Neutral Citation Number: [2018] EWHC 3393 (QB)

Case Nos. HQ16X04249 and HQ16X04250

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Date: 05/12/2018

Before:

MASTER VICTORIA McCloud

BETWEEN

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(1) MR MARTIN WARSAMA
(2) MS CLAIRE GANNON

Claimants

-and-

(1) THE FOREIGN AND COMMONWEALTH OFFICE
(2) THE WASS INQUIRY
(3) MS SASHA WASS QC

Defendants

Judgment

Keywords: Bill of Rights - ECHR Art. 8 - basis of damages in Convention Claims - loss of a chance - costs - statements of case – right to give account before public criticism – Parliamentary Privilege

Authorities referred to:

CC Herts Police v Van Colle [2008] UKHL 50

Singh v SSHD [2016] EWCA Civ 492

Warsama and Gannon v Foreign and Commonwealth Office and others [2018] EWHC 1461 (QB)

1. This brief supplemental judgment deals with the form of order to be made arising from my longer judgment in this case which is at [2018] EWHC 1461 (QB). I received short written submissions from the parties and heard brief oral argument. This case, as appears from my main judgment, relates to the Wass Inquiry Report into alleged child abuse in St Helena, and to the impact which the Claimants say that Report (and, they argue, also the *process* by which it was established) causes them damage in the form of breaches of Art. 8 rights and loss flowing from that.

2. Among other matters it is complained that there was no or no adequate process or forewarning about possible criticism of the Claimants by the Inquiry, and of seeking an account from the Claimants before publication. It is trite law that in certain circumstances a person facing criticism in a public report is entitled to a process of notice and an opportunity to respond so that their account can be taken into account. Where that right arises it is of course part and parcel of basic fairness.

3. The above has become known as, variously, 'Maxwellisation' or the provision of a 'Salmon" letter in the context of formal statutory inquiries, or simply as an aspect of fairness beyond that. (It is fairly ubiquitous as a concept: immaterially to this decision but of interest to those peculiarly interested in such things, I was informed recently that even lowly first instance judges facing criticism of their conduct are, apparently, entitled to be asked by an appeal court for their account, to be disclosed to the parties, before their conduct is publicly criticised on appeal (Singh v SSHD [2016] EWCA Civ 492)).

4. Here the Claimants say that after a flawed process undertaken by a panel which was not truly impartial, they faced 'trenchant' criticism

and have lost their careers and reputations. I summarise and oversimplify and I choose the formula 'after… and' so as to deliberately avoid the question of causation for the moment, but that is the gist.

5. The Defendants seek an order dismissing all claims and awarding their clients their costs on the footing that the issues of law in relation to Parliamentary Privilege were decided in their favour and that the claim as pleaded in reality has no substance and there are no maintainable claims remaining. The Claimants maintain that they succeeded in resisting the applications by the Defendants for summary judgment and/or strike out and hence are the successful parties.

6. This being a very brief judgment in lieu of an extempore decision I will not set out the arguments at length but will give my decision and in the course of that it will be clear as to my view on the salient matters argued, but omission to refer to every detail does not imply that I have ignored anything.

7. The starting point under the costs rules is that the successful party gets its costs. Issue-based costs orders are discouraged. In my judgment the point I have to decide is the simply stated one of 'who has won?' and I should start from there.

8. I say that with the slight caveat that if a party has technically managed to resist an entire strike out, but the claim has survived in name only, as a de minimis matter, then the 'winner' might well be a defendant even if not strictly completely successful on a strike out. So in that sense I intend to ask myself both 'who has won?' and 'if anything remains does it amount to anything of substance practically?'

9. I shall start by reminding myself that the matters which were before the court at the substantive hearing were (a) applications by the Defendants for strike out and/or Summary judgment on the entire claim and (b) as a result of directions I gave by email with the cooperation of the parties, the necessarily imported questions of law (on undisputed facts insofar as relevant) were:

   Whethe Ms Wass was acting as a public body for the purposes of the Convention; and

Whether on the pleaded facts of this case, and in particular the use by the Secretary of State of a parliamentary procedure known as a 'Motion' for an 'Unopposed Return', the Claimants' Claims are defeated by the defence of Parliamentary Privilege; and

(stating much the same but using the expression 'barred' and a somewhat Dickensian expression on my part):

Whether a plea that [these Claims are] barred on grounds of parliamentary privilege in reliance upon Art IX of the Bill of Rights, is a good plea.

What did I decide?

10. There is no dispute that in relation to the 'convention status' question I decided that point against D3. That by itself does not conclude matters even as regards D3 since if there is nothing left of the claim once one takes into account the Privilege issue then claims against her would fail. Hence one considers the impact of the Privilege decision generally and not just in relation to D1.

11. As to the Parliamentary Privilege aspects the most useful passages in judgment on this point are those to which the parties referred me namely 112, 113, 115, and 156-158. I shall not set those out here and I refer to my judgment.

12. In my judgment the decision embodied in the above paragraphs amounts to a decision that the entirety of the claims are not defeated or barred by the plea of Privilege in reliance on Art. IX of the Bill of Rights, but that the Defendants succeeded in establishing their Privilege arguments in relation to any parts of the case which question the content of the Report or which seek damages relying on harm said to be done in consequence of the publication of it.

13. Given the wording of the issue which was formulated before hearing, and which the Defendants relied on in their submissions prior to this

judgment, it seems to me that the answer to the questions posed on privilege are, strictly, 'no', in that my decision permitted such claims to continue as did not question or impugn the content of its report or rely on damage done by the publication of the contents of the report.

14. However that is not the end of matters. The Defendants refer to the 'admittedly generous' approach which I stated that I was taking to the reading of the Particulars of Claim, and to the fact that there has been no amendment subsequent to judgment, and to the content of the pleading as it stands, and they argue that in reality there is no claim left, practicably. The whole loss and damage in the claims against both Defendants as pleaded they say must be said to flow from the content of the report and hence, albeit I entertained the prospect that 'process' claims outside the bounds of Privilege might be valid claims, there is in fact no such remaining claim of any substance here on the statements of case.

15. The net effect therefore, say the Defendants, is that these claims now fall to be struck out. They have not been rescued by the type of amendment which I foresaw in judgment and the Defendants regard it now as time to call matters to a halt, since any investigation of loss on the basis pleaded will trespass into the forbidden forest of Privilege, being founded on the consequences of publication of the content of the report itself. Mr Johnson used the expression 'forbidden land' but I shall call it a forest, redolent as that term is of notions not merely of trespass, but of a risk of becoming constitutionally lost, never to find ones way out.

16. To answer the above I need to look at the Particulars of Claim (I will refer to the claim by Mr Warsama which was the one focussed on in this hearing, but it would make no difference which Claim I consider).

17. To resolve this I consider that I need to address here three points:

18. First, do the Particulars make allegations that of facts capable of engaging or establishing breach of Article 8 by reason of matters extraneous to the content of the Report (in shorthand one could call them 'process' arguments)?

19. Second, if so, do the Particulars allege that those breaches found claims by these Defendants?

20. Third, is it correct that in the event that breaches extraneous to the Report have been pleaded and are later established on the evidence, any loss would necessarily flow in its entirety from the content of the Report and thus inevitably lead the court into the forbidden forest?

21. Some voluntary particulars were served not very long before the hearing leading to this judgment but in the event I feel able to determine the questions which I have posed simply by reference to the pleading and to the applicable law.

22. As to the first question: I refer to a selection of occasions on which it is pleaded that the process of the inquiry breached the Claimant's Art 8 rights. See POC para 1('liable for the conduct of the inquiry'), arguably 6, 7 ('the Claimant felt overwhelmed and bullied during the interview session… communicated to the effect that he felt his health prevented him from attending…"), 8, 9, 14 ("Article 8 contains, implicitly, procedural rights ... prior to the decision to publish it … should have provided full information about those criticisms to have allowed the Claimant to express his views…", 16 (reference to safeguards), 17(a)(ii) and (iii), 17(b) as to conduct of inquiry, 17(c) procedures and framework of inquiry (save for publication of report), 17(d) – conduct of inquiry). I have given some examples but for brevity will not list more. In my judgment it is clear that Art. 8 breaches are alleged by reason of process and not simply the content of the published report.

23. As to the second question: it is pleaded that the Defendants have acted incompatibly with the Defendant's Art 8 rights and unlawfully within HRA 1998. See para. 17 and 3. That suffices to import a plea that the Claimants fall within the class of victims of alleged Art. 8 rights. That would found claims in principle.

24. As to the third question, even if the Art 8 breaches are proven, does the issue of loss in fact necessarily mean that what the court must consider is loss caused by the content of the report itself which would, therefore, be impermissible?

25. Here the pleading is not ideal. The allegations at para. 21 are put rather directly as a simple matter of conventional (in the common law sense) damages caused by a wrong. The linkage there is put on the basis that the breaches caused loss of profession and employment (and so on). Damages are said to be necessary for just satisfaction under the Convention. However turning to 17(f) it is pleaded that if the inquiry had carried out a balancing exercise including the Claimant's rights then 'the trenchant criticisms of the Claimant would not have been published, and sufficient safeguards in the Inquiry procedure would have been included'. It seems to me that this (imperfectly) imports notions of a loss of a chance that if such safeguards had been incorporated, the outcome may have been different (the term 'would' is unhelpful but the meaning fairly can be taken to be 'there would have been a real prospect that' or some such wording).

26. Further at 17(b) it is alleged that 'the conduct and procedure of the Inquiry … has had a significant impact on his professional career and his ability to continue employment in his chosen profession', and this seems to me to be a clear assertion which relates to alleged loss not arising from the content of the report. I am not here expressing a view on merits, absent evidence, but the pleading is sufficient to amount to an averment that harm was done in the form of damage to professional standing, *by the process of the inquiry*.

27. The law here is probably the most central point: I was referred to CC Herts Police v Van Colle [2008] UKHL 50, per Lord Brown of Eaton-under-Heywood at 138. There the House of Lords considered the nature of remedies when claimed in respect of breaches of Convention rights, as compared with the nature of remedies in claims founded on common law claims such as tort. To quote in part:

> *"Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights… It is also why section 8(3) of the Act provides that no damages are to be awarded unless necessary for just satisfaction. It also seems to me to explain why a looser approach to causation is adopted under the Convention than in English tort law. Whereas the latter requires the claimant to establish on the balance of*

probabilities that, but for the defendant's negligence, he would not have suffered his claimed loss – and so establish under Lord Bingham's proposed liability principle that appropriate police action would probably have kept the victim safe - under the Convention it appears sufficient generally to establish merely that he lost a substantial chance of this."

28. This is a Convention claim. As a matter of law I accept that the potential availability of a remedy as just satisfaction in this case therefore comes under the notion of a loss of a substantial chance that if the Convention had not been breached, the victim of the breach (here, said to be the Claimants) would not have suffered the harm to professional standing said to arise from the conduct of the inquiry (per para 17(b)), or, more contentiously but in my view not fancifully, that the principle of just satisfaction would also operate by way of a 'loss of a chance that without the breaches of Art. 8 the outcome of the inquiry would have been less critical or not critical of the claimants'.

29. I accept sufficiently for the present purposes that it is not fanciful to argue as Mr Bowen QC did before me that there is a difference between impermissibly attacking the correctness of the Report published in that form, on the one hand, and an argument which says that if the Convention had been followed in terms of process, there was a chance (which has been lost) of an outcome more favourable to the Claimants which would have had less, or no impact on them professionally.

30. I do not need finally to decide that interesting point but it seems to me that the foregoing is sufficient to show that, howsoever the pleading may be couched in 'tortiously concrete' terms as to the nature of causation which are not quite appropriate in a Convention case, the reality is that at any trial the court would have to approach this for what it is: a Convention claim, where just satisfaction is determined applying the loss of a chance basis to causation, described by Lord Brown in the above quotation. I think to hold otherwise would be to elevate a pleading point relating to how paras. 21 and onwards in the POC are expressed beyond what it merits.

31. In the circumstances I therefore conclude that the claims before the court are not now left devoid of substance. Indeed in addition to the

substantial just satisfaction question (loss of professional standing), it may very well be that the simple fact of breaches of Art. 8 would lead to entitlement to pecuniary sums by way of just satisfaction to represent the denial of fair process to these Claimants if that were to be established in due course and to acknowledge their victim status in Convention law in the interest of giving 'substantial effect' to Convention Rights.

32. I conclude therefore that the claims have not been concluded by reason of the applications for strike out or summary judgment, and are not effectively rendered meritless or impermissible by the decision on Privilege and its scope in this case.

33. In my judgment the consequence is that the Claimants are the successful parties both strictly in terms of the questions which the main judgment determines but also in substantive terms, that is to say that I am not satisfied that what remains is de minimis or that it represents an impermissible incursion into the forbidden forest beyond the gates of Privilege.

34. Costs should follow the event, I do not see good grounds from departing from the usual rule and making an unusual issue-based order narrowly in relation to parts of the Privilege issue on which the Defendants succeeded. I attach to this judgment the order which I shall direct court staff to seal.

MASTER VICTORIA MCCLOUD

Royal Courts of Justice

12/12/18

Case Nos. HQ16X04249 and HQ16X04250

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MASTER VICTORIA McCLOUD

BETWEEN

(1) MR MARTIN WARSAMA
(2) MS CLAIRE GANNON

Claimants

-and-

(1) THE FOREIGN AND COMMONWEALTH OFFICE
(2) THE WASS INQUIRY
(3) MS SASHA WASS QC

Defendants

ORDER

UPON hearing Leading Counsel for the Claimants, Counsel for the First Defendant, and Leading Counsel for the Third Defendant and by way of further written and oral submissions on the form of order:

IT IS DECLARED THAT:-

1. The Claimants are not prevented on the grounds that the Wass Inquiry Report is privileged as a proceeding in Parliament pursuant to Article IX of the Bill of Rights 1689, from continuing to pursue any grounds of claim which relate to actionable harms (including loss of a chance of a better outcome), which neither seek to impugn or call into question the correctness of the content of the report nor to claim remedies arising from consequences of its publication in the form in which it was published by Parliament.

2. In particular (for avoidance of doubt and non-exhaustively) the grounds pleaded in the Particulars of Claim in relation to the decision to conduct the inquiry in the form in which it was conducted, the process and procedure of the inquiry (including in respect of forewarning and seeking explanations from the Claimants prior to conclusion of the report), and decisions made as to disclosures of information during the process of the inquiry are not barred by virtue of Parliamentary Privilege. (See para. 113 of judgment).

3. The Claimants are prevented, on the grounds that the Wass Inquiry Report is privileged as a proceeding in Parliament pursuant to Article IX of the Bill of Rights 1689, from pursuing claims which seek to impugn or otherwise challenge the correctness or otherwise of the content of the Wass Inquiry Report or from pursuing claims arising from the consequences of its publication in the form in which it was published by Parliament. (See paras. 115-116 of judgment but as to admissibility in evidence of the report on other matters see also para. 112).

4. The 3rd Defendant and her co-panel members when conducting the inquiry were carrying out a public function and constitute a "public authority" within the meaning of s.6 of the Human Rights Act 1998.

5. The court declares accordingly that in formal answer to the formulated questions (subject to the detailed declarations above) on the ‘privilege issue’:

    i. Whether on the pleaded facts of this case, and in particular the use by the Secretary of State of a parliamentary procedure known as a ‘Motion’ for an ‘Unopposed Return’, the Claimants’ Claims are defeated by the defence of Parliamentary Privilege.

    Answer: no.

    ii. Whether a plea that [these Claims are] barred on grounds of parliamentary privilege in reliance upon Art IX of the Bill of Rights, is a good plea.

    Answer: no.

IT IS ORDERED THAT:-

6. The 1st Defendant's applications dated 19th July 2017 and the 3rd Defendant's applications dated 2nd June 2017 to strike out the Claimants’ claims and/ or for summary judgment on the whole claims do stand dismissed.

7. In relation to the issues of law before the court and formulated as above, the declarations recited above record the determinations of those issues.

8. The court considering that the successful parties are the Claimants, the Defendants shall pay the costs of and occasioned by the said applications and hearing of the issues, to be subject to a detailed assessment on the standard basis if not agreed.

9. Of the court's own motion the Claimants are granted permission to appeal, to the Court of Appeal, pursuant to CPR 52.23(1). The time limit for lodging their notice of appeal is extended to 21 days passed the date upon which this Order is sealed.

10. Of the court's own motion the Defendants are granted permission to appeal, to the Court of Appeal, pursuant to CPR 52.23(1). The time limit for lodging their notice of appeal is extended to 21 days passed the date upon which this Order is sealed.

MASTER VICTORIA MCCLOUD
5/12/18