because evidence of criminal convictions is admissible in relation to a person's general reputation, see *Goody v Odhams Press* and paragraph 49 above. If the publication by the Secretary of State had come out of the blue to a person whose general reputation was not the same as Mr Mueen-Uddin's general reputation, these proceedings would not be an abuse of process, but that is not this case. It was because the judge had struck out the claim as an abuse of process that the judge did not rule on the Secretary of State's application for reverse summary judgment, which was made on the basis that Mr Mueen-Uddin could not show serious harm to his reputation.

65. Libel actions provide a principled way to protect the reputation of claimants, but such actions can be an abuse of process. Phillips LJ is justifiably concerned about Mr Mueen-Uddin's access to the courts in this jurisdiction. If Mr Mueen-Uddin had wanted a fair trial of the issue of whether he was wrongly accused of being a war criminal, he had that opportunity in 1995. If the Secretary of State (or another person) had persisted in publishing the words complained of, he might be justified in requiring such access even today. In my judgment, however, these proceedings are an abuse of process.

Conclusion

66. For the detailed reasons set out above, I would dismiss this appeal.

Lord Justice Phillips

Introduction

67. By her unchallenged order dated 25 February 2021 Tipples J determined that the UK Government ("the Government") has defamed the appellant at common law by alleging that he was responsible for war crimes and has committed crimes against humanity. Tipples J accepted in her judgment at [70] that the accusation "is plainly very grave". That might be described as an under-statement, all the more so since it was made by the Government against a British citizen resident in this country.

68. The defamatory statement in question was neither casual nor fleeting, but was published in an official report, which was hosted online by the GOV.UK website, for 5 months. Almost 5,000 copies of the report were downloaded in PDF format: it is unknown how many times it may have been read online without being downloaded.

69. The appellant therefore has a good arguable case in libel (subject to any and all defences that may be raised) and the English courts have jurisdiction to hear the claim. The Government nonetheless contends that it should not have to defend the claim, and that it should be struck out *in limine*, on the ground that it is an abuse of the process of the court, a contention accepted by the judge below.

Hunter abuse

70. The Government first asserts, and the judge below accepted, that the claim is an abuse because, in 2013, the appellant was convicted of the crimes in question, in his absence, by the International Criminal Tribunal in Bangladesh ("the ICT") and did not avail himself of the right to appeal. The contention is that these proceedings are therefore "*Hunter* abuse", as described by Dingemans LJ above, that is to say, a collateral attack on the decision of a court of competent jurisdiction.

71. In principle, I see no reason why *Hunter* abuse should not extend to cover collateral attacks on criminal convictions in foreign courts. However, in so doing the courts of this country must necessarily give careful scrutiny to any question raised as to whether an accused had a full opportunity to defend himself in the foreign court (*Hunter* p. 541). Whilst there is a strong presumption that an accused had such an opportunity in the courts of this jurisdiction (and perhaps those of closely linked and well-established common law jurisdictions such as New Zealand, as in *King v Grundon*) taking into rights of appeal, any presumption in relation to other foreign courts or tribunals will be weaker (if it exists at all) and more easily rebutted on the evidence. A cursory examination of the law governing the ICT's rules and procedures gives rise to immediate concerns as to their compliance with standards of fairness and protection for the rights of the accused as recognised in this country and internationally, particularly on the facts of the appellant's case. As the judge did not consider those matters in any detail, I propose to summarise what appears from the undisputed evidence before the judge.

72. The ICT, despite its name, is a domestic tribunal in Bangladesh, established by legislation passed in the immediate aftermath of the successful struggle for independence from Pakistan during which millions died. The International Crimes (Tribunals) Act 1973 ("the 1973 Act") contains provisions which necessitated the amendment of the constitution of Bangladesh (by the insertion of Article 47A) to remove the rights of those accused under the 1973 Act from seeking remedies under the constitution. In particular:

    i) Section 6(8) provides that no party may challenge the constitution of a Tribunal or the appointment of its chairman or any of its members.

    ii) Section 10A provides that where the Tribunal has reason to believe that the accused person has absconded or concealed himself so that he cannot be produced for trial, it may hold the trial in his absence and may direct that counsel shall be engaged at the expense of the government to defendant the accused person.

    iii) Section 19(1) provides that the ICT "shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value".

    iv) Section 20(2) provides that "Upon conviction of an accused person, the Tribunal shall award the sentence of death or such other punishment proportionate to the gravity of the crime…".

    v) Section 23 disapplies the Criminal Procedure Code 1898 and the Evidence Act 1872.

73. After the ICT was activated in March 2010 (still governed by the 1973 Act) it attracted widespread international criticism (if not outright condemnation) from respected sources. By way of example:

    i) On 11 July 2011 Human Rights Watch recorded that amendments to the ICT rules of procedure failed to bring the law and rules into compliance with international standards. Further amendments were needed, including allowing the accused to question the impartiality of the Tribunal; defining war crimes in accordance with international standards, ensuring that the defence has more than the current 3 weeks to prepare; allowing for interlocutory appeals and appointing an independent panel for appellate review.

    ii) On 28 November 2011 Stephen J Rapp, US Department of State Ambassador at Large for War Crimes Issues, identified 4 issues with the ICT: (1) the lack of definition of "crimes against humanity"; (2) the need for restoration of constitutional rights, including rights to consult with counsel, to prepare and to challenge the process; (3) the need for protection of witnesses from threats and intimidation; and (4) the need for transparency of the proceedings.

iii) On 16 November 2012 the Bar Human Rights Committee of England and Wales expressed its concern that the ICT was failing to meet international fair trial standards, expressing particular concern as to interference in the defence, harassment, intimidation and surveillance of the defence team, denial of constitutional rights and perceived bias and lack of independence of Tribunal members and of the Chief Prosecutor (from the Tribunal and the government).

iv) On 7 February 2013 two UN Special Rapporteurs appointed by the UN Human Rights Council referred to concerns as to the impartiality of the ICT judges and prosecution services, as well as their independence from the executive. They also referred to complaints by witnesses and lawyers for the defence as to hostility, intimidation and harassment.

74. By its judgment dated 3 November 2013, the ICT found the appellant guilty of 11 charges of abetting and complicity in the commission of the offence of "extermination" as a "crime against humanity" and sentenced him to death by hanging. The following appears from the judgment:

i) The ICT had determined, on 27 May 2013, that the appellant had "absconded or concealed" himself, and so ordered the trial be held in absentia, appointing state defence counsel to defend him [22]. It did so notwithstanding that the appellant had emigrated from Bangladesh 41 years earlier, had been living openly in this country (with a very high profile in the community) during the intervening period and that the appellant asserts (an assertion which must be accepted in the context of a strike-out) that he was not contacted during the course of the investigations leading up to the prosecution or served with notice of the proceedings by the ICT. It follows that there was no legitimate justification for proceeding against the appellant in his absence, even under the provisions of the 1973 Act.

ii) The formal charges and documents relied upon were supplied to state defence counsel on 4 June 2013 (but no attempt was made to send them to the appellant in England) [23]. The trial started on 15 July 2013, just 6 weeks later [25].

iii) The prosecution called 25 witnesses. The appellant's counsel "could not collect any witness and detail documents despite their endeavor and contact with the relatives of the accused" [26]. The appellant states, however, that his state-appointed counsel did not contact him.

iv) The ICT determined "crucially common and relevant issues" as to (i) the killing of the intellectuals being a designed and calculated operation; and (ii) the identity of the group responsible for the "killing operation". It did so by "[appraising] the old reports, documents and authoritative books together with the facts that are reasonably undisputed…", expressly disavowing the need for oral evidence in that regard [73]. The ICT concluded that there was a designed and calculated operation and that Al Bader was responsible for it.

v) The ICT also categorised the appellant's "role and position of authority" in the killing operation by Al Bader, doing so "chiefly on the basis of investigative reports mostly published immediately after the incidents in the news media" [108]. The key extract at [109] was taken from an investigative report in the

Daily Purbadesh published on 29 December 1971, over 41 years before the trial. The extract refers, without stating the source, to a confession of a third person naming the appellant, translated by the appellant for these proceedings as follows:

> "One of the evil sons of Bengal and a key civilian head of the killers of the Golden sons of Bengal, beacons of knowledge, journalists, medical doctors and other members of the intelligentsia, Chowdhury Mueen Uddin (photo above) has absconded. Just like the other murderers of the local collaborators of the brutal invading army, Jamaat-e-Islami's fascist organ Al Badar forces Chowdhury Mueen Uddin is also in hiding today. A few days ago Abdul Khaleq Majumder, office secretary of the Dhaka city Jamaat-e-Islami was caught. In his confession he disclosed the names of some who were involved with the massacre of the intelligentsia and admitted that Chowdhury Mueen Uddin was the 'Operation-in-Charge' of this killing-sphere.'

vi) Although there were 11 incidents charged, it was only alleged that the appellant was directly involved in two of them, numbered 6 and 7. Charge 6 related to the abduction and murder of seven intellectuals, most of the "evidence" against the appellant being hearsay statements, mainly in contemporaneous newspaper articles. There was, though, one eye witness (PW1) who identified the appellant as one of the abductors of her uncle (one of the seven), apparently recognising the appellant because she had seen him at a meeting 4 months before the abduction [137]. However, the ICT gave no consideration of the quality of that identification (in terms of precisely what she saw, from what distance and in what light), notwithstanding that the ICT had recorded that the abductors had generally attempted to disguise their identity with headscarves. Nor was there any consideration of the reliability of her recollection of events which had taken place over 41 years ago, let alone any recognition of the risks and uncertainties inherent in identification evidence more generally.

vii) As for charge 7, two witnesses (one aged 8 at the time) did not themselves identify the appellant, but gave evidence that they heard others identify the appellant by name during the abduction and abuse of the academic named as the victim [205-207]. Again, there was no consideration of the circumstances in which such identifications took place or in which they were over-heard, nor reflection on the reliability of the evidence after 41 years. The witness evidence was regarded as corroborated by copious citation from newspaper reports both foreign and domestic. How reports in the New York Times or The Observer (in this country) could be regarded by the ICT as probative of events in Bangladesh is difficult to understand.

viii) In relation to the other 9 charges, the ICT simply found the appellant to be guilty on the basis that that he was part of a common plan and design, there being no evidence that he had any involvement in the relevant abductions.

75. In my judgment it is clear beyond contradiction, on the evidence before the judge, that the appellant did not have a full opportunity to defend himself at the ICT, or indeed any opportunity at all. He was wrongfully tried in his absence, without formal notification

of the proceedings or receipt of prosecution materials, in circumstances where he cannot reasonably have been expected to attend (given the likely imposition of the death penalty). Further, the proceedings fell far short of the standards of fairness recognised in these courts and internationally, several crucial issues being determined on the basis of multiple hearsay, consisting of or corroborated by newspaper reports of some antiquity.

76. The judge did not reject the appellant's contention that the ICT proceedings were grossly unfair to him, and recorded the Government's position that the claim should be struck out as *Hunter* abuse even if the appellant was convicted after "a gross miscarriage of justice" [83(vi)]. Indeed, the judge recognised that the appellant "was faced with a dilemma when he learned that he was to be prosecuted for war crimes before the ICT" [83(vii)]. However, the judge held that the proper course for the appellant to have taken in relation to such contentions was to appeal within the Bangladeshi criminal process. Having failed to do so, the judge held, it was not open to him to mount a collateral attack on the ICT conviction in these proceedings [83(vi)].

77. Perhaps because he did not address the nature of the unfairness of the ICT proceedings, the judge did not consider on what basis the appellant could have appealed. However, given that the procedures adopted and the evidence admitted by the Tribunal were expressly sanctioned by the 1973 Act, it is unclear on what grounds the appellant could have advanced on appeal (being debarred from relying on protections in the Bangladesh constitution), other than perhaps the factual contention that he had not absconded or concealed himself. But it is difficult to see that he could have advanced that case with any prospect of success without surrendering to the Bangladesh authorities and submitting to almost inevitable execution.

78. But in any event, whilst I accept the availability of a right of appeal may provide a full opportunity for a fair trial to an accused despite a flawed procedure at first instance, the existence of such a right cannot, in my view, cure a process as inherently unfair and unjust as that adopted by the ICT, where the legitimacy of the conviction is seriously in doubt on any international standard of fairness. The appellant is entitled, in my judgment, to have that recognised without having to appeal within the flawed statutory regime . Indeed, I find it surprising that these courts (and, for that matter, the Government), would place any reliance on the decision of the ICT in the appellant's case, let alone regard it as abusive for the appellant to mount a claim inconsistent with that decision.

79. I therefore conclude that these proceedings do not constitute *Hunter* abuse, or come anywhere close to doing so. I note that Dingemans LJ accepts that the ICT conviction on its own "might not have been sufficient" to render the proceedings abusive, but he nonetheless regarded it as a factor in so holding. I disagree with that approach, for the reasons set out above and discussed further below.

Jameel abuse

80. In *Jameel* a foreign claimant brought defamation proceedings in England against the publisher of a US newspaper in respect of an article on an internet site hosted in the USA. The evidence was that the article had only been accessed by five subscribers in England. This Court struck out the proceedings as an abuse as publication within the

jurisdiction was minimal and that there was therefore no "real and substantial tort". The proceedings did not serve the legitimate purpose of protecting the claimant's reputation.

81. It can be seen that *Jameel* was an extreme case, where minimal publication in England was being used opportunistically to found jurisdiction to litigate what was in reality a foreign dispute between persons with no connection to this country. The present case is very different, the appellant having a clear and legitimate interest in vindicating his reputation in the jurisdiction of the state of which he is a citizen and where he resides, against a most serious accusation by the government of that state. The publication was by no means minimal and was from an authoritative and apparently trustworthy source.

82. Dingemans LJ identifies four factors (in addition to the collateral attack on the ICT conviction, which I would discount altogether as explained above) as leading him to support the judge's finding of *Jameel* abuse in this case. As to those factors:

i) There is no doubt that the appellant's conviction by the ICT in 2013 was widely publicised. But some care must be taken in defining the reputation to which that publicity gave rise, particularly at this earlier stage of proceedings. The publications generally made plain that the conviction was in the appellant's absence, that he denied the charges and that he further asserted that the proceedings in Bangladesh were politically motivated and unfair. It is not the case that he was unequivocally described by the authors as guilty, and many readers will have reserved judgment given the international concern as to the ICT. An unequivocal and unqualified assertion of the appellant's guilt was first made by the Government in the publication in issue. In my judgment it is not difficult to see the damage the Government's endorsement of his conviction would do to the appellant's reputation in this country and in his community in particular: it undermined his plausible denials of the crimes and "officially" recognised him as being guilty notwithstanding those denials. Further, I cannot see how it can be said that success in these proceedings would not be "worth the candle" for the appellant: it would be a major vindication. It is a very different scenario from that which caused Simon J to strike out the claim in *Karpov.* As in *Jameel,* the claimant in that case was foreign and had no connection with England and no reputation to protect here: any damage he suffered was in Russia and so he could not show a real and substantial tort in this jurisdiction.

   I see little relevance in the appellant's reputation prior to the ICT conviction, being some time ago and superseded by publicity over that conviction. In particular, I do not share Dingemans LJ's concern that the appellant did not pursue the proceedings he commenced in respect of the Channel 4 documentary in 1995. The settlement of those proceedings for fear of their cost is understandable given that they pre-dated the legality of conditional fee agreements and the introduction of ATE insurance policies.

ii) I see little or no significance in the fact that the defamatory statement was in a footnote in a long report. It could be established at trial that many readers would regard footnotes in this type of report as containing references to established facts, and therefore particularly authoritative. But in any event, it is clear that the statement was published relatively widely and was drawn to the appellant's attention by a number of people, indicating its significant penetration. The full extent of that not inconsiderable publication would be a matter for trial.

iii) Dingemans LJ's third and fourth further points appear to address the same concern, namely, that the Government could not have a fair trial of its defence of justification given the time that has passed since the events in question. In my judgment it is difficult to come to that conclusion on the material before the judge. The "evidence" which was relied upon by the ICT (such as it was) is fully recorded in the judgment: no enquiries have yet been made as to the continuing availability of the witnesses or of other evidence. If witnesses PW1, PW11 and PW22 are still alive and can be contacted, it is unclear why their evidence could not be adduced, remotely if necessary.

On the other hand, if accessing the evidence that was before the ICT is insufficient for the Government to mount a defence of justification, in my judgment that is not something of which the Government can legitimately complain given that it chose to endorse that decision several years after the event. More generally, it is unclear why the Government should be absolved from the need to defend the claim because it has made a serious allegation against a living citizen about events 50 years ago which it will, by the very nature of the defamatory statement it made, have difficulty in justifying.

83. I therefore conclude that the judge was wrong to find *Jameel* abuse in this case.

The "rolled-up" approach

84. I accept that the categories of abuse of process are not closed and that the court must engaged in a close merit-based analysis of the facts. However, Dingemans LJ's approach of identifying a number of factors, each of which does not necessarily amount to abuse on its own, but then deciding whether overall the proceedings are or are not abusive, seems to me to be unprincipled. In my judgment these proceedings are not abusive in either the *Hunter* or the *Jameel* sense. I do not consider that they should be struck out, nonetheless, on the ground that they fall foul of some unidentified combination of partial aspects of those two recognised grounds.

Conclusion

85. I would therefore allow the appeal.

86. I would add that, having been denied a fair trial in Bangladesh in 2013, it would be unfortunate if the appellant was now prevented from having access to the courts of this jurisdiction, at least in part because of his conviction by the ICT.

Dame Victoria Sharp, P.

87. I have had the advantage of reading the judgments of Lord Justice Dingemans and Lord Justice Phillips in draft. Like Dingemans LJ, I would give permission to the appellant, Mr Mueen-Uddin, to rely on Ground 8 of his Grounds of Appeal.

88. The factual background to the Secretary of State's application is set out in detail by Dingemans LJ and it is not necessary for me to repeat it. In brief summary, the round up and murder of 18 intellectuals by members of Al-Badar occurred over 50 years ago, as did the world wide publicity given to the allegation that Mr Mueen-Uddin was a member of Al-Badar and responsible for their abduction. The effect on Mr Mueen-

Uddin's general reputation was amplified and reinforced in this jurisdiction by the Channel 4 Dispatches programme broadcast more than 25 years ago, in which Mr Mueen-Uddin was accused in terms of taking part in those murders. That programme, which included interviews with eye witnesses, remained available on YouTube for at least 20 years after it was first broadcast and is still hosted on a website. Mr Mueen-Uddin says he did not pursue his libel action against Channel 4 at the time it was broadcast in 1995 because he did not then have the financial resources to do so. Until the introduction of the single publication rule by section 8 of the Defamation Act 2013 on January 2014, it was the case however, that each publication of the Dispatches programme constituted a fresh cause of action in respect of which libel proceedings could have been brought. In 2013, Mr Mueen-Uddin was convicted in his absence in Bangladesh of war crimes in respect of the 18 murders at a trial he chose not to attend, and he was sentenced to death. These event themselves attracted extensive publicity. As recorded in the judgment below, Mr Mueen-Uddin's Wikipedia website entry introduces him as a "convicted war criminal for the killing of Bengali intellectuals in collusion with the Pakistan army at the time of Bangladesh liberation war."

89. These proceedings have now been brought in respect of a footnote published by the Secretary of State in a report in October 2019 in hardcopy and available online for a period of five months (the footnote was removed from the online version by the Secretary of State two months after receipt of the letter before claim). The purpose of these proceedings is the vindication of Mr Mueen-Uddin's reputation. The defamatory meaning of the footnote found by Tipples J is undoubtedly a serious one and the Secretary of State has said in a witness statement made on her behalf, that it is her intention to rely on the defence of truth. The burden of proving that defence will lie upon her. There may still be a live eye witness to the events of 50 years ago, but as Dingemans LJ points out, it is apparent from the reports of the trial in Bangladesh that many of the relevant witnesses are now dead, and if the proceedings continue there will be the wretched spectacle, as he describes it, of a judge attempting to determine whether the allegations against Mr Mueen-Uddin are true or substantially true without much live evidence. Like Dingemans LJ, I consider that whatever the judge concluded in these circumstances would not lead to a vindication of Mr Mueen-Uddin's reputation – because those who do not accept the result will point to the absence of relevant witnesses and evidence.

90. The issues that arise in relation to abuse are inevitably fact sensitive, and it is important to avoid the rigidity cautioned against by Lord Diplock in *Hunter* when considering the abuse jurisdiction (to state the obvious, prior to the decision in *Jameel*, there was no category of so-called *Jameel* abuse). As it is, having regard to the various factors identified by Dingemans LJ as set out in his nuanced discussion of them at paras 54 to 61 above, and as carefully considered by the judge below, it seems to me there can be no worthwhile vindication of Mr Mueen-Uddin's reputation through the medium of these proceedings, and it would not be possible for there to be a fair resolution of the claim. In the circumstances, the continuation of these proceedings serves no useful purpose, and in my judgment would bring the administration of justice into disrepute.

91. For the reasons given by Dingemans LJ, with which I respectfully agree, including his observations at paras 62 to 65, I too would dismiss this appeal.