Neutral Citation Number: [2021] EWHC 3026 (QB)

Case No: QB-2020-002120

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2021

Before :

SIR ANDREW NICOL

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Between :

Chowdhury Mueen-Uddin	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

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

Hearing dates: 21st and 22nd October 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANDREW NICOL

Sir Andrew Nicol :

1. This is the hearing of an application by the Defendant to strike out the claim or for summary judgment in her favour of the claim brought by the Claimant in libel and Data Protection.

The nature of the claim in summary

2. Within the Home Office there is the Commission for Countering Extremism ('the Commission'). The Commission is a non-statutory body expert committee of the Home Office. It was chaired by Sara Khan, who was the Lead Commissioner. In October 2019 the Commission published a report entitled 'Challenging Hateful Extremism' ('the Report'). The Report was published in hard copy and was also available on-line. It was 144 pages long. Two passages in the Report give rise to the present proceedings.

3. The first was on p.54 of the Report which said,

> 'We also heard about violence towards secular people from those of a similar faith background. Muslim bloggers described being physically attacked during a protest in East London. The protest was to show support for the conviction of a senior Jamaat-e-Islami leader for war crimes committed during the 1971 War of Independence [footnote 158]. Some of those we spoke to are in hiding […]

4. The second passage in the Commission's Report which gives rise to these proceedings was footnote 158 which said,

> 'Links between those responsible for the violence in 1971 and JI [i.e. Jamaat-e-Islami] 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: See: Channel 4. 2013. 'British Muslim leader sentenced to death for war crimes 3 November 2013 (accessed 4 September 2019) https;//www.channel4.com/news/Chowdhury-mueen-uddin-warcrimes-london-mulsim.'

5. The Defendant is the Secretary of State for the Home Department. It may be that the proper Defendant is actually the Home Office (see Crown Proceedings Act 1947 s.18 and CPR Practice Direction to Part 66), but this procedural nicety forms no part of the strike out application or application for summary judgment. The claim is attacked whether it is the Secretary of State who is sued or the Home Office.

Factual Background

6. The Claimant was born in what was then East Pakistan and is now Bangladesh. He became a journalist and was employed as a reporter for the 'Daily Purbadesh'.

7. As a student in 1965 the Claimant had joined an organisation called 'Islami Chatra Sangha' ('ICS') which the Claimant describes as an Islamic student organisation, the mission of which was to share Islamic values and teachings with other students in order to gain the pleasure of Allah. In 1970 he became publication and publicity secretary of ICS. He says that he ceased to be Publication and Publicity Secretary of ICS in 1969

(this is the information that the Claimant gives in paragraph 13 of his 1st witness statement although the date is before he says he was appointed to that post (see paragraph 12 of the same statement) and he resigned as a member of ICS in 1971. He says that ICS was perceived by many to be the student wing of Jaamat-e-Islami, ('JEI'), a Bangladesh political party. He says that on occasions, he himself has referred to it as such, but he says, they are separate organisations and there was no organisational link between the two.

8. Bangladesh achieved independence from Pakistan in 1971. It was a turbulent and violent process. One particular incident took place in 1971 when 18 or so intellectuals were murdered. The Claimant says that he was opposed to Bangladesh separating from Pakistan, but he did not take part in any violence. In particular, he denies any involvement in the murder of the 18 intellectuals.

9. Bangladesh achieved its independence from Pakistan in 1971. It has, of course, since then been an independent country.

10. The Claimant left Bangladesh in 1971. He travelled via India and Nepal. He arrived in the UK in 1973. He has made the UK his home since then. In 1996 Channel 4 broadcast a documentary in the *Dispatches* series which accused the Claimant of taking part in war crimes during the Bangladesh war of independence (see *War Crimes Files*). The Claimant says that he brought libel proceedings against the broadcaster 'but 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.' The Claimant did travel to Bangladesh on a number of occasions, including after Channel 4 *Dispatches* programme was broadcast.

11. In 1973 Bangladesh passed the International Crimes (Tribunals) Act 1973 which established the International Crimes Tribunal ('ICT'). The Act conferred the power on the Tribunal to pass the death penalty (see s.20(2) of the 1973 Act). As the Tribunal itself has made clear, despite its name, it is not an international criminal court but a creature of Bangladesh's domestic legal system.

12. I understand that the ICT was essentially dormant until about 2008 when the Awami League was elected to government in Bangladesh on a platform that the ICT would start to take cases.

13. In 1984 the Claimant was naturalised as a British Citizen.

14. One of those investigated for offences during Bangladesh's war of independence was the Claimant. He was prosecuted before the ICT for 11 charges contrary to the International Crimes (Tribunals) Act 1973 (as amended). The charges were of a most serious kind and included crimes against humanity. Essentially, they arose out of the murder of the 18 intellectuals in 1971.

15. So far as the Claimant has been able to establish, his extradition was never sought for the trial. Since the Tribunal had the power to pass the death penalty, the Claimant could not, in any event, have been extradited absent an assurance that the death penalty would not have been passed, or, if passed, would not have been carried out in his case (see Extradition Act 2003 s.94). The Claimant did not attend his trial voluntarily. The trial took place between 15th July 2013 and 30th November 2013. Some 23 lay witnesses

gave evidence. The trial took place in the absence of the Claimant and his co-accused. State defence counsel was appointed to represent each of them. The Claimant says that his counsel never made contact with him.

16. Judgment was delivered by the Tribunal on 3rd November 2013. The Claimant was convicted and sentenced to death. It does not appear that the Claimant sought to challenge his conviction or sentence by way of appeal. Inevitably, the trial attracted a great deal of publicity, as did the Claimant's conviction and sentence, including within the U.K. Thus, for instance, the Claimant's entry on Wikipedia introduces him as 'convicted war criminal for the killing of Bengali intellectuals in collusion with Pakistan army at the time of Bangladesh liberation war.'

17. In 2017 Interpol issued a 'red notice' (asking national police forces to arrest the Claimant), but, on the Claimant's application, this was withdrawn on 13th November 2018 (see decision CF/R 676.17).

18. As I have said, the Report of the Commission was published in October 2019. 4,982 copies of the report were downloaded, but, Mr Hudson submitted, that did not mean that all of those who downloaded the report read the words complained of. 80 hard copies were distributed.

Procedural background

19. The Claim Form was issued on 19th June 2020. It was served with Particulars of Claim on the same date.

20. The claim relied on libel in respect of the two passages which I have mentioned. It also alleged that the Report had infringed the Claimant's rights under the General Data Protection Regulation ('GDPR') and specifically Article 5 (on the grounds that the Report was inaccurate, because the Claimant had not committed war crimes and had never been a senior leader of Jaamat-e-Islami); Article 6 of the GDPR (on the grounds that none of the permitted circumstances applied) and Article 10 of the GDPR (since none of the exceptions permitting publication of criminal convictions applied).

21. In consequence of pre-action correspondence between the parties, the on-line version of the Report was amended on 20th March 2020 to delete the reference to the Claimant in footnote 158 and to delete the sentence which referred to the footnote ['the amended on-line report']. The claim only relates to the original hard copy and the original on-line report (i.e. before its amendment).

22. By a consent order of Master Brown of 30th September 2020, it was ordered that there should be a trial of a preliminary issue, namely the natural and ordinary meaning of the words complained of, and whether the words complained of conveyed the information alleged in the Particulars of Claim for the purposes of the GDPR.

23. By consent the preliminary issues also extended to whether the words complained of were defamatory of the Claimant at common law.

24. The preliminary issue trial was conducted by Tipples J. who gave her judgment on 16th February 2021 – see [2021] EWHC 269 (QB).

25. She found that there was no difference between the meaning of the hard copy of the Report and the (original) on-line version.

26. Tipples J. found that the words of both meant:

    i) That the Claimant was one of those responsible for war crimes committed during a 1971 War of Independence in South Asia; and

    ii) The Claimant has committed crimes against humanity during a War of Independence in South Asia.

27. She also found that the meanings were allegations of fact which were defamatory of the Claimant at common law.

28. As to the claims under the GDPR, Tipples J. concluded that the Claimant's personal data contained in the Report was as follows:

    i) The Claimant was a member of Jaamat-e-Islami.

    ii) The Claimant was one of those responsible for war crimes committed during a 1971 War of Independence in South Asia.

    iii) The Claimant committed crimes against humanity during a 1971 War of Independence in South Asia.

    iv) The Claimant was found guilty of crimes against humanity following a trial in absentia.

    v) The Claimant provides a link between those responsible for war crimes committed during a 1971 War of Independence in South Asia and Jaamaat-e-Islami in the U.K.

29. On 2nd March 2021 the Claimant served Amended Particulars of Claim to plead the meanings and infringement of his personal data rights as Tipples J. had found them to be.

30. The application presently before me was issued by the Defendant on 13th May 2021 (notice of the Defendant's intention to issue such an application having been given to the Claimant on 20th April 2021). It was supported by the 1st witness statement of Jackie Omeni of the 13th May 2021.

31. On 18th May 2021 Nicklin J. directed that the Defendant's application should be heard by a judge in the Media and Communications List and he gave directions for the hearing.

32. On 7th June 2021 Master Thornett extended time for service of the defence until 28 days after the hand-down of judgment on the present application.

33. In addition to the 1st witness statement of Ms Omeni, I have a witness statement from the Claimant dated 29th July 2021, a witness statement from Adam Tudor of Carter-Ruck of the same date, a second witness statement of Ms Omeni (of 10th September 2021) and a second witness statement of the Claimant (of 14th October 2021).

34. In advance of the present hearing, I notified the parties that one of the items in the bundle was a report of Geoffrey Robertson QC. Mr Robertson is head of chambers at Doughty Street Chambers which was where I had been a tenant before my appointment to the High Court bench in 2009. I also intended to apply to be an honorary associate tenant there following my retirement from the bench in May 2021. I had also co-authored a book with Mr Robertson. I asked the parties if they wished to make any representations as to why I should not hear the case. Neither party wished to do so.

The Defendant's grounds for the application in outline

35. Mr Hudson QC, lead counsel for the Defendant, argued in outline:

i) Both the claim in libel and the GDPR claim were an abuse of the process of the court. It was an abuse to seek to re-litigate in subsequent civil proceedings whether a person had been rightly convicted by a criminal court. Such a claim brought the administration of justice into disrepute and was unfair to the Defendant compelled to meet such a claim. Mr Hudson argued that it made no difference that the criminal court in question was outside the jurisdiction and the unfairness to the Defendant could be (and was in the present case) all the greater when it was. An alternative way of putting the Defendant's case on abuse was that 'the game was not worth the candle' and should be struck out on the ground recognised by the Court of Appeal in *Jameel (Yousef) v Dow Jones Inc*. [2005] QB 946 C.A. ('*Jameel'*). If the Defendant succeeded on either way of putting the abuse argument, she needed no more.

The Claimant had many criticisms of the fairness of his trial, but the forum to ventilate those complaints was the trial itself or an appeal against conviction or sentence: not a subsequent civil claim.

For the strike out application, the Defendant relied on CPR r. 3.4(2)(b).

ii) But alternatively, if the claims could continue, the Secretary of State should be granted summary judgment in her favour on the libel claim, because the Claimant had no realistic prospect of establishing that the publication had caused serious harm to his reputation, as the Claimant alleged in the Amended Particulars of Claim. As issued, the application had sought summary judgment both of the libel claim and the data protection claim, but Mr Hudson made clear that he was now confining the summary judgment application to what I have just summarised.

The strike out application

Hunter abuse

36. As I have already summarised the Defendant says that both the libel and the data protection claims should be struck out as an abuse of the process of this court.

37. The Defendant argues that both claims would involve re-litigating whether the Claimant was guilty of the murders of 18 intellectuals at the time of the Bangladesh war of independence in 1971. As part of the data protection claim, the Claimant has alleged that it is untrue and inaccurate to describe him as a war criminal as the Commission's

Report had said. On the data protection claim the Claimant would have the burden of proof. In the libel claim, the same issue would arise because, through Ms Omeni, the Defendant has said that, if required to serve a defence, the Secretary of State would rely (among other things) on the defence of substantial truth in Defamation Act 2013 s.2. For that purpose, she would have the burden of proof. However, Mr Hudson submitted that the abuse of process would arise whichever party had the burden of proof.

38. Mr Hudson submitted that for all practical purposes, the issues in both the data protection trial and libel trial would be whether the Claimant had been guilty of the murders of the 18 intellectuals.

39. Although, Mr Hudson submitted, the essential issue on both claims would be whether the Claimant had murdered the 18 intellectuals, the Secretary of State would have to prove that *de novo*. This was because the Civil Evidence Act 1968 s.13, which provides that a finding by a criminal court that a claimant has committed a crime is conclusive evidence of guilt, applies only to convictions by UK courts (see Civil Evidence Act 1968 s.13(3)). Indeed, the view of the ICT that the Claimant was guilty of those murders would be inadmissible evidence because it was no more than the opinion of that Tribunal on the evidence which had been submitted to it – see *Hollington v Hewthorn* [1943] K.B. 587. The rule in *Hollington v Hewthorn* had been much criticised and it was reviewed by the Law Reform Committee in 1967 (15th Report, 'The Rule in *Hollington v Hewthorn* HMSO Cmnd 3391), of which Diplock LJ was a member. The intention of Civil Evidence Act 1968 was to give effect to the Law Reform Committee's proposals (see Hansard HL Debs vol 288 col 1340) which made (a) convictions admissible evidence that the Defendant was guilty of the offence in question (Civil Evidence Act 1968 s.11); and (b) provided that in defamation actions, as against a Claimant, such a conviction was conclusive evidence of guilt (Civil Evidence Act 1968 s.13). However, both s.11 and s.13 applied only to convictions by a U.K. court (see s.11(1) and s.13(3)).

40. Mr Hudson submitted, however, that the twin foundations of the abuse principle applied just as much in relation to foreign convictions. Indeed, the unfairness limb could be even more acute when the conviction was abroad.

41. The Law Reform Committee directly addressed the issue of foreign convictions in paragraph 17 of its report in which it said,

> 'We have restricted our recommendation to convictions by courts of competent jurisdiction in the United Kingdom. We do not include convictions by foreign courts. This is for practical reasons. The substantive criminal law varies widely in different countries. So does criminal procedure and the law of evidence. The relevance of the foreign conviction to the issues in the English civil action could not be ascertained without expert evidence of the substantive criminal law of the foreign country and reliable information as to the standards of its courts. Its weight could not be judged without expert evidence of the procedural law and reliable information as to the standards of its courts. There are, of course, many countries whose standard of administration of criminal justice is as high as our own, but there are others in which one cannot be assured of this. It would be invidious to draw distinctions in the legislation needed to give effect to our recommendations between one foreign country and another. It would be impracticable to leave the admissibility and weight of a foreign conviction to the discretion of an English

> judge unfamiliar with the legal system and standards of criminal justice of the foreign country concerned. Furthermore, the burden of showing that a foreign conviction was erroneous would be difficult, perhaps impossible, to sustain, since there would be no way of compelling the witnesses in the foreign criminal proceedings to attend to give evidence in the English courts. The practical effect of making foreign convictions admissible might well be to make them conclusive, and the remoter the country in which the conviction took place the more difficult it would be to dispute its correctness.'

42. Mr Hudson accepted that the application of the *Hunter* principle was flexible: it was not an automatic, tick-box exercise. But if, as a matter of judgment, the Court came to the conclusion that the present proceedings were an abuse, the Court was under a duty to strike them out.

43. The modern consideration of the power of a court to strike out a claim (or a defence) as an abuse of process dates from *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. As is well-known, that case concerned the 'Birmingham 6'. They had been prosecuted for, and convicted of, murder after explosions in two Birmingham pubs killed 21 people. After their arrest some of them made confessions to the police. At their trial they submitted that the confessions should be ruled inadmissible because they had been beaten by police officers. They alleged that they had also been subjected to violence by prison officers when they had been remanded in custody. The trial judge was Bridge J. He held a *voir dire* to determine the admissibility of the confessions. He ruled that they were admissible because the prosecution had shown to the criminal standard that the allegations of police brutality were untrue. The Defendants gave evidence and repeated their claims that they had been ill-treated. They were convicted by the jury. Their applications for permission to appeal were refused by the Court of Appeal Criminal Division. The present claim was against the Chief Constable and Home Office for the violent assaults which they claimed they had suffered at the hands of the police and prison officers. The defendants sought an order to strike out the claims under R.S.C. Order 18 r.19 and under the inherent jurisdiction of the court. Cantley J. had refused to do so, but the Court of Appeal had allowed the appeal and the House of Lords dismissed the Plaintiffs' appeal (for the latter decision see *Hunter v Chief Constable of West Midlands Police and others* [1982] AC 529). The leading speech in the House of Lords was given by Lord Diplock who began by saying (at p.536),

> 'My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

44. The allegation that prison officers had assaulted the Birmingham 6 led to the prosecution of 14 prison officers on charges of assault. They were all acquitted (see *Hunter* at p. 539).

45. Lord Diplock summarised the form of abuse of process which that claim exemplified as,

> '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.' (see *Hunter* at p.541)

46. Commonly, this type of abuse is referred to as a 'collateral attack', collateral because it does not take the form of an appeal to a higher court but a challenge by the second set of proceedings.

47. As is now well-known, the Birmingham 6 had in fact suffered a gross miscarriage of justice and in 1991 their convictions were quashed by the Court of Appeal Criminal Division on a reference by the Home Secretary whose role has now been taken over by the Criminal Cases Review Commission (see *R v McIlkenny* [1991] 93 Cr App R. 287).

48. Despite this, the principle in *Hunter* remains as was shown, for instance, in the sequence of cases concerning whether legal representatives could be sued in negligence for their conduct of criminal trials. In *Smith v Linskills (a firm)* [1996] 1 WLR 763 the Court of Appeal struck out a claim by a criminal Defendant against his former solicitor for negligence and breach of contract. The claim was ruled to be an abuse of process following *Hunter*. Sir Thomas Bingham M.R., giving the judgment of the court, identified three public policies underlying the power to strike out a claim as abusive:

i) The affront to any coherent system justice which must inevitably arise if there subsist two final but inconsistent decisions of courts of competent jurisdiction.

ii) The virtual impossibility of fairly retrying at a later date the issue of what was before the court on the earlier occasion.

iii) The importance of finality in litigation.

49. A related issue is whether barristers have immunity from suit for their conduct of cases in court. In *Saif Ali v Sydney Mitchell and Co (a firm)* the House of Lords held that they did (though only in regard to what was done in court). That decision was reversed by the House of Lords in *Arthur J S Hall &Co (a firm) v Simons* [2002] 1 AC 615 in part because the risk of a collateral attack by civil proceedings could be avoided through the exercise of the court's jurisdiction to strike out cases as an abuse of process. Lord Steyn (a member of the majority in *Arthur JS Hall*) said at p.679,

> 'But I have no doubt that the principle underlying the *Hunter* case must be maintained as a matter of high public policy.'

50. Mr Hudson observed that the *Hunter* principle was not limited to courts exercising judicial power. In *Re Barings plc (No 3)* [1999] 1 BCLC 226 Jonathan Parker J. held that there was an abusive collateral attack on a decision of the Securities and Futures Authority. Jonathan Parker J's decision was upheld by the Court of Appeal (see [1999] 1 WLR 1985). In *Iberian U.K. Ltd v B.P.B. Industries plc* [1977] ICR 164 (Ch.D.),

Laddie J. found that the action was an impermissible collateral attack on decisions of the European Commission, the Court of First Instance and the Court of Justice of the EU. In *Kamoka v The Security Service* [2017] EWCA Civ 1665 Flaux LJ summarised the position at [75] as,

> 'The touchstone for the application of the principle is not whether the earlier proceedings led to a final determination of a court of competent jurisdiction but whether the pursuit of the subsequent proceedings is "Manifestly unfair to a party to the litigation… or would otherwise bring the administration of justice into disrepute among right-thinking people."'

51. Mr Hudson commented that the Claimant could only have recourse to the argument that he had fresh evidence which required his conviction by the ICT to be re-examined if he could satisfy the test in *Phosphate Sewage Co Ltd v Molleson* (1878-9) 4 App Cas 801 (HLSc), but that would have to mean that the fresh evidence 'entirely changed the aspect of the case and could not by reasonable diligence have been obtained before' (*Phosphate Sewage* at p.814). An attempt in *Kamoka v The Security Service* [2017] EWCA Civ 1665 to argue for a more benign approach to fresh evidence was unsuccessful – see the judgment of Flaux LJ at [53]-[52].

52. In the present case, Mr Hudson argued, the testimony which the Claimant himself could have given to the ICT was not fresh evidence by this standard since the Claimant could have given that evidence at his trial.

53. Although, the prospect of abuse of process is not limited to cases where the earlier decision was of a court of criminal jurisdiction (and Lord Diplock relied on two cases where the earlier decision had been of a court exercising civil jurisdiction – see *Reichel v Magrath* (1889) 14 App Cas 665 and *Stephenson v Garnett* [1898] 1 QB 677), Mr Hudson submitted that the abuse is particularly acute where the first case was criminal. As Lord Hoffman said in *Arthur JS Hall v Symons* (at p.702B),

> 'Criminal proceedings are in my opinion in a special category because although they are technically litigation between the Crown and the Defendant, the Crown prosecutes on behalf of society as a whole. In the United States the prosecutor is designated as "The People". So, a conviction has something of the quality of a judgment *in rem* which should be binding in favour of everyone. As Lord Diplock pointed out in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 223. This policy is reflected in s..13 of the Civil Evidence Act 1998, which provides that an action in libel or slander, proof of the plaintiff's conviction is conclusive evidence that he committed the offence of which he was convicted.'

54. Similarly, in *Kamoka v The Security Service* [2017] EWCA Civ 1665 Flaux LJ said at [48],

> 'There is no doubt that where the subsequent civil proceedings involve a collateral attack on a criminal conviction, such as *Hunter* itself, provide the clearest examples of where the doctrine of abuse of process will be applied.'

55. Mr Hudson submitted that the twin but independent foundations for the principle were: (a) the risk that the administration of justice would be brought into disrepute; and (b) that it would be unfair to the Defendant.

56. Mr Hudson submitted that the present proceedings would be an abuse, even if all that the Claimant said about the ICT proceedings was correct. In other words, the Defendant's strike out did not depend on a finding that the ICT proceedings had been fair and impartial. The Secretary of State did not advance a positive case that they were unfair or partial but she did submit that the proceedings would be an abuse of the process of this court even if all that the Defendant said about them was correct.

57. As I have said, Mr Hudson relies on both of the twin foundations for the *Hunter* principle: unfairness to the Defendant; and affront to justice.

58. As for unfairness, Mr Hudson observes that it is now 50 years since Bangladesh's war of independence and the murders of the 18 intellectuals. In *Smith v Linskills* under the unfairness of trying the case, the court had said (at p.773),

> 'It is over 12 years since the crime was committed. Recollections (of the participants and the layers involved) must have faded. Witnesses have disappeared. Transcripts have been lost or destroyed. Hayes may, or may not, be available to testify. Evidence of events since the trial will be bound to intrude, as it already has. It is futile to suppose that the course of the Crown Court trial can be authentically recreated.'

Mr Hudson added that, in this case, although the interval since the trial was similar, the period of time since the murders was far longer. The other difficulties were comparable, accentuated by the likelihood that for many of the participants their first language was not English.

59. Mr Hudson also argued that it would be an affront to justice if the Claimant could, in these proceedings, argue that his conviction was wrong. His complaint about the fairness of the trial should properly be (or should have been) argued on appeal in Bangladesh.

60. Although this conviction had been in a foreign country, there were two decisions where the *Hunter* principle had been relied on nevertheless. These were *El-Diwany v Hansen and Sorte, El Diwaney v The Ministry of Justice and the Police Norway* [2011] EWHC 2077 (QB) and *King v Grundon* [2012] EWHC 2719 (QB). Both were decisions of Sharp J.

61. In the first ('*El Diwany*') the Claimant brought two proceedings for libel in England over allegations that he had harassed a Ms Schone in Norway. This was despite the fact that Mr El Diwany had twice been convicted in Norway of the harassment of Ms Schone in Norway. Mr El Diwany had also brought civil proceedings in Norway against Ms Schone. They had been unsuccessful and his appeals to the Norwegian Supreme Court and the European Court of Human rights had been unsuccessful as well.

62. The Defendants made a number of applications. These included that the claims should be struck out as an abuse of process. Sharp J. accepted that the claims were abusive and she struck them out – see [64]-[74]. She acknowledged that the Norwegian convictions were not conclusive evidence that the Claimant had harassed Ms Schone since they had not been convictions of a UK court and Civil Evidence Act 1968 s.13 did not therefore apply. However, he had had an opportunity to contest the issues on the merits and the

court was entitled to have regard to them, particularly in light of admissions by the Claimant of his guilt.

63. *King v Grundon* ('*King*') was also a libel claim by an English barrister who had been convicted in New Zealand of conspiracy to unlawfully detain a person without his consent and possession of a pistol. Both related to a plot to kidnap a businessman and hold him in a box buried in the bush. His appeal against conviction and sentence were dismissed by the New Zealand Court of Appeal and he was refused permission to appeal to the Privy Council. He was subsequently deported from New Zealand. The Claimant was then disbarred by his Inn. The Defendant applied to strike out the claim. He argued that the claim was an example of *Jameel* abuse (on which Mr Hudson also relies - see below). But in considering that claim, Sharp J. said (at [38],

> 'It is true that the Defendant cannot rely upon the Claimant's convictions in New Zealand as conclusive proof, pursuant to .13 of Civil Evidence Act 1968, that the allegation is true. Nevertheless, the court, in my opinion, is entitled to have regard to the findings of a court of competent jurisdiction on an application of this nature, a view I have already expressed in *El Diwany v Hansen* [2011] EWHC 2077 (QB) at 70. In my view Section 13 plainly does not operate to prevent a Defendant from relying on a conviction in a different country as evidence of bad reputation, in particular, where, as here, it relates directly to the relevant sector of the Claimant's reputation, is not spent and is notorious.'

64. Mr Dean for the Claimant argues that it would be wrong to strike the claim out. The Commission's report was significant because it added the imprimatur of the UK government to the conviction. Tipples J. had found that the words complained of meant that the Claimant had committed war crimes and crimes against humanity: they were in other words *Chase* level 1 meanings. Furthermore, unlike many of the other reports of the ICT conviction, it was not accompanied by any summary of the Claimant's complaints about the process which had been adopted or that he could only have attended the trial if he had risked the death penalty. By Article 6(1) of the ECHR, the Claimant had the right to a determination of his civil rights and the Defendant had not shown good reason why he should be deprived of that right. That was of particular significance where the Claimant was seeking to vindicate another of his Convention rights viz his right to reputation which was part of Article 8 ECHR. A similar principle could be seen in the common law expressed in the general rule that where there was a wrong, there should be a remedy – see, for instance, *Day v Womble Bond Dickinson* [2020] EWCA Civ 447, [2020] PNLR 19 at [25].

65. *El Diwany* and *King* were the only cases where the *Hunter* principle had been applied to foreign convictions and both were different on their facts. In *El Diwany* the Claimant had admitted harassing Ms Schone. In addition, there were other hurdles which the Claimant could not overcome: thus, the claim in slander could only be brought in Norway as a result of the Lugano Convention; the claim was also out of time and there was no basis to extend the limitation period. Further, there was no sustainable case that any republication of the oral statements by the press agency had taken place in the U.K. within the limitation period. Mr Dean also drew attention to the fact that Mr El Diwany had been an English solicitor, but he had been struck off by the Solicitors Disciplinary Tribunal in 2019. That decision arose out of Mr El Diwany's Norwegian convictions. In the regulation of solicitors, there is no equivalent restriction on the admissibility of foreign convictions comparable to Civil Evidence Act 1968 ss.11 and 13. Mr El Diwany

appealed to the High Court, but his appeal was dismissed by Saini J. (see *Farid El Diwany v Solicitors Regulation Authority* [2021] EWHC 275 (Admin). Part of Mr El Diwany's grounds of appeal was that it had been unfair for the SDT to rely on the Norwegian convictions. As to this, Saini J. said,

> '54. Norway is a Council of Europe Member and a party to ECHR. In principle another state party, like the UK is entitled to proceed on the basis that Norway's justice system is Article 6 and Article 10 compliant. There has been no fundamental defect in its processes and procedures in general or in the process leading to the two convictions.
>
> 55. See by analogy the position in extradition cases and complaints about Article 6 ECHR violations in requesting states which are ECHR parties.: *Symeou v Public Prosecutor's Office* [2009] EWHC 897 (Admin); [2009] 1 WLR 2384 at [66].'

66. In this case, Mr Dean observed, Bangladesh is not a party to the ECHR.

67. As for *King*, Mr Dean submitted, that case was regarded as an abuse on *Jameel* grounds rather than on the grounds that there would be a *Hunter* abuse of process.

68. Mr Dean argued that there could be no question of the administration of justice being brought into disrepute if the present claim continued since two different legal systems were in play: it was Bangladesh where the Claimant had been convicted; it was in the U.K. that he sought to vindicate his reputation.

69. Mr Dean submitted that the 'unfairness' referred to in *Hunter* was being vexed twice by the same litigation. But that had no application in the present circumstances. It was that principle which underlay the confinement of Civil Evidence Act 1968 ss.11 and 13 to convictions in an English court. The Defendant's reliance on the length of time since the murders of the intellectuals was nothing to the point: many allegations of sexual abuse related to events which took place many years previously and yet the courts have regularly said that they can be fairly tried. Similarly, Mr Hudson's reliance on the first language of many of those involved was unimportant: English courts frequently tried cases where witnesses were giving evidence which had to be translated. As Lord Hoffman said in *Arthur JS Hall v Symons* (at p.700G),

> 'evidential difficulty which is not, as I have said, a general reason for refusing to try a case.'

70. Tugendhat J. had addressed a similar issue in *Powell v Baldaz* [2003] EWHC 2160 (QB) when he said

> '[78] If Mr Warby QC's submissions are correct, then it ought to follow that no such claim by Dr Williams could proceed because there could not be a fair trial of the action.
>
> [79] But in my judgment that would not be right. The fact that a person threatens to publish, or does publish, allegations about events occurring many years previously does not of itself preclude a fair trial. In the 1970s it was possible to have a libel trial of allegations concerning allegations against a naval officer on a Russian convoy, and there have been more than one very famous trials concerning

> the holocaust, one at the suit of Dr Dering and only very recently at the suit of Mr Irving. Criminal proceedings concerning events occurring a generation or more ago are also not uncommon, particularly in relation to allegations of abuse of children. In order to show that a fair trial is not possible, it is not enough to point to delay. Each case will depend on its own facts.'

71. Likewise, it was only if the proceedings were in the same court system that there would be an affront to justice for the same matter to be litigated twice. That was implicit in cases such as *Reichel v Magrath* (see the speech of Lord Halsbury L.C. at p.668)

72. Mr Hudson had accepted that the Defendant could not rely on ss.11 or 13 of Civil Evidence Act 1968. Yet Parliament had had the opportunity to amend that statute on numerous occasions and had not done so. By Defamation Act 1996 s. 14 absolute privilege for contemporaneous reports had been extended from UK courts to the European Court of Justice and the European Court of Human Rights and to any criminal tribunal established by the United Nations or an international agreement to which the UK was a party (as already noted, The ICT is a domestic court of Bangladesh). Then by Defamation Act 2013 s. 7 absolute privilege was further extended to any court of competent jurisdiction. Mr Dean submitted that nothing had been done to alter the Civil Evidence Act 1968 when the Defamation Act 1996 or the Defamation Act 2013 was passed. Neither the Defamation Act 1996 nor the Defamation Act 2013 had taken the opportunity to amend ss.11 or 13 of Civil Evidence Act 1968, indeed the Defamation Act 1996 had narrowed s.13 so that a previous conviction, instead of being conclusive evidence against any party was thereafter only conclusive evidence against a plaintiff (see Defamation Act 1996 s.12(1)).

73. Mr Dean submitted that the proposition for which he was contending – that there can be no abuse of process if the earlier decision was of a foreign court – was supported by the decision of Flaux J. in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd.* [2015] EWHC 1640 (Comm), [2016] 1 All ER (Comm) 233. ['*Standard Chartered*']. The facts of the case were complex, as was the procedural history. One issue between the parties was whether the litigation between them should take place in England or Tanzania. The Defendants argued for Tanzania: the Claimants contended for England. One argument raised by the Defendants was that Standard Chartered Bank (the parent company of the Claimants) had, in related proceedings, in New York argued that Tanzania was the appropriate forum. In the English proceedings, the Defendants argued (*inter alia*) that it would be an abuse of process for the Claimants to argue now that England was a more appropriate forum.

74. In the course of his judgment, Flaux J. said the following,

> '[162] In my judgment that passage [a quotation from *Secretary of State for Trade and Industry v Bairstow, Re Queens Moat House plc*] does not assist Mr Coleman [counsel for the 2nd Defendant] here because there is no question of any issues being 'relitigated' in England: the relevant issues have yet to be litigated anywhere and in any case there is no question of manifest unfairness to VIP [the 2nd Defendant] if they are held to their contractual bargain as regards jurisdiction. Nor in any sense does the continuation of these proceedings bring the administration of justice into disrepute in England as a consequence of what was said by SCB in New York.

> [163] that brings me to the third reason why there is no abuse of process. There is an obvious question mark as to whether, in the absence of an issue estoppel, it can be said that a collateral attack of a foreign court (even if the current proceedings were such a collateral attack, which they are not) can be said to bring the administration of justice into disrepute. The only authority which supported any such wide ranging proposition Mr Coleman was able to cite was the decision of Mr Jeremy Cousins QC, sitting as a Deputy Judge in the Chancery Division in *Polegoshko v Ibragimov* [2014] EWHC 1535 (Ch). That case concerned an application by the Defendants to restrain the claimants from taking proceedings against them abroad. The application was unsuccessful and one of the grounds relied upon the claimants in resisting which seemed to find favour with the deputy high court judge at [35] was that the Lithuanian courts pronounced upon the particular issue, so that the application was a collateral attack on the judgment of those courts.
>
> [164] It seems to me that that was a conclusion which depended on the particular facts of that case and was not laying down any general principle that, absent issue estoppel, the raising of an issue in English proceedings which had already been decided or considered by a foreign court where contentions were being advanced in England contrary to the conclusions of the foreign court could amount to an abuse of the process of this court. Any such general principle would be far reaching and would extend the conclusory effect of foreign courts beyond the principles of res judicata estoppel in an impermissible manner. In my judgment, unless an issue estoppel can be established (which it cannot in the present case) the pursuit of proceedings in England, even if they involve some form of collateral attack on the decision of a foreign court, cannot amount to an abuse of process of this court.'

74. *Standard Chartered* was considered by the Court of Appeal – *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] 2 All ER (Comm)740. The appeal was dismissed. In the course of his lead judgment, Longmore LJ said,

> '[40] If there is no issue estoppel, I cannot see that there is any question of an impermissible attack on the judgment of Judge Marrero [the New York judge]. The issue which he was considering is just not the same as whether SCBHK's claim can be brought.
>
> [41] For much the same reasons, the submission that the judge failed to stand back from the detailed facts and ask himself the general question whether SCBHK's claim was abusive cannot be accepted. Of course, there can be abuse in circumstances in which there is no issue estoppel but such cases will, in general, be rare and any decision that a litigant is not entitled to have its dispute in the country permitted by the terms of the contract will be rarer still. The further one stands back from the detailed facts of this case, the less abusive it looks.'

75. In any event, Mr Dean argued, a well-established exception to *Hunter* abuse is where the litigant wishes to advance a case of which they were unaware at the time of the earlier proceedings (see e.g. *Kamoka v The Security Service* at [120]) or, Mr Dean submitted, where there were good reasons why the case could not be advanced in the earlier proceedings. In the present case, the Claimant could only have given evidence if he had attended his trial and run the risk of the death penalty being imposed after an unfair trial. Mr Dean observed that the ICT had already passed the death penalty in a case in January 2013, so the risk was not hypothetical.

76. Mr Dean asked me to note the comments of the Court of Appeal in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 LL.R.132 CA in which Sir David Cairns had said (at p.139),

> 'If further the Defendant was at some disadvantage in the earlier proceedings from which he would be free in the later ones, that is a positive reason why he should not be deprived of the opportunity of raising the issue afresh. I am satisfied that in this case Oceanus was at some disadvantage at the first trial in relation both to the documents and to the cross-examination of witnesses.'

In this case, Mr Dean submitted, the Claimant was manifestly free of the difficulty which faced him in his criminal trial before the ICT. He could only have attended, as already submitted, if he had been willing to expose himself to an unfair trial before the Tribunal which could have (and did) impose the death penalty. This was not a case where English law would have permitted the trial to proceed in his absence since he had not voluntarily chosen to be absent and, in any case, in his absence the trial could not have been fair (see *R v Jones* [2002] UKHL 5, [2003] AC 1).

77. That proposition would also be in line with the consistent confinement of *Hunter* abuse to circumstances where the litigant had in the earlier proceedings 'a full opportunity' to argue the case he wished to raise in the later proceedings (see *Hunter* at p. 541). In *Smith v Linskills* at p. 770 Sir Thomas Bingham M.R. gave examples of where a litigant in an earlier civil case would *not* have had a such a full opportunity as when summary judgment was entered in default of defence. He contrasted that with the case before him when Mr Smith had been represented by counsel and solicitors at his trial. In the present case, Mr Dean observed, the Claimant had been tried in his absence. His absence could not be regarded as voluntary (a critical requirement for waiver of the right to attend one's trial under Article 6(1) of the ECHR - see *Deweer v Belgium* (1980) 2 EHRR 439. State counsel had been appointed to represent him, but they had acted minimally and were, of course, hampered by the Claimant's non-attendance.

78. Mr Hudson had relied on the judgment of Laddie J. in *Iberian U.K. Ltd v BPB Industries* for the proposition that *Hunter* abuse could arise in relation to administrative proceedings such as decisions of the European Commission. However, that case turned on the UK then being part of the comprehensive European economic order – see p.181H. There was nothing comparable in the present case.

79. Mr Dean argued further that an appeal would not assist the Claimant:

i) At best, if the appeal succeeded the Claimant would be granted a re-trial, but he could not attend a re-trial for the same reason as he could not attend the trial, namely his exposure to the risk of the death penalty.

ii) In any event, it was highly doubtful whether the Claimant could have appealed without first surrendering himself to the jurisdiction of Bangladesh.

iii) The Claimant's reason for not surrendering to the Bangladeshi jurisdiction would not be accepted by the Bangladeshi courts since the death penalty was part of the law of Bangladesh.

80. Mr Dean further submitted that the Defendant had asserted that the Claimant's motive in bringing the present proceedings was to establish that he was innocent of the murders

of the 18 intellectuals, but this added nothing to the argument since his motive in bringing the proceedings was irrelevant if the action was not otherwise an abuse of process. As Simon Brown LJ had said in *Broxton v McLelland* [1995] EMLR 485, 497-8,

> 'Accordingly, the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only abusive if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings.'

In the same case Simon Brown LJ commented that,

> 'a plaintiff is entitled to seek the Defendant's financial ruin if that will be the consequence of properly prosecuting a legitimate claim.'

Thus, in the present case, Mr Dean submitted, if the consequence of bringing the claim was that the conclusion of the ICT was undermined, that was simply a consequence of the action succeeding, not an improper purpose.

81. Mr Dean also argued that it was incorrect to suggest that all of the claim involved the truth of the Claimant's guilt for the murders of the 18 intellectuals. The claims under Articles 6 and 10 of the GDPR concerned the lawfulness of the processing of data about the Claimant's criminal conviction rather than the accuracy of the guilt of the Claimant.

82. In my judgment the present proceedings are an abuse of process and should be struck out. I recognise that the exercise depends on an assessment of all the circumstances and is not to be treated as a tick-box exercise. As Simon LJ held in *Michael Wilson and Partners v Sinclair*, [2017] 1 WLR 2646 CA at [48](3),

> 'To determine whether proceedings are abusive the court must engage in a close "merits-based" analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process.'

83. My reasons for coming to this conclusion are as follows:

i) I accept Mr Dean's argument that the Claimant's purpose in bringing these proceedings does not, of itself make the proceedings abusive. However, the inevitable consequence of the claim is that the correctness of the ICT's conclusion that the Claimant was guilty of war crimes will be in issue. Mr Dean submitted that that was not true of the data protection claims under GDPR Articles 6 and 10. However, I accept the response of Mr Hudson that, even in respect of those claims, the Court will inevitably have to grapple with the issue of whether the Claimant was indeed guilty of war crimes. As Mr Hudson observed, paragraph 20 of the Amended Particulars of Claim invokes Article 8 of the ECHR in support of the claim that Article 6 of the GDPR was infringed by the Report. This follows from his data protection claim that the allegation he committed war crimes was inaccurate. It follows as well from the indication in Ms Omeni's statement that the Secretary of State intends (if necessary) to defend the libel claim as substantially true (see Defamation Act 2013 s.2). I recognise that the Defendant has not yet pleaded her defence and it may be that not all of the matters on which the ICT relied are amenable to being included in a defence of

substantial truth, but it is sufficiently clear that in both the libel and data protection claims the accuracy of the ICT's conclusions will need to be re-visited. Indeed, Mr Dean did not really question that this was the object of the proceedings.

ii) While there can be abuse of process where the earlier proceedings were civil, I agree with Mr Hudson that the courts are particularly vigilant to guard against a collateral attack on a finding of guilt by a criminal conviction.

iii) In *El Diwany v Hasan* and *King v Grundon* Sharp J. applied the same or similar considerations to convictions by an overseas criminal court. It is right, as Mr Dean argued, that the outcome in *King* was that the Defendant was granted summary judgment, rather than having the claim struck out as abusive. However, it is clear from [38] of her judgment in *King* that she saw that case as being of a piece with *El Diwany*.

iv) I appreciate that in *Standard Chartered Bank* Flaux J. thought that there was a critical distinction between previous decisions of UK courts and foreign courts. However, it is notable that neither *El Diwany* nor *King* were apparently cited to Flaux J. It is also notable that *Standard Chartered* did not involve an earlier criminal conviction, to which, as I have said, particular significance attaches.

In the Court of Appeal in *Standard Chartered* Longmore LJ was more diffident and said only that cases where it would be an abuse to relitigate issues that had been decided in earlier litigation to which the claimant had not been a party or privy to the decision 'will, in general, be rare.' In my view he did not have in mind the kind of situation where the earlier proceedings had been criminal, or alternatively such cases were examples of situations where re-litigation would be an abuse.

v) I recognise that the Law Reform Committee in 1967 deliberately excluded foreign convictions from its recommendations, but that does not alter my conclusion:

a) The power of the court to strike out proceedings as an abuse of process has developed since 1967.

b) The 'practical reasons' which deterred the Committee from extending its recommendations to foreign convictions now look somewhat dated. Thus, judgments are now regularly made as to the standards of criminal justice in other countries for the purpose of extradition among other reasons and for this purpose evidence is regularly given in English proceedings. So, it is no longer regarded as 'invidious to draw distinctions between one country and another.'

c) Since neither Civil Evidence Act 1968 s.11 nor s.13 apply to foreign convictions, the consequence is that the Secretary of State would have to prove *de novo* that the Claimant was guilty of the murders of the 18 intellectuals, for the purpose of the libel claim. Although the burden of proof would be reversed for the data protection claim, that could still leave the Defendant exposed to an adverse judgment on the claim in libel. Mr Hudson described that as an afront to justice and manifestly unfair. I agree.

vi) The conclusion to which I have come implies nothing about the merits of the Claimant's claim that the proceedings in Bangladesh were grossly unfair to him. As Mr Hudson submitted, the Defendant's position is that the present claims are an abuse of process, even if all of the Claimant's complaints were justified and he was convicted after a gross miscarriage of justice. I accept Mr Hudson's submission that the proper course for the Claimant, if it is important to him to challenge the conviction is, or was, to appeal within the Bangladeshi criminal process. It may be that any opportunity he had to do this is now past, but that is not material to whether the present proceedings are an impermissible method of collateral attack on the conviction, which in my view, they are.

vii) I recognise that the Claimant was faced with a dilemma when he learned that he was to be prosecuted for war crimes before the ICT: he could surrender voluntarily and take his chances with the fairness of the ICT's procedures and the prospect of being sentenced to death if convicted (as apparently, the ICT had already done in January 2013) or he could do what he did and let the ICT procedures take their course without his attendance. However, it seems to me that he is trying to have the best of both worlds, by remaining outside Bangladesh, but challenging his conviction. In my view, that course is not open to him. The proper forum to decide whether the trial was so tainted by unfairness that the conviction cannot stand is the appellate court in Bangladesh. Had the Claimant pursued that course and succeeded in having the conviction quashed, the merits of the Defendant's argument would have been entirely different.

viii) I also agree with Mr Hudson that, if this claim was to continue, it would be unfair to the Secretary of State. Over 50 years have passed since Bangladesh gained its independence and over 50 years since the intellectuals were murdered. Inevitably over that time, witnesses must have died, and documents been lost. Yet, as I have already said, not only would the conviction not be conclusive evidence of the Claimant's guilt, but his conviction would not even be admissible in evidence on the issue of his guilt. *Hollington v Hewthorn* would preclude both. The Defendant would have some comfort that, as a practical matter, the Claimant would have to give evidence in support of his data protection claim, but that does not eliminate the unfairness to the Defendant. I agree with Mr Dean that the need to translate testimony or documents is not relevant: that is a daily fact of life in numerous courts and tribunals in the U.K., but the length of time since the events in question is another matter. Of course, there are cases where criminal proceedings are brought in respect of events that happened very long ago, but, even then, the courts are alive to the possibility of prejudice through lapse of time. In my view the period in this case is so great that I can safely assume that there will be such prejudice without specific evidence that that is the case.

ix) I also agree with Mr Hudson that unfairness to the opposing party is a separate and independent ground for finding that a claim is abusive. It is not the case that all considerations collapse into bringing the administration of justice into disrepute.

x) Nor is it the case that abuse only arises where the parties are the same. The ability of the courts to strike out a pleading as an abuse of process is only needed

where the principle of *res judicata* is not available, precisely because the parties are not the same (or are not privy to the earlier litigation).

xi) I accept that the courts should be careful before striking out a claim as abusive. That principle precedes the ECHR and Article 6(1) but has its origins in common law. As Lord Bingham said in *Johnson v Gore Wood and Co (a firm)* [2002] 2 AC 1 at p.22,

> '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.'

xii) As Mr Dean submitted, the starting point should be that where there is a legal wrong, there should be a remedy. Nonetheless, some sense of proportion is important here. The online Report of the Commission was amended as a result of pre-action correspondence. The claim form was issued after that correspondence. Yet it was only the original online version to which the claim took objection; it was not alleged that the amended on-line version was either defamatory of the Claimant or infringed his rights under the GDPR. No doubt this was for the very good reason that the only passage which identified the Claimant was footnote 158 and that footnote was removed by the change. The passage in the text to which that footnote referred was also deleted. No doubt as well, the change had the consequence that the Claimant does not seek an injunction by way of relief in these proceedings. The consequence is that, even if the Claimant is successful, the earlier publicity (including his entry on Wikipedia) can remain. The publicity which followed the Claimant's conviction and sentence can continue unaffected (and others would have a qualified privilege defence to any claim for libel). The original version of the report was download 4,982 times but, as Mr Hudson submitted, there can be no necessary inference that those persons read the very limited passages which constitute the words complained of – see for instance *El Diwany* at [57]. Only a handful of copies of the hard copy version of the original Report were distibuted. Mr Dean submits that it is a very serious thing for a government department to label someone a war criminal. So it would be, but the features to which I have drawn attention mean that other factors have to be taken into account in weighing the importance of the Claimant being free to try to vindicate his reputation.

All of this is also relevant to Mr Dean's submission that the Claimant was seeking to protect his reputation, an aspect of his right to private life protected by Article 8 of the ECHR.

Although Mr Dean correctly said that the Defendant had no Article 10 right (because she was a public authority), he rightly recognised this was of little consequence since readers of the Report did have an article 10 right to receive the information in the Report.

xiii) Mr Dean emphasised the presumption of innocence. That principle is, of course, a cornerstone of our criminal jurisprudence, but the principle applies until conviction and the Claimant has been convicted by the ICT. At a trial of the

present claim, as I have said, the conviction would not be admissible evidence of the Claimant's guilt, but I have to decide whether it would be an abuse of process for the claim to continue.

Jameel abuse

84. Since I would anyway strike out the claim for *Hunter* abuse, this aspect of the Defendant's application is moot, but I will consider it briefly.

85. The Defendant submits that it would be open to her to refer in mitigation of damage to the Claimant's reputation that he had been convicted of the murders of the 18 intellectuals and he therefore had no reputation in this particular area worthy of vindication. She also argues that litigating whether the Claimant did indeed murder the 18 intellectuals would be a long and costly process. Ms Omeni estimates the cost at about £750,000 - £1,000,000, if not more.

86. In this respect, Mr Hudson relies also on *Goody v Odhams Press Ltd.* [1967] 1 QB 333 CA. In that case the Plaintiff had been convicted of the Great Train Robbery. He brought an action for libel over an article in 'The People' which said that he had committed that offence. The Defendants at first sought to plead justification. However, the rule in *Hollington v Hewthorn* stood in their way (this was before the Civil Evidence Act 1968). Instead, they sought to amend their defence to plead in mitigation of damages that the Plaintiff had a reputation for theft and violence and sought to rely on other previous convictions of his from 1948-1964. The Court of Appeal allowed them to do so, despite the objection of the Plaintiff that instances of previous bad reputation could not be relied upon – see *Scott v Sampson* (1882) 8 QBD 491 DC and *Plato Films Ltd v Speidel* [1961] AC 1090.

87. Mr Hudson argues that the conviction of the Claimant by the ICT will likewise be admissible, but, if that is so, it is plain that the Claimant has no reputation to vindicate.

88. Mr Dean responds that the ICT conviction could not be relied upon in mitigation of damage. *Hollington v Hewthorn* would also be an obstacle to deploying the conviction in this manner and, in this context as well, the Defendant cannot rely on Civil Evidence Act 1968 ss.11 and 13 because the conviction was by a foreign court. The Commission's Report (in its original form) had not been accompanied by the Claimant's denial of responsibility for the murders or anything of his complaints of the unfairness of the ICT's procedures. The number of hard copies of the Report had been limited, but, Mr Dean reminded me, damage to reputation was not simply a 'numbers game' – see *Ames v Spamhaus Project Ltd* [2015] EWHC 127 (QB), [2015] 1 WLR 3409 at [33]-[34], which also emphasised that it was an exceptional course to strike out a viable claim on proportionality grounds. He stressed as well that the litigation was at an early stage, and, in advance of a properly pleaded defence, it was premature to estimate the costs of the claim, as Nicklin J. had warned in *Ward v Associated Newspapers Ltd.* [2020] EWHC 2797 (QB) at [62]-[64].

89. I recognise the points which Mr Dean makes, and, in my judgment, this is not an appropriate occasion for me to rule on whether the ICT conviction would be admissible in evidence of mitigation of damage. Nonetheless, I accept Mr Hudson's broad submission as to the likely cost of the proceedings. They would inevitably be lengthy and costly. While it is a serious matter to deprive a litigant of the opportunity of the

chance of vindicating his reputation, the *Jameel* jurisdiction exists and, in my judgment, this would, if necessary, have been an appropriate case in which to exercise it.

Defendant's application for summary judgment

90. Mr Hudson agreed that it is unnecessary to consider this aspect of the Defendant's application notice, the claim being in any event struck out.

Conclusion

91. The claim will be struck out and judgment entered for the Defendant.