THE SUPREME COURT

[Appeal No. 2017/170]

[High Court Record No. 2014/6642P]

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
O'Malley J.

BETWEEN:

GARY SIMPSON

APPELLANT

V.

THE GOVERNOR OF MOUNTJOY PRISON, THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE & EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 31st day of July, 2020

Introduction

1. On the 14th November, 2019, this Court delivered its judgments in this appeal ([2019] IESC 81), holding that, as a result of the conditions under which he had been detained, the appellant was entitled to a declaration under Article 40.3 of the Constitution of Ireland, and an award in damages of €7,500. The Court invited separate submissions on costs. The purpose of this judgment is to deal with that question. As it was accepted by all parties that it was necessary that the principles applicable in this category of case be authoritatively determined, the respondents have now properly acknowledged that the appellant is entitled to the costs of the appeal.

2. What remains in question, then, are the costs of the 30-day High Court hearing where, despite granting a declaration that the appellant's constitutional right to privacy had been infringed, the trial judge (White J.) declined to award him any costs as a result of the extent to which he had lied and exaggerated in his testimony. Counsel for the appellant submits to this Court that his client is nonetheless entitled almost all the costs of the hearing in the High Court. He makes allowance for 4 days where he accepts his client's case was rejected by White J.

3. This judgment is to be read in conjunction with the judgments of this Court already handed down. It seeks to outline the legal principles now to be considered; examines a number of key features of the High Court case itself; and then applies those legal principles in addressing the application for costs. Finally, there are some more general observations arising from the case.

4. An application for costs is often a routine matter determined on first principles. Here it may be of more significance. There are 1,500 other prison condition cases pending in the courts system. There may well be other claims giving rise to awards of damages. Whether the claimants may already have duties or debts due in law either to individuals harmed by their criminal activities, or to society in general, is a matter outside the scope of this judgment.

5. There has been some description of this case as a "slopping-out" case. I think that description is misleading. In fact, the claim concerned a range of features which led the Court to the conclusion that there had been an infringement of rights and duties derived from Article 40.3 of the Constitution. These concern a range of issues of which in-cell sanitation was but one factor, albeit an important one.

The Liability of the Respondents

6. The Court held that the award of damages was necessary because the conditions to which the appellant, a "protection prisoner", was exposed fell seriously below those to be expected in an Irish prison in the year 2013. The State respondents ("the State") were in breach of their duties to uphold those standards in practice. The appellant's rights were infringed to a degree which required a constitutional vindication greater than the declaration alone which was granted in the High Court.

The High Court Judgment

7. The High Court judgment, delivered by a highly experienced judge, was careful, meticulous and detailed. When there were aspects of the appellant's detention regime to be criticised, White J. did so in no uncertain terms. When it came to considering issues in dispute, he carefully distilled and sifted the evidence and reached clear conclusions on each of the issues before him. This balanced approach provides a strong basis for the consideration which follows.

8. As is clear, both from his main High Court judgment and his subsequent ruling on costs, White J. found this appellant to be a very unreliable witness. But there is a danger here in arguing from the particular to the general. Prisoners, or former prisoners, who bring cases concerning very sub-standard conditions are entitled to a fair hearing, just as the appellant received. Each case deserves to be treated on its own merits. Litigants are constitutionally entitled to have access to the courts; issues of credibility arise in a wide variety of cases - not any one in particular.

9. The appellant was fortunate to have the services of legal representatives prepared to take on this case in circumstances where there was no guarantee of remuneration. It is worth making the point that both sides shared the common view that, because of its nature and its potential precedential effect, this case warranted a level of legal representation unusual by current-day standards. It is now necessary to consider some specific features of the High Court judgment.

The Basis for the Remedy

10. Consideration must start with the findings of facts which, in turn, grounded the remedy as ultimately determined by this Court. For most of his imprisonment, the appellant was kept

in a cell for up to 23 hours a day with another inmate on a restricted regime with no in-cell sanitation. On some occasions, he was one of three prisoners confined to a single cell. All these features were breaches of the standards for accommodation laid down by the Inspector of Prisons for protection prisoners. White J. criticised the fact that the prison authorities had not adverted to the extent to which such prisoners continued to be placed in, and ultimately filled the entirety of, the D1 landing in Mountjoy Prison. He observed that the possibility of alternative accommodation in the prison had not been sufficiently considered, that the appellant's out-of-cell time was severely restricted, and that the appellant was denied access to any form of education or work while detained in the D wing. These were all findings of fact, or inferences firmly based on evidence (see, *Hay v. O'Grady* [1992] 1 I.R. 210).

11. The judge criticised the fact that the prison authorities had not taken steps to ameliorate the toileting arrangements for protection prisoners on the D1 wing, and that no satisfactory explanation had been proffered as to why mobile toilets had not been deployed. He drew attention to the fact that misleading assurances on sanitation issues had been given to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. He expressed concern that the Prison Service left it to the Governor of the prison to deal with the overcrowding issue.

12. The High Court judge distinguished this case from the High Court judgment in *Mulligan v. Governor of Portlaoise Prison and Ors.* [2010] IEHC 269; [2013] 4 I.R. 1. *Mulligan* also concerned sub-standard and unsanitary prison conditions, including some physical cell conditions not dissimilar to those as found here. But, in *Mulligan*, the applicant had, at all times, been the sole occupant of the cell where he was accommodated in Portlaoise Prison. He had ample out-of-cell activities available. He was not confined in his cell to anything like the same extent as here. He was free to leave his cell for considerable periods of time during the day. Viewing all these features cumulatively, the High Court in *Mulligan* declined to make a declaration that the respondents had infringed any privacy right derived from Article 40.3 of the Constitution. Mr. Simpson's case, by contrast, concerned in-cell prison conditions one decade later than those in *Mulligan*. Even in the year 2013, the appellant was kept in cells with similar unsanitary facilities to those described in *Mulligan*, but, in Mr. Simpson's case, with another prisoner and sometimes two others. White J. held correctly that this was an essential distinguishing feature.

13. In its judgments delivered in the appeal, this Court varied the High Court judgment on the question of remedy. But in doing so, the Court briefly discussed European Court of Human Rights ("ECtHR") judgments where, on uncontroverted findings of somewhat similar conditions, that Court made awards of just satisfaction under Article 41 of the European Convention on Human Rights ("ECHR"). While the facts and awards in those cases may bear some resemblance to those in the instant case, a consideration of the ECHR decisions shows that the costs awards made by the ECtHR were in marked contrast to the type of sums likely to be in issue here.

14. Having made these preliminary remarks, it is now necessary to consider the legal principles which form the framework for this judgment.

Legal Principles

15. It is often said that awards of costs are discretionary. But this is something of a misnomer, as in exercising this discretion a court must act in accordance with legal principles. The general principle, to which there are exceptions, is that costs follow the event (Order 99, Rule 1(3) and (4) of the Rules of the Superior Courts, 1986 ("the RSC")). This case was undoubtedly a complex piece of litigation. Substantial sums of money are at stake in this application. It is, therefore, necessary to engage in a more detailed analysis of the precise circumstances relevant to the costs issue and to endeavour to do justice between the parties by formulating appropriate costs orders.

16. The law on costs has been refined in the last two decades. In complex cases, a court must consider issues such as the extent to which one party or the other added to the costs by arguing issues which were unsuccessful. It is necessary to assess the extent to which unmeritorious issues which were raised had a bearing on the costs incurred, where the raising of such matters can reasonably be said to have affected the costs of the litigation seen as a whole (see, *Veolia Water UK plc and Ors. v. Fingal County Council (No. 2)* [2006] IEHC 240; [2007] 2 I.R. 81). But there are special circumstances in this case which militate against any straightforward application of the *Veolia* principles. These circumstances are the scope of the claim mounted, the quality of the appellant's own testimony, a fair assessment of whether there was success or failure on the relevant issues, and the level of the award made.

The Approach Adopted in this Judgment

17. The findings made in the High Court must form the essential building blocks for assessing liability for costs on an issue by issue basis. These are now individually analysed in order to identify the features which, brought together under headings, may have a potential bearing on costs. It is also necessary to consider the degree to which much of the appellant's evidence was marked by substantial dishonesty.

The Issues

18. The High Court judgment begins with a consideration of what can be properly called "background" aspects of the case. Amongst other matters, White J. had to hear evidence and later submissions on the political decision to renovate Mountjoy Prison rather than to move to a new site in North County Dublin. Questions under the separation of powers principle were raised. There was evidence on the history of the prison. When assessing costs, these features can be seen as "neutral": they were integral to the case, forming necessary background, but did not result in success or failure in the *Veolia* sense. However, while neutral, this does not mean that they should be discarded or ignored. They were a necessary part of the claim and the response to it.

Three Material Issues

19. The directly relevant material must then be considered. This falls under three headings. These were, first, the appellant's physical conditions of detention; second, his claim that he had sustained personal physical and psychological injuries; and third, allegations of

harsh regime and ill-treatment. In principle, all three issues can be described as coming within the spectrum of protections from unfair attack and the duty to vindicate rights to the person derived from Article 40.3 of the Constitution. These three issues formed the true basis of the appellant's case.

20. It is also necessary to bear in mind that what is in question is not just the appellant's own testimony or that of witnesses called on his behalf, but also the substantial number of the respondents' witnesses which were called to address the appellant's case, on occasion having to give evidence on more than one of the three issues. While references to the transcript can assist the consideration to a degree, the High Court judgment itself is the surest guide.

Issue I: Physical Conditions of Detention

21. The first issue can best be described as the physical conditions of detention. Here, the judge considered cell sanitation, including "slopping-out"; ventilation; food quality; the cleaning regime; lighting; and alleged rodent infestation. Certain core features of these conditions were not ultimately seriously in dispute.

22. Insofar as the appellant's claim was successful, that success derived from these findings. However, even under this first heading, the judge found there were some elements of exaggeration. He rejected the appellant's testimony that, to avoid odour, he had had to throw plastic bags of faeces out of the window of his cell. While observing the slopping-out process was intrinsically very objectionable, White J. did not accept the appellant's claim that the process was chaotic. This aspect of the case also consisted in part of an allegation that the conditions had *exposed* the appellant to harm, by contrast with the further claim that the conditions had actually caused him actual physical or psychological harm. This claim of exposure to hazardous conditions failed. White J. also held that the appellant had exaggerated in his claims about the quality of the food, which he held to be good. He rejected the appellant's testimony in relation to the cleaning regime.

23. In summary, therefore, under this first heading, there were findings in the appellant's favour, but his testimony was found to be tainted with dishonesty. The material which the judge accepted was, nonetheless, solid evidence on the physical conditions of detention which actually formed the basis for the remedies, as determined by the High Court and, ultimately, this Court. White J.'s findings on these were often corroborated by other evidence, drawn from the respondents' own records.

Issue II: Physical and Psychological Injuries

24. The second category of complaints concerned allegations of physical and psychological injuries. The appellant claimed that, not only was the prison environment unhealthy, but that it had actually caused his physical and psychological health to be compromised. The High Court heard evidence from experts concerning the potential risk of bacteriological infection in the prison. The appellant's case that he had been directly or indirectly exposed to the risk of infection was rejected. The High Court judgment records that the appellant's Mountjoy Prison medical records contained no indication that he had been immunocompromised or that he had suffered stomach cramps, as he claimed. The

evidence as to psychological effect of detention on the appellant was held to be insufficient to give rise to a cause of action. The appellant's claim under this heading failed.

Issue III: Ill-Treatment and Harsh Regime

25. The complaints raised under the third heading or issue can be best be described as "ill-treatment and harsh regime". The appellant claimed that the majority of the prison staff were unsympathetic, discourteous and contemptuous. More seriously, he alleged that both prison officers and senior management in the prison had conspired or condoned a regime on the D Wing whereby protection prisoners had been bullied and intimidated by other prisoners in the prison. The trial judge observed this was a most serious allegation. If proved, any claim might have attracted punitive or aggravated damages warranting a significantly higher award. The judge rejected this claim also, holding it was unfounded. He held that the allegation of a conspiracy against the appellant or other protection prisoners was marked by gross exaggeration and untruthfulness.

26. In evidence, the appellant claimed one prison officer victimised and assaulted him on an occasion when his partner and children were visiting him in Mountjoy Prison. White J. held that, in fact, it was the appellant's own behaviour on the occasion which had been wrong and distasteful, and that it was the appellant himself, and his own misunderstanding as to the permitted duration of the visit, which had triggered the flare-up. The judge rejected an assertion by the appellant that the same officer had grabbed him by the throat. He held that Mr. Simpson had persisted with inaccurate allegations about this visit and the officer's actions at a time long after he knew that these were unjustified. The judge held that these put the appellant's credibility very much in issue.

27. White J. also found that an allegation that the appellant had been pressurised to withdraw a complaint about the incident, and that he had been victimised by being denied showers for 12 days, had been undermined. The judge rejected the contention that either the named prison officer or his colleagues had deliberately denied showers to the appellant. White J. also rejected the contention that the same named officer had engaged in a "head game" with the appellant. The judge found on the evidence that the appellant had been a volatile prisoner, with a number of disciplinary offences, and that he had amplified a difficult personal relationship between himself and that prison officer into an invented conspiracy.

Summary

28. Taking these three relevant issues together, it can be said that, even though the first important issue contained key findings giving rise to the remedies, there was exaggeration and dishonesty. The claims made under the second and third headings failed. The allegations under the third heading were strongly rejected.

29. The judge also rejected the evidence that prisoners carrying out cleaning work were "always on drugs". He held this was a "nasty allegation", which he entirely rejected, pointing out that, at one stage, the appellant himself had been assigned to do cleaning work in the prison.

Further Observations

The Scope of the Case

30. A number of more general observations must now be made. To state the obvious, these proceedings were brought by the appellant. It was he, therefore, who determined the scope of the case. The evidence took up 24 days. The fact that the hearing was so long was largely, albeit not entirely, attributable to the range of the factual issues which the appellant instructed his lawyers to pursue. Counsel who represented him were professionally obliged to proceed on his instructions as to the facts of the case. There were indications that, at times, his counsel tried to direct their client to remain focussed on testimony to focus on core issues when he seemed too willing to deviate into other claims which were not always believed.

The Nature of the Case

31. There have been references to this as a "lead" case. But this claim cannot simply be seen as a "lead case", confined to the question of cell conditions on the D Wing. It was also a full-scale systemic attack on many aspects of the prison regime in that part of the prison. It is not surprising therefore that, in the circumstances, the respondents chose to defend the case strongly. The nature and extent of the action brought was met with an equal and opposite reaction in the response. The case was hard fought, with no quarter asked or given. For many reasons, presumably tactical, neither side applied to have legal issues determined prior to the trial. This is understandable, as much was in dispute. There was but one notice to admit facts. There were no interrogatories. If there was prior case management, this Court is not aware of it. There was no agreement to admit statements of evidence, now frequently the practice in the Commercial Court. The High Court case had some features of a "trial by ambush" - a phenomenon which courts strongly disfavour. This should not happen in any future case. It is, however, true that the respondents unsuccessfully raised a range of procedural issues. But the time expended on these issues must be measured against the substantial number of days expended on the issues of fact, not only on the appellant's side, but in rebutting these claims where, frequently, a number of witnesses had to be called in response.

32. It is useful, then, to pose a hypothetical question. That question is, how long would the case have taken if the appellant had confined his testimony to a simple account as to the physical conditions under which he had been held? The answer is abundantly clear. The case would have taken a much shorter time. The range of issues would have been radically reduced. The claim would not have acquired many of its inflated and exaggerated aspects. The fact is that it was the appellant himself who elected to mount this broad attack, claiming substantial damages, which failed on a number of fronts, not least because of his own lack of credibility. These are relevant considerations. The very breadth of the case, and the extent of the dispute between the parties, would have rendered a lodgement of money in court, or any other form of pre-trial resolution, a highly problematic and speculative exercise.

Case Law

33. I move then to consider the legal principles. I re-emphasise, first, the trite point that the fact that this Court grants leave to appeal under either of the headings contained in the

33rd Amendment to the Constitution cannot, in itself, be any indicator of some *prima facie* entitlement to costs. The principle that costs follow the event is well established in the RSC (see, as mentioned above, O.99, r.1(3) and (4) of the RSC, and the full discussions in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535, and *Cunningham v. President of the Circuit Court* [2012] IESC 39; [2012] 3 I.R. 222). The general principles have been refined and discussed in a number of the authorities on a case by case analysis, for example in instances where it is contended there is a public interest aspect (see, *Dunne v. Minister for the Environment and Ors.* [2007] IESC 60; [2008] 2 I.R. 775). There may be "test cases" which might, to a greater or lesser extent, have a precedential or "knock-on" effect on other cases (see, T.F. v. Ireland [1995] 1 I.R. 321). But there have been, too, instances where, even where a plaintiff is successful on the outcome or event, a court has nonetheless awarded costs against him or her arising from the conduct of the plaintiff (see, *Mahon and Ors. v. Keena and Anor.* [2009] IESC 78; [2010] 1 I.R. 336, and, generally, the discussion in Hillary Biehler, Declan McGrath and Emily Egan McGrath, *Delany and McGrath on Civil Procedure* (4th edn., Round Hall 2018).

34. But *Veolia* and other judgments illustrate that there are occasions, especially in complex cases, where a more nuanced and proportionate approach is warranted (see, ss. 168 and 169 of the Legal Services Regulation Act, 2015).

The Appellant's Conduct

35. The appellant's own conduct in the case must be a highly material consideration. I am not persuaded that gross dishonesty and exaggeration comes within the classical understanding of vexatious litigation or abuse of process (see, *Riordan v. Ireland (No. 5)* [2001] I.R. 463). This was not an instance of using the courts to repeatedly litigate the same, or very similar, issues. But there comes a point where falsehood, dishonesty and fabrication can be seen as an attack on the integrity of court process so as to constitute an abuse of process in a more specialised sense of the term. The courts are entitled to protect themselves against such conduct. There will, therefore, be occasions where the conduct of a plaintiff in bringing a fraudulent or grossly dishonest case must bring serious consequences in costs. Such instances will be rare. The jurisdiction should be used sparingly. But what falls for consideration in this application is the weighty consideration of protecting the integrity of the court process. Counsel for the appellant accepted that this Court had to mark the adverse credibility findings against his client in some way. He referred this Court to a chart setting an apportionment of the time spent on various issues.

Issue	*Approx. Time Spent per Respondents' Calculations*
Food	*45 minutes*
Chaotic Nature of Slopping-out	*60 minutes*
Frequency of Showers and Condition of Showers	*45 minutes*
Allegation of denial of showers	*2 hours, 45 minutes*
Allegation that cleaners were on drugs	*30 minutes*
Allegation of assault by Officer Murphy on 5/7/17	*4 hours*
Allegation of conspiracy against protection prisoners	*5 hours*
Allegation that suffering stomach cramps	*85 minutes*
Total:	*16 hours, 10 minutes*

36. Relying on this, counsel submitted that just 4 days of the High Court trial had actually been expended to deal with evidence in respect of which adverse credibility findings had been made. Proceeding then to the principles set out in *Veolia*, counsel contended that it would be appropriate to make no order as to costs in respect of those 4 days, but that his client should be awarded his costs in respect of the remainder of the High Court proceedings. He submitted that his client should not be penalised in respect of evidence in relation to other background issues, such as the narrative concerning the project for redevelopment of Mountjoy Prison. On the last point, he was on firmer ground. I accept there was no "winner" or "loser" on the background context issues, which were nonetheless integral to the case.

37. But in its other aspects, this was a brave application. A litigant who comes to court prepared to lie and exaggerate to the extent which occurred in this case cannot expect to escape without significant sanction. I regret, therefore, that I am unable to accept the balance of counsel's submissions.

38. In *Shelley-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232, the members of this Court (Denham, McGuinness and Hardman JJ.) reiterated warnings given earlier in *Vesey v. Bus Éireann* [2001] 4 I.R. 192. What these conveyed was that, in a claim for personal injuries, the onus of proof lay on a plaintiff who was obliged to discharge his or her duty to the court in a truthful and straightforward manner (p. 257). The Court emphasised that a trial judge is neither obliged nor entitled to speculate in the absence of credible evidence. The judgments pointed out that plaintiffs who engaged in extensive falsehoods exposed themselves to adverse costs orders. Reiterating the warning which given in *Vesey*, Hardiman J. emphasised in his judgment in *Shelley-Morris* that there could come a point where dishonesty in the prosecution of a claim could amount to an abuse of the judicial process, as well as an attempt to impose on the other party (p. 257). He made clear that a court has the power to provide remedies for abuse of process which may extend to staying or striking out proceedings.

39. *Shelley-Morris* was not a case where there might have been two legitimately tenable views on some evidential issue but was, rather, one where a plaintiff engaged in deliberate, extensive falsehoods. Hardiman J. observed at p. 258 that such a plaintiff runs three risks; first, that his or her credibility in general, and not simply on a particular issue, will be undermined to a greater or lesser degree; second, that in cases heavily dependent on that plaintiff's own account, the combined effect of the falsehoods and consequent diminution in credibility might mean that a plaintiff could fail to discharge the evidential onus, either generally or in relation to a particular aspect of the case; and, third, if this did happen in a case, it was not appropriate for a trial court to engage in speculation or benevolent guesswork in an attempt to rescue the claim, or some particular aspect of it, from the unsatisfactory state in which the plaintiff's falsehoods have left the claim.

40. The judgments in *Shelley-Morris* make clear that what is pleaded in a case will be imputed to the party making that plea, and not to their lawyers, or to some other source. This Court emphasised a point previously made, at pp. 198–199 in *Vesey*, that it was not the function of the courts to disentangle a plaintiff's case when it became entangled as a result of lies and misrepresentations systematically engaged in by the plaintiff himself or herself (pp. 239 and 252). In *Shelley-Morris*, the defendant applied for the costs of the appeal on the basis of the court's final conclusions where both parties enjoyed a degree of success. But, in considering the order for costs of the appeal, this Court held that a discretion must be exercised on the facts of each case. In *Shelley-Morris*, there had been a mixed outcome. The defendant was successful in varying the High Court order, but the plaintiff retained the award for general damages. The Court, therefore, made no order for costs in the appeal, but, significantly, held that the conduct of a plaintiff was an important factor for the Court to consider in the exercise of its discretion as to costs (pp. 266 - 267).

41. By contrast, in *Grimes v. Punchestown Developments Company Limited* [2002] 4 I.R. 515, Denham J., speaking for this Court (Denham, Hardiman and McCracken JJ.) held that costs need not necessarily follow the event (pp. 523–524). She cited with approval *dicta* of Hamilton C.J. in *T.F. v. Ireland* (cited at para. 33 above) where, in a test case involving issues of importance to parties in some 3,060 cases in which issues had been made under the Judicial Separation and Family Law Reform Act, 1985, the Court awarded the costs of the appeal to the plaintiff. The outcome of *Mahon v. Keena* (cited at para. 33 above) shows the very broad scope of the distinction where, even though the defendants succeeded, the Court awarded costs against them.

Application

42. I see no reason why the *dicta* in *Shelley-Morris* should be confined to personal injury cases. The dicta are equally applicable in this case which, in any event, can be viewed as having a "personal injuries" aspect which makes any factual distinction irrelevant.

43. When applied to this case, the various observations in *Shelley-Morris* can be reduced to three: first, that this appellant, who ran a case where there was found to be large-scale dishonesty, undertook very substantial risks, both within the case itself as well as other possible consequences outside the case. The second is that, in lying or exaggerating in many aspects of the evidence, he ran the risk of undermining his whole case. Third, in this instance, the appellant was fortunate that he had a trial judge who was in a position to identify and distinguish evidence about the physical prison conditions from other material which he clearly found not worthy of belief.

44. This case cannot, therefore, be compartmentalised into discrete segments where there was simply "success" or "failure". Too many aspects of the claim were marked by serious dishonesty for a precise, or abstract, approach. Counsel for the appellant suggested that, in some way, the impact of his client's dishonesty was diminished because the respondents had the resources to rebut that evidence. I reject that submission also. The duty on *all* litigants and witnesses coming to court is to tell the whole truth, and nothing but the truth.

45. The extent to which the appellant's case was deflated during the High Court hearing is telling. By the end, it is clear that, by then, the issue was not whether the appellant was entitled to the award for the substantial level of damages he had claimed but, rather, whether his case warranted any award of damages or an award of costs. The judge heard submissions on the costs issue and, as described earlier, delivered a separate ruling where he commented on the irony that, rather than the appellant, it would be the appellant's lawyers who would have to pay the penalty on costs. The position at the end of the case in the High Court was a far cry from the beginning, when high levels of damages were clearly in the appellant's own contemplation, including a claim for punitive damages. As remarked on earlier, when shorn of the many features where the High Court judge found against him, this case could have been heard within a much shorter period of time.

46. Clearly, if other cases of this type proceed in a court setting, in whatever jurisdiction, it will be necessary to engage in rigorous case management. Courts will require the parties to define at an early stage what exactly is alleged and the nature of a defendant's defence. Parties will be made aware that such decisions may have consequences in costs - on either side. Both plaintiffs and defendants have procedural rights. Defendants have the right to make a lodgement in court, or an offer without prejudice as to costs. But plaintiffs, too, have a right to know what case a defendant will make in court.

47. Turning back to this case, one cannot either ignore the fact that, while the appellant was justified in *bringing* the litigation in the High Court, the level of damages actually awarded fell very far short of the lowest band of the High Court jurisdiction. The fact that this case had constitutional features, and may have some precedential value, cannot immunise the appellant from being considered in a similar manner to an unmeritorious and dishonest plaintiff in a personal injuries action. Here, the exaggeration was more significant. Counsel for the respondents submitted that, in considering costs, the Court should not try to engage in what he pithily characterised as a "taxonomy of untruthfulness". He meant by this that the Court should not embark on some futile quest to categorise the particular species of dishonesty, in circumstances where untruthfulness permeated substantial parts of the case. I agree.

48. Wide scale dishonesty, such as in this case, requires a more direct approach. In such instances, hopefully rare, the primary and overarching consideration must be the protection of the integrity of the court process. There will be occasions when consideration of *Veolia*-type approach may well be appropriate, whether prior or subsequent to a consideration of a costs sanction when there is substantial dishonesty. A court's response must always be reasoned and proportionate. It is to be hoped it will seldom be necessary for a court to engage in the detailed analysis deemed necessary in this application.

49. It is true, however, that by obtaining a declaration, both in the High Court and ultimately in this Court, and an award of damages in this Court, there were "events", in the O.99 of the RSC sense, in the appellant's favour in both courts. But, against that point, this was

not a case of a plaintiff "making the most" of the symptoms of a back or neck injury. The intent here was far more serious. It was calculated to indict the entire detention regime in the D wing; to elevate the level of any damages award to a quite different level; and to expose public servants doing their jobs in difficult circumstances to potentially very serious consequences. Even having regard to the fact that the appellant did succeed on the "conditions issue", what occurred in this case was so serious that he must pay a significant penalty in reduced costs.

50. Where I respectfully disagree with the approach in the High Court is that I think that, rather than totally disallowing costs, the judge might have adopted a more proportionate approach on the question, bearing in mind that he did grant a declaration. Now it is also necessary to have in mind the orders made by this Court. Here, as elsewhere in this entire case, it is required to engage in a weighing and balancing process.

51. One must take into account other issues which were canvassed in the High Court, such as the claim for physical and psychological injury. In that instance also, even though there was not the same high degree of dishonesty, the appellant's case was rejected. There were some aspects of the case which the judge simply confined himself to holding they had not been proven on the balance of probabilities. A costs award may also be assessed having regard to the substantial amount of court time expended on a particular issue or issues by comparison to a hypothetical situation where the case could have been distilled down to its core elements of truthfulness. There is, additionally, the moderate level of damages awarded - well below High Court level.

52. Suffice it to say that were this Court to adopt a rigorous, time-based, *Veolia* approach to the balance of the case, after considering a sanction for dishonesty, an order for costs, setting off what might actually be due to the respondents for success on issues against what is due to the appellant for the limited success on other issues, would render what is due to the appellant down to a small fraction of what is sought, or perhaps a nil or even a negative figure.

53. In summary, there are four main relevant features. First, liability for the extended scope of the case must very largely lie with the appellant. Second, he must bear a significant sanction for dishonesty in a number of areas. Third, there were other aspects of this case where he failed to discharge the onus of proof. Fourth, the level of the award falls far below that of the High Court jurisdiction.

54. However, there are significant countervailing features. It is true this was not a test case in the true sense. But there is truth in the contention that this matter did acquire some of the features of what is described in the jurisprudence of the ECtHR as being a "pilot judgment" (see, *Ananyev and Ors. v. Russia* (App. Nos. 42525/07 and 60800/08, 10th April, 2012, at paras. 181 - 182). It may have some precedential value and assist in establishing either principles or guidelines. This Court varied the remedy in the appellant's favour. The respondents did raise a vast range of procedural and legal objections to the claim where the trial judge held against them. These did add somewhat to the length of

the case, but do not compare in nature or extent to the appellant's conduct of the case and his evidence.

55. But, even taking all these considerations into account, the case still falls short of being one involving matters of general public interest, which might fall into a different category. This was predominantly a private interest case, whereby invoking an impermissible combination of constitutional and ECHR principles, the appellant sought substantial damages for himself.

56. To some extent, therefore, this case falls into an unusual category. It cannot be characterised as an outright abuse of court process. Parts of the claim were ultimately indisputable. The cause was not a fabrication. A significant number of legal and procedural issues were determined in the appellant's favour. When disentangled, the evidence actually found to be true did warrant the form of constitutional vindication which this Court held appropriate. But there was dishonesty in the first category, exaggeration at minimum in the second category, and a high degree of untruthfulness in the third aspect of the claim. The fact that, hypothetically, the appellant might end up owing obligations to his lawyers is entirely due to his own decisions, and conduct.

57. In this case, for the reasons identified, a strict mathematical approach will not be adopted. This case must be seen in the round. But this is not to say an alternative approach could not be adopted in some other case if there is conduct of the type described. Here a cumulative approach is justified - which might by no means be the situation in other cases. Weighing all the features together, even bearing in mind that the appellant received a declaration and, ultimately, limited damages, the balance must remain substantially weighted against him. Measuring all the features, I would hold that a most just and proportionate response should be that the appellant be awarded 33⅓% of the costs of the High Court proceedings, together with 33⅓% of the reserved costs of these proceedings. The consequences of this is that at taxation there should be an identification of what might have been the total costs and reserved costs when taxed, and the appellant should receive 33⅓% of that figure.

Alternative Approaches

58. In proposing this form of order, I reiterate the point that, in another case, a court might well be justified in adopting a different approach by marking the court's disfavour for a plaintiff's conduct in *first* imposing a substantial penalty in costs on a percentage basis and, only thereafter, engaging in a *Veolia* process of setting-off successful and unsuccessful issues for costs purposes. Alternatively, a court might first adopt a *Veolia* type approach, including weighing up the time expended on legal issues, as here, as against other factual issues. A further option might be to make an award of costs simply on the basis of the number of days the case ought to have taken. A court will be justified in having regard to the level of damages actually awarded. But the conduct of the defendant must also be a consideration, sometimes a weighty one. In an extreme case, as this Court has already held in *Mahon v. Keena*, a court, even if a plaintiff is successful, may not only make no order for costs, but if there has been serious misconduct, may make an order for costs adverse to the plaintiff. The converse can also apply.

59. I would reserve for another case a detailed consideration of the circumstances in which parallel forms of sanction or enhanced orders for costs might be imposed on a defendant. All citizens are equal before the law (Article 40.1 of the Constitution). So, too, are all individuals and corporate entities.

Some Further Observations

60. Some further observations must be made. While the appellant received a declaration and an award, after 30 days in High Court and two days on the appeal to this Court, the costs of this case would very comfortably run into six figures. There must be a question mark as to whether it can be said that there was a real correlation between the means adopted to achieve justice and the end achieved in this case. To a very large extent, the High Court findings must be the true focus of this application. Those findings lead to the conclusion in this judgment on costs, but now seen through the prism of the conclusions of this Court.

61. Citizens are entitled to have access to the courts and are entitled to be in a position to present the totality of their cases there. But where substantial parts of the case are rejected, there must be consequences, such as here, where there must be a reduced costs order necessitating a radical cut in a potential award. In such situations, lawyers can only look to their client for recompense for their outlay and fees. Whether fair or unfair, that is how the system operates. It is unlikely that the same unfortunate combination of features will often arise as in this unusual case. How the approaches considered in this judgment may apply will vary from case to case. These are matters which generally fall within the discretion of a trial judge; but the discretion must be exercised fairly and proportionately.

62. The Court has already made the point that it cannot assess the extent to which the outcome of this appeal will determine the outcome in other cases. It is not possible to express any view as to whether other such cases should be heard in the High Court, remitted to courts of local or limited jurisdiction, or dealt with in a different, non-court, setting. But there must always be common sense. If each case does proceed to a court hearing and follow the same course as this one, it could take time. How these claims will be dealt with is, ultimately, a matter for the parties themselves to determine, in consultation with their legal advisors. All parties in litigation are entitled to fairness.

63. But in cases under our system substantial sums of money can be at stake. In discharging the constitutional function of administering justice, the courts must, where necessary, have resort to trial procedures which can carefully distinguish meritorious claims from those which have lesser, or no merit, or those where there are disputes of fact. Otherwise, the entire process and the integrity of the justice system may be undermined. To that extent, therefore, there are real distinctions between the role of our courts, established under the Constitution, by contrast with the ECtHR which itself has repeatedly pointed out, is not a forum for fact-finding in the same sense as our national courts.

64. In cases of this type, where there is a clear violation of constitutional protections, and no controversial issue arises, it might well be appropriate for the State to establish, and

parties to avail of, either formal or informal procedures in order to provide for the vindication of rights. Such a course of action may well recommend itself compared to the alternatives. If parties can appropriately avail of such procedures, it can then be said that obligations under the Constitution will have been discharged. If there are effective ways of remedying wrongs, it stands to reason parties should avail of these, having regard to the rights of claimants, the common good, the public interest, and the obligations and duties of the State under the Constitution.