Neutral Citation Number: [2023] EWHC 371 (Admin)

Case No: CO/2049/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2023

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

THE KING
on the application of
AMANAT ULLAH — **Claimant**

-and-

NATIONAL CRIME AGENCY — **Defendant**

-and-

(1) SECRETARY OF STATE FOR DEFENCE

(2) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS

Interested Parties

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Dan Squires KC and Julianne Kerr Morrison (instructed by **ITN Solicitors**) for the **Claimant**

Angus McCullough KC and Rachel Toney as **Special Advocates**

Sarah Hannett KC (instructed by the **Government Legal Department**) for the **Defendant**

Ben Watson KC and James Stansfeld (instructed by the **Government Legal Department**) for the **Interested Parties**

Hearing date: 14 December 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 22 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 On 28 February 2004, Amanat Ullah was captured by British soldiers in Iraq and handed over to US armed forces. Soon afterwards, he was taken by them to Afghanistan, where he was held without charge or trial until he was released in September 2014. He is now in Pakistan.

2 Mr Ullah says that, during the course of his detention, he was repeatedly tortured and subject to other forms of inhuman and degrading treatment. He brought a civil claim against the UK Government (formally the departments headed by the Secretaries of State) alleging mistreatment by UK armed forces when he was captured, unlawful rendition to the custody of US armed forces and UK complicity in the treatment suffered under US control. In its Defence, the UK Government alleged, *inter alia,* that Mr Ullah was a senior member of the terrorist group Lashkar-e-Tayyiba ("LeT"). Mr Ullah denied this. The truth of this allegation was never determined judicially because Mr Ullah's claim was settled. The settlement was recorded in a consent order dated 13 December 2019. It included provision for payment to Mr Ullah of what the Secretaries of State describe in their skeleton argument as "a very considerable sum of money indeed".

3 The settlement sum was duly transferred to ITN Solicitors, who act for Mr Ullah ("the solicitors"). However, prior to the conclusion of the settlement agreement, a "Mr al-Dakhil" had been added by the US Treasury's Office of Foreign Assets Control ("OFAC") to its Global Terrorism Sanctions Regulations; and Mr Ullah's name appeared as an alias of Mr Al-Dakhil. So, the solicitors considered it prudent to seek consent from the National Crime Agency ("NCA") under s. 21ZA of the Terrorism Act 2000 ("the 2000 Act") before transferring the money to Mr Ullah. Consent immunises the person to whom it is given from liability for an offence under ss. 15 to 18 of the 2000 Act (broadly speaking, offences concerned with transactions or arrangements for terrorist purposes). Consent was refused. The refusal was reconsidered but confirmed on 30 September 2020. The reason given was "HM Government's assessment that [Mr Ullah] is a senior member of LeT, which is a proscribed organisation".

4 So, the solicitors could not transfer the settlement sum to Mr Ullah without risking committing an offence under the 2000 Act and have not done so. The consequence is that the "very considerable" sum which (presumably) HM Government intended to be paid to Mr Ullah, or at least applied for the benefit of his family, is instead sitting in the solicitors' client account.

5 By this claim for judicial review, Mr Ullah challenges the NCA's refusal to consent to the transfer of the settlement money from his solicitors to him. On 23 July 2021, Lane J made a declaration under s. 6 of the Justice and Security Act 2013, permitting a closed material procedure. CLOSED material has since been filed and the special advocates have considered the material.

6 Separately, Mr Ullah has applied for a protective costs order ("PCO"), to protect him from or limit his liability for costs until such time as he is provided with sufficient disclosure to enable him to understand the merits of the claim. He invokes the jurisdiction recognised in *Begg v HM Treasury* by Cranston J [2015] EWHC 1851

(Admin) and by the Court of Appeal [2016] EWCA Civ 568, [2016] 1 WLR 4113 ("*Begg*"). The defendant and the Secretaries of State argue that there is no power to make such an order and have declined to give an estimate of their costs. They have, however, confirmed that any application for costs against Mr Ullah would be limited to those of the OPEN parts of the proceedings.

7 On 15 March 2022, I ordered that the application for permission to apply for judicial review, together with the application for a PCO be determined together at a hearing. That hearing was listed for 14 December 2022.

Permission to apply for judicial review

8 At the hearing, I heard OPEN and CLOSED submissions, before indicating that permission to apply for judicial review would be granted. Although some grounds appeared stronger than others, I took the view that the case raised an issue of importance and it would not be sensible to limit what could be argued at the substantive hearing. I therefore granted permission to apply for judicial review on all grounds.

9 Although it is not for the court to direct efforts at settlement, and while noting the arguments on ground 5, I would encourage the parties to consider discussing whether there is any acceptable mechanism by which the settlement sum could be lawfully applied for the benefit of Mr Ullah's family, without exposing his solicitors to the risk of prosecution under the 2000 Act.

Protective costs order

Submissions for Mr Ullah

10 For Mr Ullah, Dan Squires KC submitted that Mr Ullah was now impecunious. He was trying to support his wife and children in Pakistan on an income of £70-95 per month. His lawyers cannot advise him as to his chances of success because they have not been shown the CLOSED evidence against him. Yet the defendant and interested parties have refused to confirm that they will not seek their costs of the OPEN part of the proceedings if the claim fails; and they have also refused to give any estimate of their costs. This leaves him exposed to potentially unlimited costs.

11 Mr Ullah's solicitors and counsel are acting under a discounted conditional fee agreement which caps their own costs at £43,000. They have offered to accept a cap of £50,000 on the combined costs of the defendant and interested parties until sufficient disclosure is given to enable Mr Ullah to receive informed advice on his prospects of success. This offer was rejected.

12 The jurisdiction to make PCOs was developed in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 and other cases where claimants were litigating points in the public interest. In *Begg*, however, Cranston J recognised a new category of case in which a PCO could be made: those where, from the open material, it would appear that an individual had reasonable prospect of succeeding in an appeal, but because closed evidence was being relied upon against him, he could not properly assess his prospects of success. On appeal, the jurisdiction to make an order in that category of case was common ground, and Lord Dyson said that, in exercising it, "[g]iven the disadvantage to which CMPs (closed

material procedures) inevitably expose litigants, the courts should be vigilant to ensure that the procedures do not operate in any way that is more unfair, or exacerbates the inequality between the parties to a greater extent than is necessary": see at [21].

13 Thus, the purpose of a *Begg*-type order is quite different from that of a *Corner House*-type order: to minimise the unfairness caused by a closed material procedure. Viewed against that background, ss. 88-90 of the Criminal Justice and Courts Act 2015 ("the 2015 Act") should be read as regulating the conditions and procedure for *Corner House*-type orders, but not *Begg*-type orders. The consultation and proposals which preceded the enactment of the 2015 Act defined a PCO as an order which "limits the cost exposure of a claimant in a public interest case" (emphasis added). The Explanatory Notes confirm at para. 99 that the purpose was to codify the rules governing *Corner House*-type orders.

14 Furthermore, if ss. 88-90 of the 2015 Act were read as applicable to all PCOs (including *Begg*-type orders), the legal framework governing PCOs would be incoherent. Section 88(1) only restricts the making of PCOs in judicial review proceedings. *Begg*-type orders are not limited to judicial review proceedings. So, they would be available in control order, TPIM, asset-freezing and exclusion order proceedings (all statutory appeals), but not in judicial review claims. There is no logical reason for this distinction.

15 The jurisdiction to make a *Begg*-type order exists to ensure that closed material procedures do not operate in such a way as to exacerbate the inequality of arms inherent in them: *Begg*, [21]. Equality of arms is an essential part of the right to a fair hearing under Article 6. So, if *Begg*-type orders are unavailable, there would be a breach of Article 6. It is "possible" within the meaning of s. 3 of the Human Rights Act 1988 ("HRA") to read into s. 88(1) of the 2015 Act the words "save where such an order is required to avoid a breach of ECHR Article 6(1)": see by analogy *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440.

16 If it is not possible to read s. 88(1) of the 2015 Act in that way, a declaration of incompatibility should be made in relation to that provision under s. 4 of the HRA.

Submissions for the defendant and Secretaries of State

17 Ms Hannett KC for the defendant and Mr Watson KC for the Secretaries of State submitted that s. 88(1) of the 2015 Act clearly applies to all judicial review proceedings. The language left no room for doubt that PCOs could no longer be granted in such proceedings except in accordance with the statutory conditions. The Explanatory Notes do not suggest anything else. Insofar as the effect is to create a regime in judicial review proceedings that differs from the regime in other proceedings, the language of s. 88(1) shows that this was deliberate. Given the unambiguous terms of the statutory language, the consultation paper cannot assist. In any event, any unfairness which arises from the closed material proceedings can be cured at the end of the proceedings when the court considers what costs order to make.

18 The Court of Appeal's decision in *XH v Secretary of State for the Home Department* [2017] EWCA Civ 41, [2018] QB 355 shows that a failure to make a PCO in closed material proceedings will not necessarily make the proceedings incompatible with Article 6 ECHR. In any event, the claimant has privately funded lawyers and is able to

participate in the proceedings through them. There is a significant sum available to his lawyers in the event that an adverse costs order is made against him; and there is no evidence that he would be unable to continue if a PCO is not made.

19 There is a further difficulty: the claimant does not satisfy the requirements for a *Begg*-type order.

Discussion

20 Section 88(1) of the 2015 Act provides:

> "A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90."

21 This makes two things clear beyond doubt. First, Parliament intended that ss. 88-90 to constitute a complete code for the making in connection with judicial review proceedings of a cost-capping order, defined broadly in s. 88(2) as "an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings". The words "may not… except" leave no room for doubt that there is no power to make such an order save in accordance with the new statutory code. Second, Parliament intended that this code should apply only "in connection with judicial review proceedings" and not in other proceedings. This means that Parliament necessarily envisaged and intended that the regime applicable in judicial review would differ from that applicable in other cases. The suggestion that this makes the law incoherent must be viewed in that light.

22 Paragraph 99 of the Explanatory Notes provides as follows:

> "Protective costs orders were developed by the courts, and the principles governing when and on what terms they will be made were re-stated by the Court of Appeal in *[Corner House.]* The *Corner House* principles provided for protective costs orders to be for exceptional circumstances in cases concerning issues of public importance. However, over time their use has widened. Sections 88-90 make provision for a codified regime, replacing the regime in case law."

23 To my mind, this does not assist the claimant at all. All it shows is that the development of PCOs by the courts in *Corner House* and subsequent cases was the mischief against which the new code in ss. 88-90 of the 2015 Act was directed. The last sentence shows that Parliament chose to respond to this developing jurisprudence by enacting "a codified regime". It does not matter that the developing case law to which the code was a response did not include *Begg*, which was decided at first instance after the 2015 Act was passed but before it came into force. What matters is the intention to codify, in other words, to forestall further judicial development of the law in <u>any</u> direction otherwise than in accordance with the statutory code.

24 With statutory language as clear as this, it is not permissible to look to pre-legislative materials such as the consultation paper to which Mr Squires referred, *Judicial Review: Further proposals for reform* (Cm 8703, September 2013). Even if it were, nothing there supports his argument. On the contrary, the consultation paper makes clear that

the intention was to prevent PCOs from being granted "when the claimant is bringing a judicial review for his own benefit".

25 As to Article 6 ECHR, I have borne in mind that the closed material procedure imposes an inequality of arms. But Article 6 does not prohibit closed material procedures where (as here) there is a cogent public interest justification for them; and *Begg* is not authority for the proposition that PCOs are necessary to make such procedures Article 6-compliant. One feature of particular importance is that, when considering costs applications after judgment, the court can consider the extent to which a party in a closed material procedure was deprived of the material necessary to make an accurate assessment of his prospects of success. In *Attorney General v BBC* [2022] EWHC 2925 (KB), having considered both *Begg* and *XH*, I said this at [32]:

> "In my judgment, the authorities show that, in a claim involving a closed material procedure, the question whether costs should follow the event will depend on the extent to which the success of the winning party was based on CLOSED material. If success was based substantially on CLOSED material, it may be difficult to conclude that the unsuccessful party was at fault in bringing or contesting the proceedings, unless the CLOSED material contains matters known to that party. If, on the other hand, the winning points were substantially OPEN ones, the fact that some CLOSED material was deployed will not stand in the way of an award of costs."

26 I accept, of course, that the assurance that this approach will be applied at the conclusion of the proceedings does not remove the chilling effect of uncertainty as to the final liability at this stage, but it does narrow to some extent the difference between Mr Ullah's position and that of a litigant in fully open judicial review proceedings.

27 As the Strasbourg authorities make clear, the question whether proceedings are Article 6 compliant depends on a holistic assessment of the proceedings. Here, that assessment would include the fact that Mr Ullah has not been prevented from bringing the proceedings by the absence of a PCO. Moreover, it has not been said on his behalf that he will be unable to proceed if a PCO is not granted, though Mr Squires noted that he would have to consider his position.

28 Importantly, Mr Ullah's lawyers have available to them a very considerable sum of money, which can be used to satisfy any costs order against him. It is possible that Mr Ullah may face an order that he pay two sets of costs if he loses. The absence of estimates means that this liability is in principle open-ended, but the significance of this point should not be overstated. As I have noted, both the defendant and the Secretaries of State have confirmed that they will not seek costs in respect of the CLOSED part of the proceedings; and the costs of the special advocates will be borne by the public purse. Even in relation to the OPEN costs, both the defendant and the interested parties are public authorities and their solicitors and counsel are instructed on public rates. Mr Ullah has solicitors experienced in judicial review claims in this field, who will be able to advise him about the level of costs generally incurred in similar cases (or at least the range of likely levels). Even if two sets of costs are ordered, the total liability is very unlikely to represent more than a small part of the "very considerable" settlement sum.

29 In all the circumstances, the contention that a PCO is required to render the proceedings Article 6-compliant very clearly fails on the facts. This means that it is not necessary to

consider whether ss. 88-90 of the 2015 Act could be "read down" under s. 3 of the HRA in the manner suggested by the claimant or whether a declaration of incompatibility would be required.

30 For these reasons, I refuse the application for a PCO and decline to make a declaration that ss. 88-90 of the 2015 Act are incompatible with Article 6 ECHR.