IN THE CENTRAL LONDON COUNTY COURT

Claim No: 9CL01651

10TH JUNE 2010

B e f o r e:

HIS HONOUR JUDGE COLLINS CBE

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CLAIMANT

V

HOME OFFICE

DEFENDANT

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MS LAURA DUBINSKY appeared on behalf of the Claimant
MR TOM POOLE appeared on behalf of the Defendant

(Judgments approved by His Honour Judge Collins CBE 31/08/2010)

JUDGMENT

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HHJ COLLINS CBE:

1. In this case I wish to express my appreciation to counsel for both sides for the great assistance given to the court and for the moderation and focus of their arguments. I ought also to mention that at the outset of the hearing I made an order giving the Claimant anonymity.

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2. It is a claim for damages for detention of the Claimant at the Yarl's Wood Immigration Centre from the 28th February to the 29th March 2006. By the conclusion of the case, four decision points had been identified at which a decision to detain was or might have been considered and, in relation to each decision point, the question will be whether or not the Defendant has satisfied me that the decision made or which could have been taken at that time to detain the Defendant was lawful.

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3. A question arises as to the role of the Court in relation to these decisions. The judgment of Mr Justice Wyn Williams in *S C & D v The Secretary of State for the Home Department*, in which judgment was handed down on the 18th July 2007, referred to a division of opinion in the High Court as to the role of the judge. A few days later, on the 30th July 2007, the Court of Appeal handed down judgment in the case of *A v The Secretary of State for the Home Department*, being aware of an earlier judgment by Mr Justice Field which had been followed by Mr Justice Wyn Williams but not being aware of the decision of Mr Justice Wyn Williams himself, in which the division of opinion appears to have been resolved in a way which is

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currently binding on me in favour of the proposition that, with the liberty of the subject being involved, it is not sufficient for the court simply to consider whether or not the decision-maker's decision was reasonable according to Wednesbury standards but that the court should act as a primary decision-maker itself. Mr Poole, on behalf of the Secretary of State, has not argued to the contrary.

4. I ought to refer briefly to the procedure that has been the subject of a judgment I gave earlier during the case. This being a case of a claim for damages for false imprisonment, any party who applied for a jury trial within 28 days of service of the defence was entitled to a jury trial, subject to the discretion of the court set out in the County Courts Act. A district judge ordered a jury trial, apparently after a contested hearing on the subject, but at the outset of the hearing it seemed to me, although it may not have been apparent before the district judge, that the case was essentially going to resolve into a question of what inferences were proper to draw from the documents, since the Defendant was not going to be calling any live evidence on the central issues. I decided to discharge the jury and try the case myself. This, no doubt, caused extreme inconvenience to the dozen and a half people who were called here to give jury service. As the trial proceeded, it seemed to me that my decision was correct and it is difficult to see what issues of fact could sensibly have been determined by a jury in this case, the matters being much more suitable for a decision by a judge.

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5. I have, with the agreement of counsel, heard only the question of liability so far and shall deal with quantum when it arises. I ought also to mention that, in addition to the common law claim for damages for false imprisonment, there are claims under the Human Rights Act which are out of time. The court has a discretion to allow those claims to proceed if it is equitable to do so. I have not heard argument on either side as to whether it would be equitable to allow those claims to proceed and, in the event, it does not matter because the Human Rights claims do not add anything, as it turns out, to the claim for damages at common law. I do not propose to make any ruling on the question of whether or not I would have allowed the claims to proceed.

6. It is accepted by counsel on both sides that, the Secretary of State having conceded that the Defendant was detained at Yarl's Wood between the dates I have mentioned, the burden of proof of establishing the lawfulness of that detention rests upon the Defendant. Remarkably, the Defendant has not called the persons who made the decisions to detain the Defendant although the evidence established that those decision-makers are still employed by the Defendant in the Immigration Service. No explanation was forthcoming.

7. In anticipation of argument on quantum, counsel have submitted skeleton arguments on quantum and a bundle of authorities. I note in one of the authorities a reference to a policy of the Secretary of State not to expose the decision-makers in cases of this kind to cross-examination, which was

remarked upon in the Court of Appeal by Lord Justice Thomas in the *Muuse* case. No such policy was referred to in this case as being an explanation for failing to call the witnesses and, indeed, no explanation of any kind has been given to me for not calling those witnesses. In a case where the Secretary of State carries the burden of proof, it seems to me, effectively, the Secretary of State has conducted this case with at least arm tied behind her back.

8. Mr Poole, who is extremely experienced, as is Ms Dubinsky, in this kind of litigation, has conducted the case with total propriety in the context of the limitations of his position. Right at the outset of the case Mr Poole told me that, in the absence of any evidence from the decision-maker, the Secretary of State would be inviting me to hold that the burden of proof has been discharged by the drawing of inferences from the documents so that, even if I should decide that at various points during the process the Defendant's handling of the Claimant's case had been in breach of any rule or government policy or legitimate expectation, I should come to the conclusion that the Claimant's detention would have been determined upon, regardless of any such breach. That was a difficult position for Mr Poole to adopt in the context of this case because the witnesses who he did call, who gave evidence about generality in the system, in my view, without having any knowledge of this case, conceded at certain points that different evidence might have affected the decision-maker's position. I shall go into that in more detail later on.

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9. I do not propose to undertake an exposition of the legal framework, which has been the subject of many judgments of the Administrative Court and the Court of Appeal to which my attention has been drawn, in particular, for the purposes of the present case, the judgment of Mr Justice Davis in *D and K v The Secretary of State* [2006] EWHC 980 (Admin) and the judgment of Mr Justice Cranston in *MT v The Secretary of State* [2008] EWHC 1788 (Admin). For the structure of the legislation, primary and secondary codes of practice and government policy relating to the system of detention, fast-track detention and the provision of medical reports in cases where there is an allegation that a detainee has been tortured, those judgments provide, in my respectful view, a comprehensive account of the framework and no useful purpose would be served by my repeating it. I shall refer to the framework so far as is necessary to explain my decisions as I proceed.

10. The Claimant was 37 years old at the time of her detention and was a national of Cameroon. It is accepted that at the end of 2005 she had been imprisoned in Cameroon and it is now accepted that she had been extraordinarily badly treated while in prison in Cameroon. She had been raped by a number of inmates with the acquiescence of prison officers. She had also been raped by either a prison officer or a policeman and badly burned with a cigarette in the course of that rape.

11. No one has sought to challenge that the combination of treatments which the Claimant received in Cameroon amounts to torture. Rape is perhaps the most insidious and damaging kind of torture that can be used by persons in

authority because months afterwards the torture is not necessarily visibly apparent even though the psychological effects, as in this case, may last for a long time. The overarching feature of this case, as it turns out, is that the officials who were responsible for dealing with the Claimant's case, with the possible exception of the nurse who saw the Claimant on her first admission to Yarl's Wood Centre, do not appear to have taken the allegations at all seriously or given them proper consideration when determining the proper disposal of the Claimant's case.

12. The Claimant's account was that she had been assisted in escaping from Cameroon and arrived in this country in February 2006, presenting herself at the Asylum Screening Unit in Croydon on the 17th February. On that day a screening interview was conducted by a Ms Begum. I ought to say that in the Court of Appeal case to which I have referred where observations were made about the Home Office's policy of shielding its staff, the names of the decision-makers appear to have been redacted from the documents placed before the court. That is not the case here and everyone who made a decision is known by name and their names have been openly discussed during the course of the case.

13. In the course of the screening interview on the 17th February 2006, the following is recorded: *"Applicant claims that she was imprisoned. While she was, she was harassed and raped by one prisoner and loads of inmates."* The Claimant was not well on the 17th February and she was asked to come back on the 20th. She did come back on the 20th and was

again not well and was taken to hospital by ambulance and asked to come back again on the 28th February. It ought to be recorded that on each of these occasions she came voluntarily to the Asylum Screening Unit under no conditions of any kind.

14. When she came back on the 28th February, she provided evidence of having anti-depressants, tablets for constipation and tablets for headaches. On the 28th February she was the subject of interview and decisions by a Mr [Wackenheimer], who, like all the other decision-makers in this case, has not been called to give evidence and has not supplied a statement. His record appears at page 82 of the bundle and I will read it all out. It is very short. He gives her details and then says:

"ASU walk-in. Subject claimed asylum at the Asylum Screening Unit, Croydon, on the 17th February 2006. The subject was interviewed at the ASU Croydon on the 17th February 2006. The subject admitted that she has never held her own passport. She claimed that he (sic) entered the United Kingdom on the 16th February 2006 via Southampton seaport using no documents. She claimed she entered the United Kingdom without an agent. The subjected (sic) stated she was helped by a police guard and the captain of the ship. Subject is an illegal entrant as defined by breach 3(1)(a) and offence 24(1)(a) of the 1971 Immigration Act 1971 as amended. Subject is female, single, has no dependents or relatives in the United Kingdom. There are no compelling or

compassionate circumstances. Subject is not known to be an exceptional risk."

15. Then it says she was to be detained pending removal to Oakington in accordance with fast-track procedures although, in fact, she was removed to Yarl's Wood. He refers to there being no compelling or compassionate circumstances even though on the 17th February a record was made about her multiple rape in Cameroon as I have recorded. The reference to the Claimant being detained under the fast-track procedure ought to be explained very briefly. The Secretary of State's general statutory powers of detention (which I do not propose to enlarge on) were affected by ministerial pronouncement creating a fast-track procedure, which has been held to be ECHR-compliant by the European Court of Human Rights.

16. It is perhaps better illustrated by looking at page 154 of the bundle, which is a notice to the Claimant of her detention which was handed to her on the 7th March. It can be seen that the first part of that form provides a number of options for an officer of the Defendant to tick to explain why detention is taking place and one of those is that the application may be decided quickly using the fast-track procedures. The point is shortly that, if a case is suitable for the fast-track procedures, an applicant may be detained whether or not any of the other factors justifying detention are present.

17. The fast-track procedure in the context of ministerial pronouncements is expected to last not more than 10 to 14 days although it is accepted that

there may be exceptional circumstances in which a case may take longer but still remain in the fast-track. The decision to fast-track the Claimant was set out in a notice on page 154 and 155 of the bundle, stating that Mr [Wackenheimer] thought that the case may be decided quickly using the fast-track procedure.

18. In Mr Poole's skeleton argument at paragraph 40, he submits that the decision to detain the Claimant under the fast-track procedure was lawful and the basis of that submission is that there was no independent evidence of torture adduced while the Claimant was in detention. The Defendant thought that her case might be decided quickly, that Cameroon was a fast-track country and there was no reason to believe that her claim was unsuitable for the fast-track. The matters set out in paragraph 40(d) do not relate to the 28th February decision.

19. Ms Dubinsky, on behalf of the Claimant, points out that the Secretary of State's published policy in relation to detention applies to all detention, including the fast-track, and an extract appears at page 734 of the bundle. At paragraph 38.3(3) the following appears: *"All reasonable alternatives to detention must be considered before detention is authorised"*. Her submission was that that applied to all detention, including the fast-track, and Mr Poole did not suggest to the contrary. The submission for the Claimant is that no evidence has been adduced to suggest that on the 28th February any alternative to detention was considered although it is submitted that a number of alternatives were possible.

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20. It is accepted on behalf of the Claimant, in the light of the authorities, that certainly at the initial screening process the Defendant's officers are not obliged to make enquiries as to whether or not a claimant has been tortured and, if a claim of torture is made, it is accepted that there is no obligation on the officer at the initial screening stage to seek independent evidence of that. The fact is that on the 28th February Mr [Wackenheimer] was aware that a claim had been made and I am aware of no basis for submitting that the absence of a requirement to make a further enquiry means that the intervening officer can act as if no allegation of torture has been made at all.

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21. It seems to me that there was a serious defect in the approach made by Mr [Wackenheimer] when he stated that there were no compelling or compassionate circumstances without acknowledging that a claim of serious torture had been made. Had he acknowledged that such a claim had been made and explained why he did not regard that as compelling or compassionate circumstances or simply indicated that he took it into account when making his decision, the position might have been different but the state of the evidence is that the decision appears to have been made without acknowledgement of the claim to torture and without consideration of whether or not any alternative to detention was possible.

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22. It seems to me that, in those circumstances, the decision to detain was seriously flawed procedurally. Would the decision to detain have been made in any event? It is impossible to tell without the decision-maker

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having been called to explain his process of decision-making. It seems to me that it is impossible for me to draw the inference from the papers that the decision to detain would necessarily have been made if the exercise had been conducted properly. The Claimant had attended three times voluntarily at the Screening Unit. She had medical problems. She had made a claim that she had been tortured. It might have been possible to release her on a tag. It might have been possible to find appropriate supported accommodation for her.

23. All these things are speculative but they are matters which should have been considered when deciding whether or not there was no reasonable alternative to detention. To put it in a nutshell, just because somebody could be fast-tracked does not mean they should be. An element of discretion has to be used and there is no evidence in this case that it was nor can I be satisfied, on the basis of the material, that the decision to be detain would inevitably have been made had the matter been approached correctly.

24. For those reasons, I hold that the initial detention was unlawful. That would be sufficient to dispose of the whole case but it is accepted that it would be appropriate, in case my decision on the initial detention is wrong, for me to consider the three other decision points in the case. It will also be necessary for me to make findings of fact in relation to the other decision points because they will affect the claims for aggravated and exemplary damages.

25. The Claimant arrived at Yarl's Wood and was examined at 11 o'clock on the 28th February 2006, which was a Tuesday. There is no evidence that she was examined by a doctor, notwithstanding the assertion in paragraph 30 of Mr Poole's skeleton argument that at the time she underwent a full medical examination. The examination was conducted by somebody whose surname is Quinn and about whom nothing more is known. The inference which the Claimant properly asked me to draw I think is that that person was not a doctor since the last sentence of his/her note reads: *"to see doctor in morning"*, suggesting that the person writing the note was not him/herself a doctor. It looks as though, doing the best one can on the material, the Claimant was seen late at night by a nurse for an initial health screen.

26. The man or woman named Quinn is the only person who seems to have taken the Claimant's allegations that she was tortured seriously because there is a note which reads as follows: *"Seen upon arrival. Reports a history of stress and anxiety. Reports to have been subjected to recent physical and sexual assaults by members of the Cameroon police/security services. These assaults include rapes (multiple) and cigarette burns to breasts. To see doctor in morning"*. The note concludes: *"Victim of Torture form completed"*. At page 435 of the bundle is a form (if that is the way to describe it) signed by the person Quinn (because the signature is the same as that which is at the bottom of the medical note), addressed to the Manager of Yarl's Wood, which is a contracted out organisation, and it reads as follows: *"Dear Ray, re: [E]* (and it gives the reference)*, In accordance with Detention Rules (Rule 35), I am writing to inform you that*

the abovenamed detainee claims to be a victim of torture. Yours sincerely". It has got Quinn's signature, although the typed name of the writer of the letter is said to be "S. Jones, HCC Manager".

27. Although Quinn completed that form before midnight on the 28th February, it was not received apparently by the Centre Manager until the 7th March 2006 because it is so stamped. Nobody has been called to explain why a form which was completed on the 28th February was not received until the 7th March when all relevant officers were on the same site physically. The passage I have read from Quinn's note was in the medical record but at page 437 to 438 is the report form which was summarised in the medical record and it also records the Claimant's previous medical attendance, showing that she was negative for Hepatitis B, HIV and sexual infections and recording that she was anxious and tearful and stressed.

28. I need to say something about the record that a 'Victim of Torture' form was completed and that the document I have referred to refers to Rule 35 of the Detention Rules because there was a fundamental misunderstanding, to put it mildly, at Yarl's Wood Detention Centre about what Rule 35 was and what it required. The Detention Centre Rules 2001 deal at paragraphs 33 to 35 with health care. Paragraph 33 requires every Detention Centre to have a medical practitioner who shall be vocationally trained as a GP and fully registered. Paragraph 34 provides that every detained person shall be given a physical and mental examination by the registered medical practitioner within 24 hours of admission. The importance of the requirement that the

examination should be physical and mental hardly needs emphasis in a case where so many detainees, for a wide variety of reasons, will be subject to serious stress and their mental condition must be regarded as as critical as their physical condition and, since it is no doubt more difficult to diagnose, it requires careful attention.

29. Rule 35 is the rule in question and I shall read the relevant passages:

> *"35(3) The medical practitioner shall report to the Manager on the case of any detained person who he is concerned may have been the victim of torture.*
>
> *(4) The Manager shall send a copy of any report under paragraphs 1, 2 or 3 to the Secretary of State without delay."*

30. It will be seen that there is no provision in Rule 35 for any report of the kind which was sent in this case, which is not a report by a medical practitioner and, in any case, is not a report on the Claimant's case. It is an assertion that the Claimant claims to be a victim of torture but is not a report on her case and it is clear that what Rule 35 anticipates is, whether or not a claim has been made by a detained person, that the qualified medical practitioner shall produce a medical report on the physical and mental health of any person who the medical practitioner is concerned may have been the victim of torture. The Manager (that is the contractor) is to send that to the

Secretary of State without delay and the Secretary of State's representatives are also on the premises.

31. So in this case the document which is said to be a Rule 35 report is not a Rule35 report at all and it turns out (and I will deal with this when I focus more closely on the second decision point, which is identified as the 3rd March 2006) that no proper Rule 35 report was ever made or sent. It is difficult to imagine a breach which more closely affects somebody who has been the victim of torture and in this case the omission is quite unforgivable and has been the subject of no explanation..

32. In May 2005 the Inspector of Prisons reported on an inspection of Yarl's Wood which had taken place between the 28th February and the 4th March and at paragraph 4.20 the report recommends as follows: *"The Immigration and Nationality Directorate should immediately investigate and consider any illnesses or conditions affecting a detainee raised under Rule 35 of the Detention Centre Rules. This process should be documented and the detainee and the Health Care Department notified of the outcome."*

33. At 4.12 an example of a failure was identified. In another case, health care staff had issued a pro forma letter under Rule 35 of the Detention Centre Rules soon after the detainee's arrival. This rule required notification to the Manager and, in turn, to IND if a person's health was likely to be injuriously affected by continuing detention or if suicidal intentions or a history of torture was suggested. This had been forwarded to the case holder in

London. Five weeks later there was no evidence that the case holder had responded to the Rule 35 letter and investigated the issues raised although there was further communication about the need for escort to implement removal. For most of this time that detainee was under close watch because of attempted self-harm.

34. Shortly before the Claimant's admission to Yarl's Wood, the Inspector of Prisons conducted an unannounced visit and the relevant passage is at page 788 of the bundle. It refers to the recommendation, which I have read, from the 2005 Report and it says in relation to this recommendation:

> *"Not achieved. Rule 35 of the Detention Centre Rules requires Health Care to inform the Manager, who is to inform IND if detention or conditions of detention may be injurious to health, including where there has been an allegation of torture or suicidal intent. The Centre's Health Care Department did have a pro forma letter stating that the named detainee claimed to be a victim of torture but there was no section on it for additional comment. No central record was kept to enable overall monitoring and there appeared to be no follow-up. Immigration staff who forwarded the letter to the responsible case holding office kept no central folder and they said that rarely, if ever, did the letters receive a response from the case holder. We repeat the recommendation."*

35. It seems to me that it is outrageous, in the most ordinary of language, that a recommendation made by the Inspector of Prisons in May 2005 had not been implemented by February 2006. The recommendation does not draw specific attention to the fact that there is no procedure in Rule 35 for a pro forma report of a claim, but the drawing of attention to the Rule 35 failure should have prompted a proper review of the Rule 35 procedure at Yarl's Wood by both the Secretary of State and by the Manager of Yarl's Wood to ensure that the procedures were properly conducted. The Claimant has been the victim of a failure to do that and there was a total failure to comply with Rule 35 in this case.

36. The medical practitioner who did see the Claimant on the 1st March must have been concerned by the possibility of torture and simply did not comply with his duty under Rule 35 to make a report about it. The person's name is Dr Edwards and he has not been called to give evidence. Dr Edwards saw the Claimant on the 1st March. This was a Rule 34 examination although, as I have pointed out, he did not make a report under Rule 35. He recorded on the medical record sheet previous medical history: depression, constipation; and, in relation to general health examination, flat speech, dull effect, wanted to show me scar from cigarette burns; and then it says "O/E scar right breast, healed". It then says current medical needs "see over" and I am not sure the back of the sheet has been included in the bundle. The back does not seem to have been copied. In the ongoing medical record he records as follows: *"states very low, 'best thing for me would be to die', low since the 15th November 2009* (that is understood to be the date when

she was imprisoned in Cameroon), *loss of appetite, disturbed sleep"* and then refers to the anti-depressant "*which was no real help, denies suicide/self-harm, getting nightmares from her experiences in the Cameroons"*. He suggests counselling, which the Claimant never ever received and was not offered I think until the day or the day before she was eventually released. He suggested a different anti-depressant and then he refers to the HIV test and he says *"it needs repeating as the last rape occurred in December"*.

37. It is clear from those records that the doctor was concerned, and rightly concerned, that the Claimant might have been tortured and there is no explanation as to why he did not make a Rule 35 report. Accordingly, it was potentially a serious dereliction of duty by the doctor although I suspect the doctor may not have been personally responsible. The failure appears to be a systemic one at Yarl's Wood in understanding what Rule 35 required and ensuring that it was complied with. Insofar as it is said to be a physical and mental examination, it was fairly superficial in any event.

38. Very shortly after the Claimant was released, on the 6th April 2006, she was seen by a Dr Burnett of the Medical Foundation for the Care of Victims of Torture, who came to the conclusion that the evidence of the Claimant's scar was highly consistent with the account she gave. It says this: *"She had an indurated, that is a half circular scar measuring 1cm in diameter on the upper aspect of the right breast. She says this was caused by a burn from a cigarette"*. The doctor also refers to a note made in an interview which had

taken place on the 6th March that the Claimant had an area of her hair shorter and ragged on the left-hand side, which is where the Claimant said that her hair had been pulled out. The doctor went on: *"The scar has the appearance of a cigarette burn. The nature of the scar is such that the skin has been burnt some depth. This would indicate that the cause of the burn was applied to her skin with some force, which is highly consistent with the story that she gives of a cigarette being applied with force to the skin of her right breast"*.

39. In the judgment to which I have referred, Mr Justice Cranston refers to the use of the expressions "consistent" and "highly consistent" by experienced doctors of the Medical Health Foundation and the expression "highly consistent" is effectively a term of art designed to indicate that the claims of torture are highly believable as opposed to the mere use of the word "consistent", which means that they are nothing more than that and could be attributable to other causes.

40. In my judgment, the nature of the investigation carried out by Dr Burnett and the nature of her conclusion is one that could and should have been fixed upon by an experienced general practitioner at Yarl's Wood and, if he had understood what his job was because he had been properly instructed in it, I see no reason why he should not have come to that conclusion. He could and should have submitted a Rule 35 report containing that conclusion on the 1st March which should have been in the hands of a decision-maker no later than the 3rd March.

41. It is the Secretary of State's policy not to detain persons who claim that they have been tortured where that claim is supported by independent evidence in the absence of special circumstances and the Secretary of State has to stick by his policy. A proper Rule 34 examination should have produced that independent evidence and the question is what would have happened if that evidence had been in the hands of a decision-maker on the 3rd March? It is sufficient to say that the Defendant has simply not even begun to satisfy me that the Claimant would have been detained in any event. There is no reason whatsoever in any of the evidence to suppose that a competent examination under Rule 34 would have come to any conclusion other than that the cigarette scar was highly consistent with the claim of torture and that that claim was supported by evidence which was compelling on any basis. It seems to me that there is no evidence which has been placed before me to suppose that a responsible official considering a proper Rule 35 report on the 3rd March would have done anything other than act in accordance with the Secretary of State's policy, which would have been to release.

42. I ought to say one other thing about the criticisms which I have made about the system at Yarl's Wood. There is other evidence I need to mention at this point although it is out of time chronologically. There is other evidence that the whole system operating at Yarl's Wood was dysfunctional at this time. On the 28th March a letter was prepared by one team at Yarl's Wood telling the Claimant that she was going to continue to be detained and it was signed, so far as I understand it, at the same time a completely different

team at Yarl's Wood was planning for her release and did release her on the following day. The one team did not know what the other was doing. This is an extraordinary state of affairs and I was relieved to be told by Ms Hamilton that the two teams approach has been abandoned and that the situation of each detainee is considered by one team. That deals with the second decision point.

43. The next decision point was on the 7th March. On the 6th March the Claimant was formally interviewed for the purpose of her asylum application by a Ms Raven and her application was refused. The interview was a long interview which was recorded and her application was refused in a decision dated the 7th March, which appears at page 212 and 213 of the bundle. She was told that her claim for asylum had been refused and she was told about her rights of appeal. In the accompanying reasons, it is clear that the officer did not believe the Claimant's account of torture and at paragraph 36 of the reasons she says this:

> *"You have claimed that you were raped by a policeman and left in a cell with three other men, one of whom forced you to have oral sex with him. Rape is not condoned by the Secretary of State* (perhaps a superfluous observation) *but it is considered that it was the actions of a rogue individual abusing his power and not carried out at the instigation of the State. The incident with the man in the cell can also not be perceived as instigated by the State."*

44. That was an extraordinary paragraph. Where the organisations of the State permit a prison or police officer to be in a position where an inmate can be abused and tortured by an officer of the institution and for that to be dismissed as the action of a rogue individual abusing his power with no responsibility on the part of the State is a breathtaking observation for a United Kingdom official to make. In my judgment, it is extremely regrettable that it was ever thought appropriate to make a remark of that kind. At any rate, the application was refused for that reason, among others.

45. It follows, of course, from what I have already said that Ms Raven had no Section 35 report when she made her decision and gave her reasons and there was no reference anywhere in her report to her having read the notes of either Quinn or Dr Edwards. That meant that at the 6th and 7th March the Claimant was at a severe disadvantage. It was conceded by one of the witnesses for the Secretary of State that her own observations in the course of the interview that there was a scar and her own observations in the course of the interview that there was a patch of hair which was shorter on the Claimant's head were no substitute for a Section 35 report.

46. Therefore the question is what would have happened on the 7th March if, as there should have been, Ms Raven had had a proper Section 35 report? It seems to me as obvious as it needs be that she may well have changed her mind about her view of the credibility of the Claimant's account. It is impossible to know whether she would or not because she has not been called to give evidence, although one of the witnesses bumped into her at

work last week and did not speak to her about the case. So it seems to me that the Secretary of State simply has not satisfied me that, even if there had been a proper Section 35 report, Ms Raven would automatically have authorised continued detention of the Claimant.

47. There is another element which has to be considered. At page 225, also on the 7th March, Ms Raven gave the Claimant a notice saying why her detention was being authorised and she ticks the box *"you are likely to abscond if given temporary admission or release"*; and ticks the box *"there is insufficient reliable information to decide on whether to grant you temporary admission or release"*; and also ticks the box *"you have used or attempted to use deception in a way that leads us to consider you may continue to deceive"*. She does not tick the box *"your removal from the United Kingdom is imminent"*, which is highly relevant to the case being on the fast-track.

48. Now something has gone wrong here because the Claimant pursued the fast-track appeal procedure and was dealt with accordingly but there is some reason to suppose that on the 7th March Ms Raven did not have it in mind that the case was a fast-track case at all: (1) because she did not think that the Claimant's removal from the United Kingdom was imminent even though she had turned down her application for asylum; and (2) because she ticked "likelihood to abscond" as being the relevant reason, which was not necessary for her to determine if the case was proceeding on the fast-track, as I indicated earlier in this judgment.

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49. So it seems to me it is necessary to consider what material there was to justify the conclusion, in particular that the Claimant was likely to abscond if given temporary admission or release as a ground for detaining her on the 7th March. All that has been suggested on behalf of the Defendant is that, the Claimant having been refused asylum, she was therefore likely to disappear if she were released. It seems to me that that cannot be a sufficient reason, on the face of it, otherwise there would be clear authorisation in every case where an application is turned down that the applicant would thereafter not be released. It is clear there is no such rule and therefore each case is to be considered on its own merits.

50. There is no indication in the papers as to what Ms Raven had in mind when she said she thought there was a likelihood of the Claimant absconding nor is there any indication that she had in mind that on three previous occasions the Claimant had attended voluntarily at the Screening Unit. It seems to me that in those circumstances I simply cannot begin to be satisfied that the Claimant would inevitably have been detained on the 7th March.

51. The final decision point is the 20th March. On the 20th March the solicitors acting for the Claimant faxed through a letter stating that the Claimant had been offered an interview at the Medical Foundation and a fax of the same date at page 252 shows that it was the appointment with Dr Burnett on the 6th April which I have already mentioned. The policy of the Secretary of State in relation to these matters is set out at page 709 of the bundle and it is

accepted that the Secretary of State is bound by his policy. At page 711, paragraph 2.2 he says this:

> *"Subject to paragraph 2.4 below, all cases that have been accepted for pre-assessment by the Medical Foundation will be placed on hold pending the outcome of the pre-assessment as long as evidence of the appointment is provided in writing."*

52. It has not been suggested during the course of the case that the Secretary of State was not properly aware on the 28th March that an appointment had been made. Putting a case on hold means that it has to be taken out of the fast-track because the fast-track, as I have indicated, is only suitable for cases where the matter can be resolved in 10 to 14 days or perhaps a little longer. Once the case is taken out of the fast-track, then the detention of the applicant can only be justified on the wider basis which is applicable to non-fast-track applicants.

53. On the same day, the 20th March, the Claimant's appeal against the refusal of asylum proceeded before Mr Grant, the Immigration Judge.
Ms Hamilton, who gave evidence for the Secretary of State, told me that the case could have been pulled from the fast-track on the day and cases are, indeed, pulled from the fast-track on the day, so there was there no obstacle to that being done but, in fact, what happened was that the appeal proceeded.

54. On the following the day, the 21st March, the Immigration Judge turned down the Claimant's appeal and on that day Ms Raven wrote to the solicitors, saying: *"Thank you for your letter dated the 20th March requesting that your client be released from the fast-track procedure because she has an appointment with the Medical Foundation on Thursday, 6th April and because she is unwell"*. She explains that the case will not be removed from the fast-track and then goes on: *"In addition, I have considered the fact that your client's appeal has now been refused and this is reflected in the decision not to release her."*

55. There is no explanation as to why that decision to take the case out of the fast-track could not have been made on the previous day. It is quite understood that once the appeal had been turned down, it might have been inconsistent to take the case out of the fast-track procedure but there is no indication why the case was not pulled on the day when the notification of the Medical Foundation appointment was received. In the absence of any reason why that was not done and any evidence from Ms Raven to justify the position, it seems to me that I am compelled to the conclusion that the Defendant has not satisfied me that on the 20th March the decision would have been made to detain the Claimant in any event.

56. I ought to simply complete the history by saying that on the 23rd March the Asylum and Immigration Tribunal refused to reconsider the Immigration Judge's decision. On the 25th January 2007 the matter came before Mr Justice Munby, who was extremely concerned that the Claimant had not

been granted an adjournment of the original hearing before the Immigration Judge even though she did not have a solicitor and she was not well, and he ordered the AIT to reconsider. The Immigration Appeal Tribunal reconsidered on the 3rd October 2007, refused to grant asylum on the ground that it was not satisfied that there was a reasonable fear of persecution of the Claimant if she returned to Cameroon but upheld her appeal on human rights grounds and, in particular, in a passage which Mr Poole has told me that the Secretary of State does not disagree with, they said at paragraph 28:

> *"We believe the Appellant's evidence that she was arrested and detained as claimed and was raped and humiliated by a fellow prisoner and by one of the prison guards whilst in detention. There is sufficient objective evidence available to support the Appellant's description of conditions in prison and the abusive treatment of prisoners. We have also taken into account the medical evidence about the scar on the Appellant's right breast and the likelihood of how it was caused."*

I was told that the Claimant currently has permission to reside in this country for five years.

57. In conclusion, therefore, I am of the view, in the absence of any evidence, in particular that alternatives to detention were considered, that the Defendant has not discharged the burden of satisfying me that the initial detention was lawful. If I am wrong about that, the Defendant has not discharged the

burden of proving that, even if a proper Rule 35 medical report had been submitted and was available for consideration on the 3rd March, the Defendant would inevitably have been detained. If I am wrong about that, the Defendant has not called Ms Raven and has not discharged the burden of proving that, even if a proper Rule 35 report had been available, she would inevitably have decided on the 7th March, firstly, to refuse asylum and, secondly, that there were good grounds for absconding. If I am wrong about that, the Defendant has not satisfied me that she would inevitably have left the case in the fast-track and refused to authorise release if she had properly considered the Medical Foundation appointment on the 20th March.

58. For all those reasons, the claim succeeds on liability.

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HHJ COLLINS CBE: Right. Have I missed anything which either of you want me to deal with?

MS LAURA DUBINSKY: Your Honour, I wonder if I can quickly take instructions? I have a difficulty, of course, which is that those sitting behind me had to leave the room for a substantial…

HHJ COLLINS CBE: Yes, I know. Well, I think I have dealt with all the points that need to be dealt with but, if there is anything, you can tell me at 2 o'clock. I have read the skeleton arguments on quantum and I had a look quickly through the authorities. It is clear, from what I have said, that I am well-disposed towards an application for exemplary damages. I am not sure about aggravated but I will hear the arguments from both sides.

MR TOM POOLE: Your Honour, yes, if it helps, on just timekeeping, I will certainly try to keep my submissions on quantum to no longer – well, somewhere between 30 and 40 minutes.

HHJ COLLINS CBE: Yes. Well, as I said, I have read the arguments.

MR TOM POOLE: So it is a question of 30 minutes *(off mic)*… there will certainly be time for judgment.

HHJ COLLINS CBE: Well, I was assuming I will do it today, yes.

MR TOM POOLE: I am grateful.

HHJ COLLINS CBE: Alright, thank you both very much.

(Lunch adjournment)

HHJ COLLINS CBE: … that I am considering are, firstly, the question of whether or not the award for general damages for detention should reflect any psychiatric damage caused by the detention. Mr Poole says I should produce one figure which does both and was suggesting that I should deal with them separately and

questions whether there is any authority on that. The other is, which is – and in practice one could sort it out, but there is obviously a very significant overlap between the kind of factors it might rely on in claiming aggravated damages and exemplary damages. It can rely on both; it could rely on certain factors for both really and, as I have indicated, I can certainly see a case here for exemplary damages to reflect the criticisms that I have made of the systemic failure in the face of the Inspector of Prisons' recommendation. That seems to me in principle to call for a strong mark of disapproval by the court and, subject to Mr Poole's arguments, obviously that is my predisposition. But a lot of those points you will argue equally on aggravated and I have got to avoid obviously an overlap.

MS LAURA DUBINSKY: Your Honour, before we go on to damages, there is a point that I would wish to raise-

HHJ COLLINS CBE: Sure.

MS LAURA DUBINSKY: -with the greatest respect, in relation to the judgment.

HHJ COLLINS CBE: Of course.

MS LAURA DUBINSKY: May I, first of all, say how very grateful we are for the careful and detailed judgment of the court. I wish to address a minor misunderstanding-

HHJ COLLINS CBE: Oh yes, alright.

MS LAURA DUBINSKY: -and I do so obviously in light of my duty to assist the court.

HHJ COLLINS CBE: Yes, please.

MS LAURA DUBINSKY: In a sense it is a misunderstanding that may have gone in our favour but I do wish to address it. My submission on the initial period was not in relation to alternatives to detention.

HHJ COLLINS CBE: I thought it had been.

MS LAURA DUBINSKY: So the Claimant's submissions about the duty to consider alternatives to detention were in relation to the period from the 7th March when we say she was no longer properly in the fast-track.

HHJ COLLINS CBE: I thought your submission was that the general provisions about detention were applicable to everything. I mean I think you said so in terms.

MS LAURA DUBINSKY: Your Honour, what I actually said is applicable to everything is the requirement – well, the policy of not detaining those who have independent evidence of torture. Now, I should say that, as the Operation Enforcement Manual was [provided] at the time of the Claimant's detention and you have a copy actually in the bundle because that was forwarded across by the Treasury solicitor as being the applicable version, so you can be confident that you have got the right version, it may well be that that criterion did apply.

I should – I wish to make a point that our submission in relation to the initial detention was simply this: we simply said there was a failure to have regard to all relevant matters arising from the Claimant's own case and by those we meant – and I think I detailed those in our submissions – the depression, the hospitalisation, the Claimant's rape.

HHJ COLLINS CBE: Well, I think I have dealt with – I think I have dealt with that-

MS LAURA DUBINSKY: Yes.

HHJ COLLINS CBE: -in that I pointed all the ways in which the initial decision failed to acknowledge that those matters were recorded.

MS LAURA DUBINSKY: Yes. Your Honour, we ask only that just by way of – perhaps this is an excess of caution – but we do ask, in order to try and prevent

any further litigation, perhaps it could be noted if it is in alternative places in your judgment…

HHJ COLLINS CBE: Well, my decision is the same because irrespective – I believe that in my judgment I have highlighted sufficient failures on the face of the documents relating to the initial detention to show that, in the absence of evidence to the contrary effect, it appears that the decision-maker did not take into account or appears not to acknowledge all those other factors, irrespective of the question of whether or not there was an alternative to detention. So the decision is the same.

MS LAURA DUBINSKY: Your Honour, I am very grateful, indeed, for that clarification. If my clarification and perhaps Your Honour's point that has just been made now, that the judgment would have been the same in any event, could be made on the record, if it could be recorded in the judgment…

HHJ COLLINS CBE: I don't think – well, everything is recorded.

MS LAURA DUBINSKY: Yes, that is correct.

HHJ COLLINS CBE: I mean the tape's running all the time.

MS LAURA DUBINSKY: I am grateful.

HHJ COLLINS CBE: So if anyone ever asks for a transcript of the judgment, make sure that you ask for a transcript of everything that amounts to a judgment that you need.

MS LAURA DUBINSKY: We certainly will. I am most grateful, Your Honour.

JUDGMENT ON QUANTUM

HHJ COLLINS CBE:

1. I have to assess damages for the unlawful detention of the Claimant at the Yarl's Wood Immigration Centre from the 28th February 2006 to the 29th March 2006.

2. I have been referred to a number of authorities, the leading one of which is the well-known decision of the Court of Appeal in *Thompson v The Commissioner of Metropolitan Police* [1998] QB at 498. I have been shown one case, the case of *Lunt*, before that date and a number of cases since then, all of which have applied the decision in *Thompson* essentially to the varying facts of the case.

3. I approach, first of all, the question of the basic award. The basic award for damages for detention has to reflect without double counting, firstly, the bare fact of the Claimant's loss of liberty and, secondly, in this particular case the fact that it is conceded that the Claimant's loss of liberty carried with it a recognisable psychiatric injury, namely the exacerbation by the unlawful detention of a pre-existing post-traumatic stress disorder, the opinion of the doctors being that that exacerbation lasted for a period between two and three years after the unlawful detention which they do not feel able to be more precise about. Ms Dubinsky suggests, and Mr Poole does not argue to the contrary, that it would be sensible in those circumstances to take a period of midway between the extremes and proceed

to award damages on the basis that the exacerbation of the Claimant's symptoms lasted for about three years after her release from detention.

4. It must be borne in mind in making any award that the post-traumatic stress disorder of which the symptoms were exacerbated was PTSD arising from multiple rape and torture in a prison in Cameroon at the end of 2005. Although being detained in Yarl's Wood for a month did not help, in terms of comparison of the nature of the facts giving rise to the disorder, one is plainly much less significant than the other and it is only an exacerbation and the duration of the symptoms and it seems reasonable to assume, and I do not think the doctors suggest to the contrary, that, even had the Claimant not been detained in Yarl's Wood, her post-traumatic stress disorder arising out of her treatment in Cameroon would still have continued for a substantial period of time.

5. The authorities dealing with the question of basic award cannot be applied mathematically. It is accepted, on the basis of *Thompson* and all succeeding authorities, that a greater sum is awarded for the initial shock of the unlawful detention and damages are awarded on a diminishing scale thereafter. That is hardly to say that after any particular length of time they disappear altogether. Each case will turn on its own facts.

6. The figure suggested by the Claimant is one of £17,000. The figure suggested by the Defendant is one of £7,500. It seems to me that what I have to be careful to do is exclude from the quantification of the first part of

the basic award any sum which might be attributable to the psychiatric illness which I have mentioned. For the bare loss of liberty for a period of one month, it seems to me that the appropriate sum is £12,500.

7. So far as the psychiatric injury is concerned, the JSB guidelines are not strictly applicable because they deal with post-traumatic stress disorder and not the exacerbation of a pre-existing post-traumatic stress disorder. Therefore some imagination has to be used in deriving assistance from the guidelines. Having regard to the opinions of both psychiatrists and the reports of each, it is clear that the Claimant did find her period in Yarl's Wood very distressing and that, when she spoke to one of the psychiatrists later on, she, on the surface at any rate, appeared to be more distressed by that than she had by her original indignities suffered in Cameroon although I think one has to be careful about the way in which interprets that kind of evidence.

8. It seems to me that the suggested approach by Ms Dubinsky that I should take a figure about halfway up the range of the moderate disorder figure of the JSB is about right and I shall award the sum of £10,000 to compensate her for her psychiatric injury, which will make a total basic award of £22,500.

9. I now turn to consider whether or not there should be an award of aggravated damages, again taking into account the observations made in *Thompson* and subsequent cases and bearing in mind that every case is

different on its facts. I have got no doubt that the circumstances of the detention in this case were aggravated and the factors which immediately spring to mind are as follows. Firstly, as I indicated in my judgment on liability, there were four separate decision points, at each of which the decision should have been made, on the basis of the material presented before me, to release the Claimant and at each of those decision points the Defendant failed for the reasons I gave in my earlier judgment. It seems to me that that clearly aggravates the Defendant's failures.

10. Secondly, and I am taking care here to avoid double counting with any award I make for exemplary damages, this particular Claimant was not properly examined under Rule 34 of the Detention Rules, which meant that she was supposed to have a proper mental and physical examination by a qualified GP and she did not get one, and I have essentially determined that that failure was a continuing factor in her unlawful detention thereafter. That seems to me to be an aggravating factor.

11. The evidence is, and it is not challenged, that the Claimant was not offered food, but then she made it perfectly clear to me that, if she had been offered any, she would not have eaten it and I do not give that much account, but it does seem to me that it caused her a considerable loss of dignity for her not to be given a proper change of clothes at the outset. She had to ask for it when a cell mate or room mate told her that she could ask for it and, until then, she had to wash her own clothes. It seems to me that to detain an asylum seeker without an appropriate respect for the person's personal

dignity in terms of clothing is an aggravating feature of the detention. The loss of liberty should be sufficient. It should not be accompanied by personal indignities and it seems to me that that is a significant factor.

12. It seems to me that the failure to offer her counselling when that was recommended by the doctor on the first day of her admission at Yarl's Wood is a serious aggravating factor. It is possible, although by no means certain because I have heard no evidence on it, that the exacerbation of her post-traumatic stress disorder might have been relieved had she been offered the counselling that the doctor had suggested. It seems to me that it is hard to over-estimate that aggravating circumstance.

13. This Claimant had three years exacerbation of her post-traumatic stress disorder symptoms for which damages have elsewhere been awarded and it may be attributable in part to a failure to offer her counselling. That must be taken into consideration together with, as was regarded as an aggravating factor in one of the other cases, a fear of being sent back to Cameroon. I do not place too much weight on that because in the end her right to stay in this country was based not upon what was said to be a justified fear of persecution if she went back to Cameroon but for human rights reasons.

14. However, it does seem to me that there are serious aggravating features and the only other one I ought to mention because it is also a serious one, is this. In the Court of Appeal in the case of ***Muuse*** [2010] EWCA (Civ) 453, Lord Justice Thomas drew attention to the extraordinary practice of the Home

Office not calling to give evidence the decision-makers, which, as I mentioned in my principal judgment in this case, was the same here and was essentially or may essentially have been the reason why the Home Office has lost the case so resoundingly. It may have lost it even more resoundingly if it had called the witnesses, of course, but one just does not know.

15. In effect, this case has not been conducted by the Home Office in a way which is conducive to the proper resolution of litigation or with due regard to the interests of the Claimant because, after all, huge sums have been built up here and the Claimant has had to hang around since the beginning of 2009 to have the liability claim determined when the Home Office basically came here with an empty armoury and the Claimant has obviously been highly distressed and quite genuinely distressed by this litigation. It is rare for a judge to have to give judgment with a claimant sobbing very audibly in the next room because her memory of what has happened to her has been revived by the judge's observations, and it seems to me that the way in which the Defendant has conducted this litigation must be substantially responsible for that.

16. So the award for aggravated damages will be one of £10,000, which is, in all conscience, modest enough for the aggravation but it must bear some relation to the basic award.

17. Now I have indicated right from the outset, and Mr Poole has realistically not attempted to argue to the contrary, that this is an obvious case for the award of exemplary damages. In most of the other cases where exemplary damages have been awarded, it is, of course, for outrageous conduct where the court has taken the view that the amount of the basic and aggravated awards are not sufficient penalty to bring home to the Defendant the gravity of their outrageous conduct but in most of the cases it is the conduct of individuals towards the claimant as an individual.

18. For example, in the case of ***Muuse*** itself, the most recent of the cases, the claimant's protestations that he was a Dutch national and not liable to be deported were constantly rubbished by officials even though they were true. He was treated on a personal level extremely badly and a substantial award of exemplary damages of £27,500 was upheld by the Court of Appeal. It was an extreme case, as Mr Poole points out, being counsel for the Home Office in that case as he is for this, of personal arrogance and outrageous conduct by specific individuals towards a specific individual.

19. This case is different and the basis on which I am proposing to award exemplary damages is the fact that, as I pointed out, the arrangements in hand for this sort of case at Yarl's Wood in February 2006 remained dysfunctional notwithstanding the recommendation made in May 2005 by Her Majesty's Inspector of Prisons to remedy the situation. I said then, and I do not shrink from saying now, that it was outrageous that in February 2006 there was no effective system for complying with Rules 34 and 35, in

particular Rule 35, of the Detention Rules. The doctor who examined the Claimant did not make a report, as he was required to do under Rule 35, on the Claimant, having regard to what was obviously his concern that she had been tortured. The pathetic apology for a Rule 35 report that was, in fact, submitted took over a week to arrive and there is no indication that anyone took it into account at all.

20. Bearing in mind the undisputed primacy of the interests of those who claim asylum in this country after being the victims of torture elsewhere, the failure to have an adequate system for dealing with Rule 35 cases, notwithstanding a warning by the Inspector of Prisons, was as grave a failure on the part of the Home Office and its contractors as can be imagined in the context of this sort of case. A true punishment of the Home Office to reflect the gravity of the situation would run into sums far in excess of those which the court is legally authorised to award. Any award has to be tempered by the crude and blunt nature of our system for awarding exemplary damages, which is that the Claimant receives a windfall which is in no sense a compensation for her but which is a punishment of the Defendant. In a more rational system the court would be able to punish the Defendant and allocate the money to worthy causes connected to the nature of the litigation. So the court has to balance the need to punish the Defendant with an undoubted public interest requirement not to land an inappropriate windfall into the arms of the Claimant.

21. In those circumstances, any award that I make is going to be unsatisfactory but I am going to make an award for exemplary damages of £25,000.

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HHJ COLLINS CBE: That is a total of 57,500 I think – yes, 57,500. Okay.

MS LAURA DUBINSKY: Your Honour, I am very grateful indeed. It remains perhaps for us to address you on the issue of costs.

HHJ COLLINS CBE: Any offers? Were there any offers?

MS LAURA DUBINSKY: I am sorry, Your Honour, I didn't hear. Yes, there were. The only offer was by us and we considered repeating it. *(Off mic)…* I am sorry, could I just have a moment? Sorry, I have just been handed [it loosely] but I have put the Part 36 offer on top.

HHJ COLLINS CBE: Thank you.

MS LAURA DUBINSKY: Your Honour, you will see that there was a Part 36 offer made more than 21 days before the trial. It was made by us. The total was 26,000 I believe.

HHJ COLLINS CBE: When did you make it?

MS LAURA DUBINSKY: On the 11th May and I should say that this is a case in which there has been no effort whatsoever to negotiate by the other side.

HHJ COLLINS CBE: So what are you asking for?

MS LAURA DUBINSKY: We actually ask for…

HHJ COLLINS CBE: If you make – you can only really get penal interest from the day your offer expired.

MS LAURA DUBINSKY: Yes, but we can also ask for our costs on an indemnity basis of the proceedings. Now exceptionally, because of the Defendant's conduct of these proceedings and I do not know to what extent Your Honour has time for me to take you through the correspondence – it may be too late in the day to do so – but we say there have been failures…

HHJ COLLINS CBE: You can summarise it.

MS LAURA DUBINSKY: I can summarise it very briefly. At every step of the way the Defendant has breached directions. At every step of the way there have been delays by the Defendant. At every step of the way my instructing solicitor has contacted the Treasury solicitor and said 'let's negotiate; are you sure you want us to run up more costs?' and we have simply hit a brick wall. We say therefore that this is a case in which indemnity costs should be granted for the entirety of the litigation. The costs should be on an indemnity for the entirely of this litigation.

HHJ COLLINS CBE: Yes?

MR TOM POOLE: Your Honour, certainly as far as the Part 36 offer goes, I would find it very difficult to argue against the normal order, which would be indemnity costs as from 21 days after that and penal interest. As far as the application goes for indemnity costs in respect of the entire proceedings, we are in a rather unusual situation that Your Honour has taken account of the way in which the litigation has been conducted in assessing aggravated and perhaps … exemplary damages.

HHJ COLLINS CBE: I hope not. I hope I haven't done that.

MR TOM POOLE: Well, Your Honour, I am quite happy to address Your Honour in more detail on, if you like, the indemnity principle for the entire set of proceedings.

HHJ COLLINS CBE: I think you should. I think you should. It is alright, I am familiar with the passages, just remind me of them.

MR TOM POOLE: Re 44.4(iii): *"When considering costs on the indemnity basis* (reading from the guidance)*, when it is alleged that it is based on conduct, the court held the Claimant's unreasonable pre-trial conduct was on its own sufficient to justify an order. Here it is the Claimant's conduct is both unreasonable and to a higher degree out of the norm to justify an award of costs*

on the indemnity basis. Where the court is considering whether the losing party's conduct is such as to justify an award of costs on the indemnity basis, the minimum nature of the conduct required is, except in very rare cases, that there has been a significant level of unreasonableness or otherwise inappropriate conduct in its wider sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of litigation itself." In this case there have been some delays, and I accept there have been some delays, by those instructing me in complying with…

HHJ COLLINS CBE: No, but you see the fact that you have made no Part 36 offer in itself is a matter which I would have to take into consideration. The fact that you have been forced to come here and defend a case without any evidence and you have not even made an offer to settle, I have got to take that into consideration.

MR TOM POOLE: Your Honour, you can take that into consideration but I hope it is not – I hope it is not too unattractive a submission to make the point that the – a similar point that I made on day one, which is the evidence the Claimant has had from Home Office has not changed since disclosure and since the witness statements. The Claimant makes the point that well, they have been forced to come to trial. Well, the Claimant had another avenue to her and the Claimant could have applied for summary judgment. The Claimant chose not to do that. That is a factor which the court can take into account when weighing up, in the round, as the court has to do.

HHJ COLLINS CBE: The trouble is it would probably have taken us two days to do the summary judgment because we would have had to have gone through exactly the same exercise and argument, wouldn't we?

MR TOM POOLE: It would have been – probably. I mean one can't speculate…

HHJ COLLINS CBE: It might have been a bit shorter but not that much actually.

MR TOM POOLE: No. I mean one would anticipate the Claimant would have taken perhaps their best point on the documents, which would have been the Rule 35 non-compliance-

HHJ COLLINS CBE: Yes.

MR TOM POOLE: -and perhaps asked for that to be determined through the issue [of] summary judgment. Now, as I say, I hope that is too much of an unattractive point because it is – and the only reason I make it is because it is said effectively the Claimant has been forced to come this far. Really, other than not making any Part 36 offers and not making any attempts to settle, the only other conduct that might arguably fall in unreasonable is failure to comply with court directions, but those are, in my submission, fairly…

HHJ COLLINS CBE: Well … there is nothing terribly significant. Alright, thank you very much. I am going to award costs on an indemnity basis. Although the Claimant only made a Part 36 offer on the 11th May, it was for – the Claimant did indicate she would accept £26,000 as opposed to the £57,500 which I awarded but the more relevant feature is that I have – as it has been apparent throughout the case, the Defendant has conducted it fixed in the intention not to call any of the witnesses who might have illuminated some of the questions on which I felt obliged to decide in favour of the Claimant and has made no offer of their own.

It seems to me that is an extraordinary way to conduct litigation, to approach it on the basis that you know you are not going to be able to call the relevant witnesses and you still do not make an offer to settle. It seems to me this is no way to conduct litigation ten years after the advent of the Civil Procedure [reports] and

this conduct seems to be totally out of the norm and is totally unreasonable. And I think the Defendant should pay the Claimant's costs on an indemnity basis. You are publicly funded presumably?

MS LAURA DUBINSKY: We are indeed.

HHJ COLLINS CBE: I make an order for a public funding assessment of the Claimant's costs.

MS LAURA DUBINSKY: I am very grateful and we also ask, of course, for the order on the interest.

HHJ COLLINS CBE: Sorry?

MS LAURA DUBINSKY: We also ask for the order on the interest pursuant to Part 36, the interest.

HHJ COLLINS CBE: Well, you probably will already have received your brief before the 21 days ran out, didn't you? I mean does it matter? Is it worth it?

MS LAURA DUBINSKY: Your Honour, we would say yes and, as a matter of principle, we are entitled to it and we should have it.

HHJ COLLINS CBE: Public funding assessment Claimant's costs and I say – alright, paragraph 2 can read pay interest at 10% from – what is the date? 21 days from receipt. Well, we say 21 days from receipt, we have to assume 13th May receipt. When does the 21 days run out? I mean what is the point?

MS LAURA DUBINSKY: Your Honour, I am told it was faxed *(off mic)*…

HHJ COLLINS CBE: It doesn't say so. Yes, by fax, alright. What is 21 days – the 2nd June, is it?'

MS LAURA DUBINSKY: Your Honour, I am told it was Wednesday of last week, which would make it the 2nd June.

HHJ COLLINS CBE: Alright, interest at 10% from the 2nd June 2010. This is all stuff that arrangements need to be made for it to be taken away.

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