



Hilary Term
[2023] UKPC 12
Privy Council Appeal No 0036 of 2022

JUDGMENT

**Douglas Ngumi (Appellant) v The Attorney General of
The Bahamas and others (Respondents) (Bahamas)**

**From the Court of Appeal of the Commonwealth of
The Bahamas**

before

**Lord Briggs
Lord Kitchen
Lord Sales
Lord Richards
Dame Ingrid Simler DBE**

**JUDGMENT GIVEN ON
5 April 2023**

Heard on 7 February 2023

Appellant

Frederick Smith KC

Ruth Jordan

Thomas Elias

Roderick Dawson Malone

Kandice Maycock

Raven Rolle

(Instructed by Sheridans (London))

Respondents

Robert Strang

Kenria Smith

(Instructed by Charles Russell Speechlys LLP (London))

DAME INGRID SIMLER:

Introduction

1. This appeal raises questions about the proper construction of provisions relating to detention for the purposes of effecting deportation in the Immigration Act 1967, and the proper approach to the assessment of damages for a lengthy period of unlawful detention.

2. On 12 January 2011, the appellant, Douglas Ngumi, a Kenyan citizen, was arrested by Bahamian immigration officials. He was held in an immigration detention centre from then until his release more than six years later, on 4 August 2017. During his time in detention he was assaulted and subjected to appalling and degrading treatment. His constitutional rights were disregarded. He brought proceedings against the respondents (in their representative capacities) for damages (compensatory, aggravated and exemplary) for false imprisonment, assault and battery, and damages for breach of his constitutional rights.

3. Following a contested trial, the Honourable Madam Justice Indra H Charles held that the appellant was initially lawfully detained as an overstayer with no right to reside in The Bahamas, and that his detention during the initial three months was for the purpose of making arrangements to deport him and so, for the most part, lawful. However, thereafter and for the balance of the period of six years, four months and four days, he was unlawfully detained. The Judge made findings about the adverse conditions in which he was held and treated, and assessed general damages (including aggravated, exemplary and vindictory damages) in the total sum of \$641,000, with agreed special damages of \$950. She awarded the appellant interest from the date of judgment and costs on the standard basis. Her judgment dated 27 November 2020, is reported at 2017/CLE/gen/01167.

4. The appellant appealed to the Court of Appeal challenging the overall assessment of general damages as inordinately low and asserting that the global award should have been in excess of \$11,000,000. He challenged the Judge's approach to a number of specific heads of claim, as well as her award of interest and costs. The Court of Appeal increased the award of general damages for unlawful detention, resulting in an increased global award of \$750,950, and extended the period for which interest was awarded so that it ran from the date of the writ, 17 September 2017. Otherwise, the Court of Appeal declined to interfere with the Judge's order. The Court of Appeal's judgment dated 18 August 2021 is reported at SCCivApp No. 6 of 2021.

5. The appellant appeals to the Privy Council. In addition to the challenge to the assessment of damages in his case, he contends that the courts below were wrong to find that he was lawfully detained at any time during a reasonable period (assessed as three months) during which the respondents were making arrangements for his deportation. In particular, he contends that there was no lawful power to detain him because the Magistrates' Court had no power to order deportation and there was no recommendation for deportation in place.

6. As for damages, the appellant's case in summary is that the Judge and the Court of Appeal made errors of principle in calculating the proper award of general damages, interest and costs: first, no award was made for assault and battery; secondly the approach to and reasons given for the award of compensatory damages were wrong in principle, not least because of the reliance wrongly placed on the settlement reached by the parties in *Takitota v Attorney General* [2009] UKPC 11, [2009] 26 BHRC 578 "*Takitota*"), and the resulting award was manifestly too low; thirdly, the assessment of constitutional damages failed to have regard to the gravity of the breaches and sense of public outrage engendered; fourthly, interest should have been ordered to run from the date when the cause of action first arose on 14 January 2011; fifthly, the appellant was entitled to costs on the indemnity basis at first instance, and should have been awarded the costs of the appeal in the Court of Appeal.

The background facts and proceedings below

7. The appellant was born in Nairobi, Kenya, on 7 September 1971. On 14 August 1997, he arrived in The Bahamas for the first time to visit a family friend. Immigration officials at the airport granted him a visa to stay in The Bahamas for 21 days. The visa was subsequently extended for a further two months. Sometime in 1999 during a visit to New Providence, the appellant met Gricilda Vanessa Pratt, a Bahamian citizen. They were married on 14 April 2000, but became estranged not long afterwards, and are now separated, though not legally divorced. The appellant remained in The Bahamas following their separation.

8. On 8 August 2005, the appellant obtained a work permit which expired on 17 June 2006. His employer's subsequent request for an extension was refused by letter dated 12 September 2006. The letter made clear that the appellant should wind up his affairs and leave The Bahamas within 21 days. Notwithstanding that instruction, the appellant did not leave permanently. Instead, he maintains that, to avoid any violation of the immigration laws of The Bahamas, he travelled back and forth to The Bahamas through Cuba and the Turks and Caicos Islands.

9. On 12 January 2011, immigration officers arrested the appellant at his home and took him to the Carmichael Road Detention Centre.

10. On 18 January 2011, he was arraigned before the Magistrates' Court on charges of overstaying contrary to section 28(1) and (3) of the Immigration Act 1967, and engaging in gainful occupation contrary to section 29(1) and (2) of the Immigration Act 1967. According to the Magistrates' Court note on the court docket, the appellant pleaded guilty to the first count and not guilty to the second count. Sentencing on the first count was deferred to 20 January 2011. The prosecution withdrew the second count.

11. On 20 January 2011, the appellant was sentenced by the Magistrate on the first count. No penalty was imposed but the court docket recorded the following:

“20/01/2011 – DEFENDANT [sic] ORDERED DEPORTED TO
HIS HOME-LAND, KENYA, AFRICA.”

12. The appellant continued to be held in the detention centre and no steps whatever were taken by the respondents to effect his deportation. The evidence the appellant gave about the conditions in which he was held was summarised by Charles J. In summary his evidence included that he suffered pain in consequence of oppressive conduct by officers at the detention centre. On one occasion he was taken from the dormitory into the kitchen by officials. There he was stripped naked, tied, handcuffed under the table and then beaten with a PVC pipe by the officers. He suffered wounds to his back that became infected. There was severe overcrowding in the dormitory resulting in illness and diseases. The dormitory was never cleaned; the toilet could not flush; and the water was bad. There were raids in which tear gas was used.

13. The Judge accepted his evidence. She also found that the appellant was badly beaten on several occasions by officers at the detention centre and subjected to cruel, inhumane and degrading treatment.

14. On about 20 July 2017 the appellant retained the services of Callenders & Co, attorneys in The Bahamas. On 26 July 2017 an application for habeas corpus was filed on his behalf. He was released on 4 August 2017. His detention lasted from 12 January 2011 to 4 August 2017, a total of 2,397 days. The appellant commenced these proceedings on 27 September 2017, filing a writ and Statement of Claim on that date. A Defence contesting liability was filed on 31 October 2017. The trial took place over three days between 11 February and 17 April 2019. The appellant gave

evidence and was cross-examined. The respondents filed no witness statements. There was an agreed bundle of documents before the court.

15. In relation to the issues of relevance to this appeal, Charles J made the following findings in summary:

(i) Immigration officers had reasonable suspicion to arrest the appellant without a warrant on 12 January 2011, in view of his immigration history and in light of his subsequent guilty plea to overstaying. His arrest was therefore lawful.

(ii) However, the appellant was not charged and brought before a Magistrate within the statutory period of 48 hours of his arrest as required by the Criminal Procedure Code: he was only arraigned in the Magistrates' Court on 18 January 2011. He was therefore unlawfully detained for four days in that period. Additionally, following his arraignment and subsequent sentence on 20 January 2011, the appellant ought to have been deported as soon as was reasonably practicable as recommended by the Magistrate. This was not done.

(iii) Charles J held that there was some evidence from the respondents that his passport was "lost" and it was impossible to repatriate him to Kenya. She rejected the assertion in the Defence that there was a failure to deport the appellant because he refused to cooperate with immigration officials to facilitate his return to Kenya, and that because of national security concerns, he could not be released in the community. There was no evidence at trial to support these assertions and she accepted the appellant's unchallenged evidence that he "was never asked to sign any documents by Immigration officials during his time at the Detention Centre." In light of the evidence she concluded that three months was a reasonable and sufficient period to organise his deportation and that he was therefore lawfully detained for three months; but his detention for the remainder of the protracted period was unlawful until it ended on 4 August 2017.

(iv) The appellant invited the Judge to make a global award of compensation for false imprisonment, assault and battery of \$3,000,000. The Judge regarded this as "an astronomical amount" (using Mr Smith KC's own words) that was "nothing more than a fantasy". In light of her findings about the conditions of his detention and the treatment he suffered, the Judge made a global award for these torts in the sum of \$386,000. In calculating that award, the Judge recognised that the courts have deprecated the adoption of

a daily rate. She decided nonetheless that in this case a daily rate of \$250 was fair and reasonable considering the socio-economic conditions in The Bahamas and the cruel and inhumane treatment suffered by the appellant. When multiplied by the number of days of unlawful detention, this produced a total of \$579,000 which was tapered to \$386,000.

(v) The appellant sought an award of \$5,000,000 for exemplary damages to reflect the outrageous acts of the State and to deter endemic abuse. The Judge observed that there was not a single authority to support this magnitude of claim in the English-speaking Commonwealth. She awarded exemplary damages of \$100,000. In doing so, the Judge recognised that this was the same sum as was awarded in Takitota in 2006 to show the court's strong disapproval of the State's conduct. The impact of inflation in reducing the present value of the same sum awarded to the appellant was justified in her view because the treatment meted out to Mr Takitota by the State was even more appalling than that endured by the appellant, and the conditions and length of Mr Takitota's detention were also worse.

(vi) The appellant sought aggravated damages of \$1,000,000 for the emotional distress and trauma caused by his detention; the humiliation and indignity of having to perform duties without the hope of release; the illnesses to which he was exposed; and the indignity of his release without any provision being made by the respondents to assist him. Moreover, liability had been denied but the respondents had offered no evidence to rebut the allegations made by the appellant. The Judge awarded aggravated damages of \$50,000 to compensate him under this head.

(vii) The appellant sought damages for breach of his rights under articles 17 (protection from inhuman treatment) and 19 (protection from arbitrary arrest or detention) of the Constitution. In addressing this claim, the Judge expressly considered the following: the appellant's long struggle to secure his release; his imprisonment in inhumane and degrading conditions; his health was severely affected; and the fact that the respondents did nothing to assist him on his release. She awarded constitutional damages of \$105,000.

(viii) Special damages were agreed in the sum of \$950.

(ix) The appellant sought interest from the date that the cause of action arose, relying on a personal injury case. The Judge did not find this argument convincing and awarded interest at the statutory rate of 6.25% pursuant to section 2(1) of the Civil Procedure (Award of Interest) Act 1992 as amended by

the Civil Procedure (Rate of Interest) Rules, 1992 from the date of judgment, 27 November 2020.

(x) The Judge rejected the claim for indemnity costs based on the manner in which the case was conducted. She set out the relevant principles and concluded that the respondents' conduct "was in no way egregious or contumacious". Accordingly the respondents were ordered to pay the appellant's costs on the standard basis.

16. On 8 January 2021, the appellant filed a Notice of Appeal (which was later amended) challenging the assessment of the award and inviting the Court of Appeal to increase it to \$11,000,000 or such other sum the court might consider appropriate. The respondents did not challenge the finding on liability, nor did they challenge the award as being too high.

17. The lead judgment in the Court of Appeal was given by Sir Michael Barnett P, with whose judgment Isaacs and Jones JJA agreed. In summary the Court of Appeal held:

(i) The appellant pled guilty to an immigration offence and the Magistrate recommended deportation. The immigration authorities had a reasonable time to arrange deportation. Given the evidence of the challenges faced by the respondents, the court saw no basis for interfering with the Judge's finding that three months was a reasonable period.

(ii) It would have been better if Charles J had awarded a separate sum of damages for the tort of assault and battery, but this was not in itself a reason to overturn Charles J's total award.

(iii) Charles J erred in principle in approaching the quantification of damages for false imprisonment in an overly mathematical way and the sum of \$386,000 she awarded as basic compensatory damages was unreasonably low.

(iv) Charles J erred in awarding both exemplary damages and vindictory damages for breach of the appellant's constitutional rights. There was no respondent's notice challenging the award for exemplary damages and accordingly the Court of Appeal could not interfere with it. However, the court

indicated that it would take it into account in determining the proper global award. There is no challenge to this conclusion.

(v) No error of law had been identified in relation to Charles J's assessment of aggravated damages or damages for breach of the appellant's constitutional rights.

(vi) A global award in the region of \$750,000 for 6 years, 4 months and 6 days of unlawful detention was appropriate. In reaching this conclusion the Court of Appeal had regard to the present day value of the compensatory and aggravated damages award agreed by the parties in *Takitota* of \$670,000 and the fact that there was duplication to the tune of \$100,000 in the awards of exemplary and constitutional damages in this case. The court had "no doubt that the sums claimed by the appellant are simply without any merit whatsoever and are in fantasyland."

(vii) In terms of the appropriate interest period, Charles J operated on a misunderstanding of the law when she ordered that interest should run from the date of judgment. Interest was instead ordered to run from the date of the writ.

(viii) There was no basis for interfering with the Judge's decision to refuse the appellant indemnity costs.

(ix) The parties filed further submissions on costs pursuant to directions given by the Court of Appeal and the Court of Appeal concluded that the appellant could not be regarded as the successful party in the appeal. The Court of Appeal made no order for costs of the appeal accordingly.

The issues

18. Although a number of detailed points of challenge are made to the Court of Appeal's order, the principal issues that arise on this appeal are accordingly as follows:

(i) Were the respondents lawfully entitled to detain the appellant on the basis that they were arranging his deportation, and, if so, was three months a reasonable period?

(ii) Did the Court of Appeal err in the assessment of damages and award of interest?

(iii) Did the Court of Appeal err in its costs award?

Issue 1: were the respondents lawfully entitled to detain the appellant and if so, was three months a reasonable period?

19. Charles J's findings about the appellant's initial arrest and detention are summarised above together with the conclusions she reached.

20. In the Court of Appeal it was noted that Charles J made no finding that a deportation order was made under section 40 of the Immigration Act 1967. Sir Michael Barnett P continued:

"17. In this case the appellant pled guilty to an offence under the Immigration Act and the magistrate recommended deportation. The Immigration authorities had a reasonable time to arrange deportation.

18. This was the position stated by this Court in *Takitota v Attorney General* [2004] BHS J No 294 at paragraph 80:

"80 If it had been proven earlier on that the appellant had landed in The Bahamas illegally, such a decision would have justified the detention of the appellant for a "reasonable period of time" in order to return him to his homeland."

19. In the circumstances, I agree with Charles, J that this reasonable time can be deducted from what would otherwise be an unlawful detention.

20. The appellant challenges the period of three months as being unreasonable. Given the evidence of the respondents of the challenges it faced, I see no basis for interfering with the judge's finding that three months was a reasonable period."

21. Mr Smith KC contends on behalf of the appellant that contrary to the findings of the courts below, there was no lawful power to detain the appellant for three months, or at all, on the basis that the respondents were arranging his deportation. The only power to detain for a reasonable time pending deportation arises under section 41(4) Immigration Act once a deportation order has been made. However, properly construed neither this provision nor section 40 confer power on the Magistrates' Court to make a recommendation for deportation or a deportation order. Nor is there any other provision conferring such power. Even if there were such power to make a recommendation, the Magistrates' Court order cannot be characterised as a recommendation since it ordered deportation; and even if it could be, this would only have allowed detention for a reasonable period until the Governor- General took a decision to make a deportation order or ordered release. Put simply, there was no power to detain for the purposes of arranging removal when there was no deportation order in place. Finally, and in any event, even if there was a power to detain, the burden was on the respondents to show what steps were taken to deport him in order to establish what was a reasonable period of detention and in the absence of any such evidence, there was no basis for finding that three months was a reasonable period to detain the appellant.

22. It is trite law that, as a creature of statute, the Magistrates' Court has no inherent jurisdiction. Any power to make a recommendation must accordingly be found in statute. It is common ground that there are no provisions in the Magistrates' Court Act of The Bahamas giving power to make a recommendation for deportation. The parties agree that the only possible candidate for such a power in Bahamian law is section 41(4) Immigration Act 1967.

23. The Immigration Act 1967 has been amended and consolidated, most recently by the Immigration (Amendment) Act 2021, but none of the amendments bear directly on the issues in this appeal. Sections 40 and 41 (as in force in 2011 when the appellant was first detained) are in Part VIII of the Immigration Act 1967, headed "Deportation and provisions relating to the removal of persons from The Bahamas". The other provisions in this part address the creation of a lien on a ship or aircraft landing passengers in The Bahamas in breach of the Immigration Act, and the cessation or remission of such a lien. Section 40(1) provides as follows:

"40. (1) If at any time after a person, other than a citizen of The Bahamas or a permanent resident, has landed in The Bahamas, it shall come to the knowledge of the Minister that such person –

(a) has landed or remained in The Bahamas contrary to any provisions of this Act;

(b) has been convicted of any offence against this Act or of any other offence punishable on indictment with death or imprisonment for two years or upwards; or

(c) is a person whose presence in The Bahamas would in the opinion of the Board be undesirable and not conducive to the public good,

the Minister may make an order (hereinafter referred to as a 'deportation order') requiring such person to leave The Bahamas within the time fixed by the deportation order and thereafter to remain out of The Bahamas."

24. Accordingly, the power to make a deportation order requiring a person to leave The Bahamas within a fixed period and not to return, is given to the relevant Minister by section 40(1) in the three circumstances identified. The Minister is defined in section 2 Immigration Act 1967 as "the Minister responsible for Immigration and Emigration".

25. Section 40(1)(b) is plainly potentially relevant here. It contemplates the possibility of a deportation order being made by the Minister where a person is convicted of any immigration offence under the Immigration Act or of any other offence punishable by imprisonment for two years or upwards.

26. Section 41(4) is also relevant. Section 41 provides as follows:

"41. (1) Subject to the provisions of subsection (5) of this section any person in whose case a order has been made may be placed, under the authority of the Governor-General, on board any ship or aircraft which is about to leave The Bahamas and the master of the ship or commander of the aircraft shall, if so required by an Immigration Officer, take such steps as may be necessary for preventing the person from landing from the ship or aircraft before it leaves The Bahamas, and may for that

purpose detain the person in custody on board the ship or aircraft.

(2) The Governor-General or an Immigration Officer may give directions to the master of any ship or commander of any aircraft which is about to leave The Bahamas, requiring him to afford to any person in whose case a deportation order has been made, and to his dependants (if any), a passage to any port specified in the directions, being a port at which the ship or aircraft is to call in the course of its voyage, and proper accommodation and maintenance during the passage.

(3) The Governor-General, may, if he thinks fit, apply any money or property belonging to any such person as aforesaid in payment of the whole or any part of the expenses of or incidental to the voyage from The Bahamas and the maintenance until departure of the person and his dependants (if any).

(4) Subject to the provisions of subsection (3) of this section any person in whose case a deportation order has been made may be detained, under the authority of the Governor-General until he is dealt with under subsection (1) of this section; and a person in whose case a recommendation for deportation is in force under section 40 shall (unless the court, in a case where the person is not sentenced to imprisonment, otherwise directs) be detained until the Governor-General makes a deportation order in his case or directs him to be released.

(5) A person in whose case a deportation order is made who is entitled in accordance with the provisions of subsection (2) of section 40 to appeal to the Governor-General against the making of the order, shall not be placed upon a ship or aircraft under the provisions of subsection (1) or detained under the provisions of subsection (4) of this section until the expiration of the period of seven days from the date of service upon him of a copy of the order or, in the event of his making such an appeal, until the decision of the Governor-General thereon is known."

27. Section 41(4) has two limbs. The first limb permits detention where a deportation order has been made by the Minister under section 40(1) and the Governor-General authorises it. It is not in doubt that the exercise of this power to detain is subject to the limits described in *R v Governor of Durham Prison Ex parte Hardial Singh* [1984] 1 WLR 704 (“the *Hardial Singh* principles”) and subsequently approved in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. As applied to the first limb of section 41(4), the *Hardial Singh* principles require the following:

- (i) The Minister must intend to deport the person and the Governor-General can only exercise the power to detain for that purpose.
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances.
- (iii) If, before the expiry of the reasonable period, it becomes apparent that there is no realistic prospect that deportation will take place within that reasonable period, continued detention is unlawful and the Governor-General should not seek to exercise the power of detention.
- (iv) The Minister and Governor-General should act with reasonable diligence and expedition to effect deportation of the person detained.

28. The second limb of section 41(4) applies to an earlier stage of the process and is a holding provision that ensures detention until relevant administrative action is taken where a recommendation for deportation is in place. The words in parenthesis make clear that it contemplates a recommendation for deportation in the case of a person convicted of an immigration (or other relevant) offence but not sentenced to imprisonment, and who may therefore present a risk of absconding. In such a case, this limb authorises the mandatory detention of the person (unless the court otherwise directs) until further steps to enable the machinery of deportation to be carried out are taken. That is entirely unsurprising: where a recommendation for deportation is made, one would expect there to be statutory authority to detain at least until a decision whether to make a deportation order is made, or a direction is given for the person’s release.

29. Limb two of section 41(4) refers to detention “until the Governor-General makes a deportation order in his case or directs him to be released”. Both Mr Smith and Mr Strang submit that this must be a drafting slip because it is plain that it is only

the Minister who has the power to make a deportation order. The Governor-General has no such power, but does have the power to authorise detention.

30. Naturally, the language of this statutory provision was approved and enacted by the legislature of The Bahamas. Given the primacy ordinarily given to the language used by the legislature as an indicator of legislative intention, before a court can correct a slip in the course of construing the provision in question, there must be strong objective indicators to demonstrate that the true legislative intention was in fact different notwithstanding the express words used. Where that is established, the court may in an appropriate case, discharge its interpretative function by correcting an obvious drafting error in order to give effect to the clear legislative intention: see *Inco Europe Ltd v First Choice Distribution (A Firm)* [2000] UKHL 15; [2000] 1 WLR 586. As Lord Nicholls of Birkenhead (with whom the other members of the House of Lords agreed) explained in *Inco Europe Ltd* at 592E – 593A:

“This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v.*

Schindler [1977] Ch 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature.”

31. The Board considers that this is true here: the drafter of the legislation slipped up. The scheme of the Immigration Act 1967 is clear. The power to make a deportation order is dealt with in section 40(1) which gives express power to the Minister to make a deportation order in the three specified circumstances. The Governor-General has no power to make a deportation order, but has power to authorise detention pursuant to section 41. It is also clear that the provision made in limb two of section 41(4) is intended to achieve a situation in which detention is capable of being continuous in the case of a person recommended for deportation to enable the machinery of deportation to be carried out without a risk of absconding. The Board is in no doubt that by inadvertence the drafter failed to give effect to both of these imperatives in providing for detention “until the Governor-General makes a deportation order in his case or directs him to be released.”

32. The parties suggest that simply replacing the words “the Governor-General” with “the Minister” in limb two would achieve the intended legislative purpose. While this would address the patent slip in relation to their respective powers, the Board does not consider that this is sufficient to achieve the full legislative intent. The result of this suggested construction would be that there might be a gap between the making of a deportation order by the Minister under limb two of section 41(4) and the authorisation by the Governor-General of detention under limb one of section 41(4) pending arrangements being made to place the detainee on a ship or aircraft under section 41(1). In other words, the imperative of continuous detention would not necessarily be achieved by this construction of the subsection. In the Board’s view, effect can properly be given to the full legislative intent of limb two by a construction which replaces the words “makes a deportation order” with the following italicised words:

“shall ... be detained until the Governor-General authorises *continued detention* in his case or directs him to be released.”

33. The effect of this interpretation of section 41(4) is that following a recommendation for deportation, the statute provides for mandatory detention in order to allow time for two administrative steps to be taken. First, by implication, the Minister must decide whether to make a deportation order under section 40(1) (since that is a necessary precondition for any detention order under section 41(4)). Secondly, if a deportation order is made, the Governor-General may continue to detain the person under section 41(4) until the person is placed on a ship or aircraft about to leave The Bahamas under section 41(1).

34. Returning to the question of who has power to make a recommendation for deportation, section 41(4) is not entirely straightforward. It refers to a recommendation for deportation being “in force under section 40” without stating expressly how such a recommendation comes into force. The relationship between sections 40 and 41 is clear on the face of the provision and the drafter clearly and reasonably intended that power to make a recommendation should be conferred on somebody. The question is upon whom and how is the provision properly to be construed?

35. Mr Smith submitted that the only proper construction of limb two of section 41(4) is that the recommendation power is conferred on the Board of Immigration (defined in section 2(1) Immigration Act 1967) referred to in section 40(1)(c), when giving an opinion that a person’s presence in The Bahamas is undesirable and not conducive to the public good. He submitted the opinion has effect by way of recommendation. Quite apart from the fact that this is a somewhat strained reading of section 40(1)(c) without obvious purpose, the Board of Immigration is a high level body, exercising general supervision and control over immigration matters, and chaired by the Prime Minister: see sections 5(2) and 6(1) Immigration Act 1967. The idea that the Board of Immigration would be involved in making recommendations for deportation in individual cases is unrealistic. Moreover, the making of such a recommendation is not specified as a function of the Board of Immigration in section 6(1) Immigration Act 1967, which sets out its functions.

36. Rather, in the Board’s view, the words in parenthesis in section 41(4) are a strong indication that the power to recommend deportation is conferred on the court responsible for the person’s conviction. It is entirely to be expected that where an immigration offence is committed and the person is convicted, the responsible court should have power to recommend deportation leading to the person’s detention in order to enable the machinery of deportation to take effect. The acknowledged absence of any other express provision giving a court power in an appropriate case to make a recommendation for deportation so that the person can be detained, and the obvious need for such a power, give all the more reason to construe these words as comprehending a court’s power to make a recommendation

for deportation. The clear words of limb two of section 41(4) contemplate a recommendation for deportation being made in respect of a person convicted under section 40(1)(b) of an immigration or other relevant offence, and the clear implication is that the court in which the person is convicted of such an offence is the body with power to make such a recommendation. This is a rational construction that gives effect to the clear legislative intention. It gives the Magistrates' Court implied power pursuant to section 41(4) to make a recommendation for deportation when an offender is convicted of an immigration (or other relevant) offence and not sentenced to imprisonment. The recommendation carries with it mandatory detention authorised by the same subsection so that the machinery of deportation can be carried out.

37. Once a recommendation for deportation is made, mandatory detention is authorised pursuant to the second limb of section 41(4) but is only lawful pending a decision whether or not to make a deportation order and then, if a deportation order is made, pending a decision of the Governor-General whether to authorise detention for the purposes of giving effect to that order. Given that the liberty of the subject is at stake, there is an implied public law duty on the Minister to act with due diligence and expedition in making such a decision within a reasonable time and a similar implied public law duty on the Governor-General to act with due diligence and expedition in deciding within a reasonable time whether to authorise detention. Absent special circumstances, such decisions should ordinarily be made within a matter of one to two working days. Unless the Minister or the Governor-General, as the case may be, can show that longer than this is required for due consideration to be given to the making of their respective decisions, after that time the lawful basis for the continued detention of the detainee will fall away and he must be released at that point.

38. The Board has no hesitation in concluding that the order made by the Magistrates' Court in this case was a recommendation for deportation. First, Charles J found as a fact that the Magistrates' Court made a recommendation, and this finding was not among the findings challenged by the appellant in the Court of Appeal. Secondly, the Magistrates' Court plainly had no power to order deportation but did have power to make a recommendation for deportation. In the circumstances, what was recorded as an order for deportation is properly to be construed as a recommendation for deportation.

39. Nonetheless, no deportation order was ever made in the appellant's case, as the Court of Appeal emphasised. Thus the appellant's detention quickly became unlawful and the question of a reasonable period in which to make arrangements to effect his removal did not even arise. Both the Judge and the Court of Appeal erred in reaching the contrary conclusion. This is not a *Hardial Singh* case.

40. There is no doubt that the appellant was lawfully arrested and his initial detention was lawful. He should have been brought before the Magistrates' Court within 48 hours, but this was not done and he was detained unlawfully in the days that followed. He was convicted on his guilty plea of overstaying on 18 January – an immigration act offence - and detained pending sentence. That was lawful. On 20 January, the Magistrates' Court made an order recommending deportation. The appellant's detention was thereafter authorised by section 41(4) Immigration Act but only for up to two working days absent special circumstances. In the absence of any deportation order in that time or at all, his detention after the expiry of the two day period was and remained unlawful. It follows that he falls to be compensated for the period just short of three months that was deducted by the courts below from the overall unlawful detention period.

41. In terms of the quantum of damages for this period, there was a late and, in the circumstances, an appropriately faint-hearted attempt by the respondents to rely on *Lumba* and *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 1 WLR 1299 to support a new argument that if the appellant's detention in the three month period was unlawful, only nominal damages should flow because that detention would have happened in any event:

“Where the power has not been lawfully exercised, it is nothing to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort has not been committed.” (See *Lumba*, per Lord Dyson at para 71)

42. This is a new argument as Mr Strang properly recognised on behalf of the respondents. He conceded that an argument that there should be nominal damages only for this period of unlawful detention had not been pleaded or raised by way of respondent's notice, and nor was it foreshadowed in the respondents' written case. The facts would need to be established to support it. Accordingly, Mr Strang did not pursue the argument in this case, but reserved the right to rely on it in an appropriate case in future.

43. We shall return to the assessment of damages for this period below.

Issue 2: Did the Court of Appeal err in the assessment of damages and award of interest?

(1) *The award for assault and battery*

44. The first specific challenge to the damages assessment advanced on behalf of the appellant is to the global award made for false imprisonment, assault and battery.

45. Mr Smith relied on findings made by Charles J that the appellant's claims for assault and battery were made out on the evidence he gave. Charles J identified three particular instances: two beatings, and an unspecified number of uses of tear gas. In addition, she accepted his evidence that he was beaten on numerous other occasions. Although Mr Smith recognised that, at the appellant's invitation, the Judge made a compendious award for the torts of false imprisonment and assault and battery, he contended that the Judge failed to identify when assessing damages, the particular assaults for which the appellant fell to be compensated, or any basis on which compensation was to be assessed specifically for those assaults. Ultimately he submitted, she overlooked entirely the need to compensate for these torts in the global award she made, and there was in fact no element of damages for assault and battery in that award. This conclusion is reinforced by the fact that the Judge tapered the entirety of the award for false imprisonment and assault and battery. While there might have been an arguable basis for tapering an award of damages for false imprisonment, there was no such basis for tapering an award of damages for assault and battery.

46. The Court of Appeal dismissed this ground of appeal, holding that a separately identified award for assault and battery would have been preferable but the Judge made no error of principle in adopting the compendious award approach. Mr Smith repeats the submissions he made below, contending that the Court of Appeal failed to consider the substantive issue whether Charles J overlooked this head of claim and failed in the event, to make any award of damages for this separate tort.

47. The Board considers that there is no merit in this argument. The appellant expressly invited Charles J to make a compendious award for the torts of assault and battery and the tort of false imprisonment in this case. The Judge was well aware of and referred expressly to the guidance given in *Merson v Cartwright* [2005] UKPC 38, para 15 about the desirability of separate awards. She decided however, to adopt the approach she had been invited by the appellant to take. That decision cannot fairly be criticised in the circumstances.

48. Earlier in her judgment Charles J made findings about the conditions of the appellant's detention and his treatment in detention. At paragraphs 22 to 25 she held:

“22. In January 2011, he was arrested by officers of the DOI [Department of Immigration] who held him at the Detention Centre until August 2017. He suffered a lot of pain due to the oppressive conduct of the officers at the Detention Centre. He further stated that when he arrived at the Detention Centre all of his belongings were taken from him and thrown away.

23. Mr. Ngumi also stated that on one occasion whilst at the Detention Centre he was taken from the dormitory into the kitchen by officials. There he was stripped naked, tied, handcuffed under the table and then beaten with a PVC pipe by the officers. He alleged that he received grave injuries to his back and the wounds got infected. The beating, according to him, went on for hours until someone told that officer “we will call the police for you if you don’t stop beating him”. He said that there were about six (6) persons in the room looking on as the officer brutalized him until one of them (a lady) said “that’s enough” “don’t beat him no more”.

24. Mr. Ngumi also testified that there were about 500 hundred persons of different nationalities living inside the dormitory which was only meant for 50 persons. As a result, he contracted diseases. He referred to one of the diseases as “the scratching one”. He further stated that when he left the Detention Centre in August 2017 he went to the Carmichael Road Clinic and was diagnosed with tuberculosis. He was subsequently hospitalized for eight (8) months at the Princess Margaret Hospital. He also testified that during his time at the Detention Centre he was not allowed to use the telephone. He was also oppressed on another occasion by officials after a fight ensued with other detainees and himself. He was handcuffed, taken outside of the Detention Centre where no one was and beaten.

25. Mr. Ngumi stated that there were several raids at the Detention Centre during his time there. Officers would come into the dormitory, take his and other detainees’ bags and suitcases, throw the contents on the floor, step on them and throw water on them. Tear gas was often used on them during those raids.”

49. Charles J observed that the respondents had adduced no evidence to refute the appellant's description of his treatment in detention. She found on a balance of probabilities, that his claims of assault and battery as she had summarised them above were made out.

50. These findings led to her conclusion that:

"62. As already mentioned, Mr Ngumi was deprived of his liberty at the Detention Centre for 6 years 4 months and 6 days or 2,316 days (my computation). His evidence that he was kept in deplorable, inhumane and degrading conditions and he endured cruel and inhumane treatment whilst being housed at the Detention Centre remained uncontroverted. He was finally released when a *Habeas Corpus* application was issued."

It is clear that she described both the conditions in detention and the treatment of the appellant as cruel and inhumane.

51. A fair reading of her judgment demonstrates that her award at paragraph 89 reflected both aspects:

"89. In my opinion, even though the Court of Appeal in *Cleare* [*Jamal Cleare v Attorney General and others* [2013] 1 BHS J No 64] did not find favour with the \$250.00 daily rate in *Takitota*, I still consider the daily rate of \$250.00 to be fair and reasonable considering the socio-economic conditions in The Bahamas. I also took into account the aggravation suffered by Mr. Ngumi which was nothing short of cruel and inhumane. ..."

This is reinforced by paragraph 90 where she referred in terms to assault and battery as well as false imprisonment:

"90. For the torts of false imprisonment, assault and battery, I assess damages in the amount of \$386,000.00."

52. The conclusion that the Judge was making her award for the tort of assault and battery, as well as false imprisonment, is not undermined by the fact that she

tapered this compendious award. Having concluded that a compendious award was appropriate, it was highly likely that if tapering was applied to the false imprisonment element, such tapering would apply equally to the assault and battery element of the same award. Mr Smith accepted this proposition in the course of argument. Nonetheless, the appellant advanced no alternative argument about tapering of the assault and battery element of the award in his submissions to the Judge.

53. Accordingly, there was no error of omission or principle in the Court of Appeal's judgment on this issue. As the Court of Appeal observed, *Merson v Cartwright* makes clear that ordinarily separate awards for the two separate torts should be made. That remains the preferred approach. It imposes some discipline on the assessment, and enables the parties to understand how the award is calculated, allowing for better scrutiny at appellate level. Nonetheless, like the Court of Appeal, the Board is satisfied that it was open to Charles J to make a compendious award here. Further, subject to the remaining grounds of appeal, there can be no doubt given the paragraphs of her judgment referred to above, that the award ultimately made did comprise compensation for the assaults and batteries sustained by the appellant during his unlawful detention.

(2) *The compensatory award: undue reliance on Takitota, coupled with the failure to consider relevant Bahamian authorities, the unfair consideration of authorities from other jurisdictions, and ultimately making an award that was manifestly too low.*

54. Before addressing these arguments, it is convenient to explain what happened in *Takitota*, a case from The Bahamas in which the Board last considered the issue of compensatory and exemplary damages for a long period of unlawful detention. Given the focus by the parties upon this case, it is helpful at this stage to describe what happened in a little detail. The claimant was a Japanese national, who brought a claim for damages for wrongful detention and breach of his fundamental rights under the Bahamian Constitution. He was arrested for an immigration matter, but never charged and never brought before a court. During his long period of more than eight years of unlawful detention, he was detained in various facilities, including a maximum-security facility, and subjected to degrading and inhumane conditions. These conditions drove him to attempt suicide on three separate occasions.

55. The Court of Appeal of The Bahamas assessed damages in the total sum of \$500,000, of which \$400,000 was compensatory damages and \$100,000 was exemplary damages. The award of compensatory damages was arrived at using a daily rate of \$250 multiplied by the number of days in detention which resulted in

the total sum of \$730,500. This was then significantly discounted on a patently wrong basis relating to lump sum awards in personal injury compensation. Moreover, the Court of Appeal arrived at the daily rate figure of \$250 by dividing the sum of \$1,000 awarded by the trial judge for the initial shock of detention and false imprisonment, by the number of days for that period, wrongly calculated as four days. In fact the Privy Council concluded on the available evidence that the initial period of detention was actually six rather than four days, so that the daily rate was much lower. The total sum of \$730,500 arrived at was then reduced by \$330,500, producing a final award of \$400,000, on the basis that the claimant would be receiving a lump sum award.

56. The only issue on appeal to the Privy Council was the correctness of the amount of the total award. The Board declined to disturb the exemplary damages award. However, in light of the errors identified above, the Board held that the award of compensatory damages was not “sufficiently securely based on the facts and the law”. The Board declined to revise the amount of the award itself, holding in line with its established practice, that local courts are better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned. This part of the award was therefore remitted to the Court of Appeal for reassessment. Lord Carswell gave the following guidance on the approach to this reassessment:

“17. The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years’ detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.”

In the event the Court of Appeal did not conduct a subsequent reassessment because the parties compromised the claim in an agreed sum of \$500,000 for compensatory damages.

57. In the appellant's case, the essential reasoning of the Court of Appeal in relation to the assessment of damages was as follows.

58. First, in terms of the global award of \$386,000 for false imprisonment and assault and battery, the Court of Appeal was critical of the Judge's approach: she multiplied the daily rate of \$250 (regarded by her as fair and reasonable considering the socio-economic conditions in The Bahamas and taking account of the cruel and inhumane conditions and treatment the appellant suffered) by 2,316 days, amounting to \$579,000. She then reduced that figure by a third to \$386,000. Having discussed the guidance given in *Takitota*, *Guishard v Attorney General of the Virgin Islands* [2021] 1 LRC 510, *Millette v Nicholls* (2000) 60 WIR 362 and *Ruddock v Taylor* [2003] NSWCA 262, the Court of Appeal held that the Judge's approach did not accord with this guidance, and in particular, the approach set out in *Takitota* at para 17.

59. The Court of Appeal next considered whether the sum of \$386,000 was manifestly too low. It had regard to the award of \$400,000 made in *Takitota*, and the settlement sum of \$500,000 agreed by the parties (uprated to \$670,000 for inflation). It considered the awards made in the following cases: *AXD v Home Office* [2016] EWHC 1617 (QB), *R (Belfken) v Secretary of State for the Home Department* [2017] EWHC 1834 (Admin), *R (Deptka) v Secretary of State for the Home Department* [2019] EWHC 503 (Admin), *Ruddock v Taylor* and *Guishard*. The Court of Appeal concluded in light of these cases that:

"38. A review of these authorities shows that in recent years the amount awarded as compensation for unlawful detention has been consistent. The courts look at the global amount to assess fairness. In none of the cases has there been an award in excess of \$1,000,000.00 as the appellant proposes.

39. Having regard to these authorities, in my judgment, the sum of \$386,000.00 as a basic award for compensatory damages is perhaps inordinately low. However, it must be looked [at] in light of the aggravated and exemplary damages discussed later in this judgment."

60. Secondly, the Court of Appeal disapproved of the Judge's award of \$100,000 by way of exemplary damages (awarded to mark disapproval of and compensate for high-handed, arbitrary, or outrageous conduct, including where relevant, a deterrent element) in addition to \$105,000 by way of constitutional damages because this

amounted to double recovery for the same loss: see *Takitota* at para 15. There was no respondent's notice challenging the exemplary damages award, but the Court of Appeal made clear that it would take it into account in determining the appropriate global award. The Board agrees with that approach, and it is not challenged.

61. Thirdly, the Court of Appeal reasoned that in awarding compensatory damages, the Judge took account of the element of aggravation the appellant suffered in the additional distress, indignity and humiliation arising from the conditions of his detention and his treatment by the respondents. The Judge assessed this element of the award in the sum of \$50,000. The Court of Appeal concluded that the appellant had identified no error of law on the part of the Judge in this regard, but recognised that his complaint was really one about quantum.

62. Fourthly, again in relation to the constitutional damages award made by the Judge, the Court of Appeal concluded that no error of principle had been identified. The sum awarded was regarded by the Court of Appeal as consistent with awards for breach of constitutional rights in other comparable cases (for example, *Takitota* and *Merson v Cartwright*). The Court of Appeal observed that while the award could have been higher, in and of itself it was not unduly low.

63. Having reached those conclusions, the Court of Appeal returned to the question of the global award of \$641,000, which should have been \$541,000 in light of its conclusion that the award of exemplary damages was duplicative. The Court of Appeal continued:

“62. However, we regard the award of \$386,000.00 as unreasonably low having regard to the award in *Takitota*, which in present day value was \$670,000.00 for both the compensatory and aggravated aspects of the claim for damages. In addition, there is the \$100,000.00 for the constitutional damages. In our judgment, an award in the region of \$750,000.00 for 6 years 4 months 6 days of unlawful detention is appropriate. I have no doubt that the sums claimed by the appellant are simply without any merit whatsoever and are in fantasyland. I would allow the appeal on quantum of damages and make a global award of \$750,000.00 instead of \$641,000.00 as general damages.”

64. The appellant contends that the Court of Appeal's reasoning and conclusions are flawed in a number of respects. First, it was wrong to treat the low sum of \$500,000, paid by consent in *Takitota* (after the matter had been remitted to the

Court of Appeal by the Board for reassessment) as equivalent to a guideline determined by the court. Mr Smith submitted that any number of factors irrelevant to the proper quantification of damages might have influenced the quantum of this settlement. The Court of Appeal was therefore wrong to base the assessment of damages entirely on the inflation-adjusted value of the amount the parties settled for in *Takitota*, which afforded no proper guidance at all.

65. Secondly, Mr Smith invited the Board to disapprove expressly of the \$250 daily rate figure apparently adopted in *Takitota* and again by Charles J in this case. Although the Privy Council in *Takitota* made clear that this figure was not securely based on facts or law, he submitted that the Bahamian Courts regularly use a daily rate of \$250 or \$300 (citing this case and *Takitota*). This practice should be discouraged, not least because such a low daily rate cannot be justified. The appropriate figure is much higher.

66. Thirdly, Mr Smith criticised the Court of Appeal's reliance on awards from foreign jurisdictions that were not cited to the court (three from England & Wales, *AXD*, *Belfken* and *Deptka*, and one from Australia, *Ruddock v Taylor*) and in respect of which no submissions were heard; and its failure to take relevant Bahamian authorities into account.

67. In relation to the foreign authorities, he submitted that the cases referred to by the Court of Appeal did not include awards of damages for assault and battery; and the conditions of detention in all of those cases were not remotely comparable to the deplorable, inhumane and degrading conditions in which the appellant was found to have been held. In two of the cases – *AXD* and *Belfken* – the claimant was lawfully detained for a significant period prior to the period of unlawful detention. There were therefore no damages for the “initial shock” of the detention (which, as the cases for short periods of detention show, can be substantial). Moreover, there was no attempt to uprate for inflation, even though *Ruddock v Taylor* dated from 2003, and was 18 years old by the time of the Court of Appeal judgment. There was also no uprating for the higher cost of living in The Bahamas. These are material factors that cannot simply be dismissed.

68. Mr Smith produced an analysis for the Court of Appeal of The Bahamian authorities relied on by the appellant as relevant. He maintained that these are relevant because quantum of damages is to be determined by reference to the societal expectations and social conditions in each jurisdiction. The awards in these cases constitute a reliable body of authority on the appropriate level of damages for false imprisonment in The Bahamas that should have been considered and preferred

to decisions from outside the jurisdiction. Yet these cases were overlooked by the Court of Appeal.

69. Finally under this heading, Mr Smith invited the Board to remit the case to the Court of Appeal for a proper assessment of damages based on the Bahamian authorities cited to the lower courts, and invited the Board to give guidance on the approach to be adopted to that assessment, both to assist the lower courts, and to facilitate settlement by parties in other similar cases. He submitted that the principled (though he accepted not the only permissible) approach to the assessment of damages for false imprisonment is to begin by establishing an appropriate starting point (namely, a daily rate figure) by reference to the local case law, uprated to reflect inflation if necessary. He made detailed submissions about the starting point figure, identifying the lowest initial daily rate figure based on authority and principle as \$5,000 per day, relying on *Lockwood v Department of Immigration* [2017] 2 BHS J No 120, *Anthony Dames v The Attorney General* [2019/CLE/gen/FP/00111] and *Daleon Brown v The Attorney General* [2019/CLE/gen/FP/00110] to support this proposition. He contended, however, for an even higher daily rate figure, with an “upper end” figure of \$20,000 derived from cases such as *Rod Bethel v Commissioner of Police* [2017/CLE/GEN/00825] and *Kevin Ronaldo Collie v The Attorney General* [2017/CLE/GEN/00916]. The next step is to multiply the number of days’ imprisonment by the daily rate. In the case of a lengthy detention, consideration should then be given to whether or not to apply a taper; or whether to apply a modest taper where there is evidence of some increased adverse effect of long-term incarceration. He submitted that the potential for not applying any taper at all remains, and applies in a case where the adverse effects of imprisonment increase rather than decrease over time. Finally, he submitted that the overall sum should be considered in the round to ensure that it represents appropriate compensation. Mr Smith submitted that this principled approach is entirely in line with the Board’s guidance at para 17 in *Takitota*.

70. The Board has emphasised on many occasions that it will not interfere with the Court of Appeal’s assessment of damages unless satisfied that there was an error of principle or that the award was manifestly too low or too high and therefore plainly wrong. This reticence is informed by ordinary principles of appellate restraint, and by the recognition that what is a reasonable sum must reflect local conditions and expectations. The assessment of compensation in The Bahamas is primarily a matter for the Bahamian courts, familiar with local conditions and the society they serve, who are better placed than the Board to say what is appropriate by way of damages. Guidance from other jurisdictions can provide insight but cannot be a substitute for the Bahamian courts’ own assessment of what levels of compensation are appropriate for their own jurisdiction where it exists.

71. This latter point was emphasised in *Scott v The Attorney General (Bahamas)* [2017] UKPC 15, a case concerned with the assessment of general damages for very serious spinal injuries. Reference was made in *Scott* to a number of earlier cases in which the exercise of converting a claimant's physical injury, pain and suffering into a monetary sum by way of damages was described as difficult, artificial and arbitrary. The Board observed that the need to achieve consistency between the decisions of different judges had increasingly constrained the value judgment exercised by judges in the assessment of general damages leading to the introduction, in England and Wales in particular, of guidelines for awarding compensation for different personal injuries sustained.

72. The evaluative exercise called for in assessing the physical and mental deprivation caused by false imprisonment is no less difficult, and is even less precise. There are no guidelines and no mathematical formula is available to be relied on in every case. Rather, the assessment must be sensitive to the unique facts of the particular case and the degree of harm suffered by the individual concerned, while at the same time reflecting a reasonable degree of proportionality to assessments made in similar cases and to awards for personal injury given the parallels between these two types of award. It is now well-established that the initial shock of unlawful arrest and imprisonment may attract a higher notional element than a later period of detention because people do tend to adjust to their changed circumstances, and the initial shock generally gives way to adaptation and resignation, though this may not always be the case. The way in which the arrest was effected and any attendant publicity may be relevant factors in the assessment. Likewise, in assessing compensation for any later period of unlawful detention that follows, any loss of reputation, loss of enjoyment of life or normal experiences foregone, are likely to require consideration alongside the obvious factors of the length of and conditions and treatment in detention.

73. But damages in these cases should not ordinarily be assessed by dividing the award into separate periods or by fixing a rigid daily rate to be awarded for each day of incarceration and multiplying it by the number of days spent in unlawful detention. Rather, as the Board held in *Takitota* at paragraph 17, compensatory damages should be assessed in the round. The appropriate figure should "reflect compensation for the long period of wrongful detention ... any element of aggravation ... the conditions of his detention and ... the misery which he endured" and accordingly, the "final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of [lengthy] detention, taking account of the inhumane conditions and the misery and distress suffered". That is the correct approach.

74. There may be cases where a notionally separate sum is regarded as appropriate to compensate for the initial shock of unlawful detention, but it is not necessary to distinguish between the initial and later periods of detention in every case. Nor is this necessarily the most principled way of making the assessment. What the Privy Council made clear in *Takitota* however, is that if an initial or daily rate figure is taken and simply extrapolated (by multiplying the daily rate by the number of days) to compensate for a longer unlawful detention period, then it should ordinarily be tapered for the reasons given above.

75. The Board emphasises however, the importance in every case of the first instance judge setting out the factors taken into account in making the assessment of damages for unlawful detention. The conditions, treatment and length of the detention will be of prime relevance. There may be other features of the detention that cause particular harm or suffering that are regarded as relevant to the level of damages awarded. If so, they should be identified. Thus, the award should indicate clearly the amount referable to assault and battery. There should be an identifiable award for false imprisonment and for both aggravated damages and exemplary or constitutional damages. As already stated, this is likely to impose a degree of discipline on what is a difficult evaluative exercise, and will enable the parties to understand why the assessment has been made at a particular level. It should provide sufficient detail and analysis to enable an appellate court to decide whether or not the assessment is legally sustainable in the case of an appeal.

76. In the appellant's case, having disapproved of the mathematical formula adopted by Charles J as not reflecting the guidance given in *Takitota*, and concluding that the figure of \$386,000 was unreasonably low, the Court of Appeal addressed the question in the round of what overall sum represented an appropriate global award of compensation for the appellant having regard to the other sums awarded by the Judge. This approach was amply open to the Court of Appeal and consistent with paragraph 17 in *Takitota* which was cited. It reflects no error of principle.

77. Nor does the Board accept the specific criticisms made by the appellant of the Court of Appeal's approach. First, it is correct that the Court of Appeal had regard to the settlement agreed in *Takitota* when the case was remitted. It did so both for the purpose of determining that the Judge's award was too low and in carrying out its own assessment in the round. While the Board accepts the appellant's submission that a number of extraneous factors may well have influenced the settlement sum that was agreed, the Board considers that the Court of Appeal was entitled to derive some guidance from it. *Takitota* is the only other case in The Bahamas in which general damages for a lengthy period of detention have been assessed. Further, the Court of Appeal made clear that it treated the agreed sum as guidance that assisted the court and nothing more. In any event, the Court of Appeal's award in *Takitota* of

\$400,000, reduced from the calculated sum of \$730,500, was not held by the Privy Council to be manifestly too low to compensate the appellant for eight years of detention marked by ill-treatment and assaults. Instead, the appeal was allowed and the case remitted because of the particular errors (described above) that led to the finding that the award was not sufficiently securely based on the facts and the law. The eventual settlement at \$500,000 fell between those two sums and did provide some limited guidance accordingly, particularly in the absence of any other lengthy unlawful detention cases. Comparable cases do not set any kind of framework for such awards, nor are they binding in any way. Their value is as illustrations affording guidance on the approach adopted in a factually similar case. The less similar the case, the less helpful the guidance offered. *Takitota* was a factually similar case and offered some illustrative guidance accordingly, when considering the appropriate award to make in this case.

78. For much the same reason, the Court of Appeal also made no error in referring to cases of awards for longer periods of unlawful detention from other jurisdictions, and making limited or no reference to the Bahamian cases relied on by the appellant. As the Court of Appeal explained, *AXD* involved an immigrant asylum seeker unlawfully detained for 614 days, who was awarded the equivalent of \$112,000 in 2016; Mr Belfken was unlawfully detained for 295 days and awarded the equivalent of \$56,000 in 2017; Mr Deptka was unlawfully detained for 154 days and awarded the equivalent of \$60,000 in 2017; in *Ruddock v Taylor* the plaintiff was unlawfully detained for 316 days and awarded the equivalent of US \$87,000 in 2003; and in *Guishard* the unlawful detention lasted 708 days and the award was equivalent to US \$232,000. These cases were much more comparable to the appellant's case in terms of length than the Bahamian cases relied on by the appellant. Taken together they demonstrated that amounts awarded as compensation for unlawful detention had been fairly consistent and there were no cases where awards in excess of \$1,000,000 had been made. The latter point was relevant in considering the justification for a compensatory award in the region of \$11 million claimed by the appellant. Moreover, given the paucity of comparable awards for longer periods of unlawful detention in The Bahamas, the Board agrees with the respondents that this review provided a relevant and useful cross-check.

79. The Board agrees that it would have been preferable for the Court of Appeal to have offered the parties the opportunity to comment on the English awards and the Australian case. However, the appellant has now had the opportunity to comment on these cases. Mr Smith explained that they are not good comparators because the awards require uprating for inflation, and reflect lesser damage than that suffered by the appellant. This may be true but it is clear that the real relevance of the cases from other jurisdictions was in demonstrating the absence of any support whatever in these jurisdictions, for the appellant's suggested approach

based on a daily rate figure of \$5,000 or more, to be extrapolated and applied to a lengthy detention period producing an award in the region of \$11 million, that would then require tapering. In that sense, the foreign awards supported the Court of Appeal's view that the appellant's claim was wholly disproportionate. Nothing the appellant has said subsequently undermines this view. In the circumstances, the Court of Appeal's failure to offer the appellant the opportunity to comment on the foreign awards was not materially unfair.

80. Nor, in the particular circumstances of this case, was there any real guidance to be derived from the awards made in cases cited from The Bahamas. The vast majority of cases referred to involved relatively short periods of detention measured in hours or days. A small number concerned longer periods of unlawful detention lasting between five and 18 months. But in those cases the courts had followed the appellant's case at first instance and so were unlikely to have advanced the position in any material way. It is implicit in the approach adopted by the Court of Appeal that it rejected the contention that any of the Bahamian cases could give useful guidance in what was a factually materially different case. The Board agrees with that conclusion.

81. In the Board's view, the Court of Appeal made no error of principle in concluding that a reasonable compensatory award in this case was \$650,000. In arriving at that sum the Court of Appeal plainly accepted the appropriateness of the award made for aggravated damages, but otherwise did not refer to each and every factor considered material, as perhaps it might have done. In the earlier part of its judgment the Court of Appeal had rehearsed the findings of fact made by Charles J. This was not an initial shock case. The appellant was an overstayer and lawfully arrested for his immigration offending. Indeed, he pleaded guilty to the immigration offence and his detention was inevitable in the circumstances. He must have expected it. As for the lengthy unlawful detention that followed, Charles J made detailed findings about the conditions of, and treatment during, his more than six year period in unlawful detention. There were repeated assaults. He contracted illnesses. Both the conditions and the treatment were degrading and inhumane. Charles J concluded that the conditions endured by Mr Takitota were worse, and his unlawful detention lasted for a longer period. These were conclusions open to her in light of the evidence she heard about the appellant's unlawful detention and what was reported in Mr Takitota's case. The Court of Appeal was entitled to take them into account, and plainly had all these factors well in mind. As the court with knowledge of local and societal conditions and expectations, it was in a better position to make this assessment than the Board. Whether or not the Board would have arrived at the same final amount is nothing to the point. The Board is unable to say that the award made by the Court of Appeal is manifestly too low in all the circumstances.

(3) *The assessment of constitutional or vindictory damages*

82. It is well-established that an award of compensation will go some distance towards vindicating a breach of constitutional rights but may not always suffice. The fact that the rights that were violated involved one or more constitutional rights adds an extra dimension to the wrong. In those circumstances, an additional award may be necessary to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches: see *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328 per Lord Nicholls of Birkenhead at para 19. The additional award is not punitive. It is designed to vindicate the important constitutional rights engaged, and to compensate for their breach.

83. The appellant claimed damages under articles 17 and 19 of the Constitution, abandoning claims under other articles. He did not pursue a claim under article 18. Charles J found that his constitutional rights had been breached. She awarded the appellant \$105,000 by way of constitutional or vindictory damages. She set out at paragraph 112, four particular factors that she took into consideration, namely the appellant's long struggle to secure his release, his imprisonment in inhumane and degrading conditions, the fact that his health was severely affected, and the fact that the respondents did nothing to assist the appellant on his release.

84. The appellant maintains the argument he advanced below, that the award made by Charles J failed to take account of three materially relevant factors: the sense of public outrage, the gravity of the breach over a long period, and the need to deter further breaches.

85. Like the Court of Appeal, the Board rejects this challenge as raising no error of principle. Charles J expressly referred to the guidance given in earlier cases. While she made no direct reference to *Ramanoop*, the Judge set out the paragraphs of the Board's judgment in *Inniss v Attorney General of St Christopher and Nevis* [2008] UKPC 42 where the guidance given in that case was repeated as to when an additional award of vindictory damages compensating for such breaches is appropriate. Charles J plainly had this in mind in highlighting the inhumane and degrading conditions, the impact on the appellant's health, the long struggle to secure his liberty from detention, and the lack of assistance on release. In identifying these aspects of his treatment, she was reflecting the gravity of the ongoing inhumane treatment he suffered in breach of article 17 and in consequence of his unlawful detention in breach of article 19. It is difficult to see how the award she made did not reflect those serious ongoing breaches, the sense of outrage and the need for deterrence. The Board has no doubt that it did.

86. Moreover, the further arguments relied on by the appellant in his submissions to the Court of Appeal are equally without merit. The appellant never pleaded or made a claim in respect of breach of his article 18 rights (concerning protection from forced labour). While certain amendments were in fact made to his claim following the trial, the amendments he sought did not include a claim for breach of article 18 rights. It was not open to the appellant to raise this claim for the first time in the Court of Appeal, and it is unsurprising that the Court of Appeal declined to address it. The Judge's reference to the global pandemic was addressed by the Court of Appeal and the Board considers that the Court of Appeal was correct to conclude that the award reflected no error of principle in this regard either.

87. The appellant also criticises the final calculations made by the Court of Appeal at paragraph 62 (set out above) which assumed that the constitutional damages awarded by Charles J were \$100,000 when in fact they were \$105,000. Mr Smith submitted that the award should be increased by \$5,000 to reflect this error. While it is quite clear that the Court of Appeal made a factual error in describing the amount of the constitutional award, this does not afford any basis for interfering with the amount awarded in this case. A global sum of \$750,000 was awarded by the Court of Appeal to compensate the appellant for the torts he suffered and to vindicate his constitutional rights. This is the global sum considered appropriate. In these circumstances, the factual error is entirely immaterial.

(4) The award of interest

88. The appellant challenges the Court of Appeal's failure to order that the damages awarded should carry interest from the date when the cause of action first arose (14 January 2011). The Court of Appeal held that Charles J erred in law in relation to the award of interest and exercised the discretion afresh. However, in exercising that discretion and limiting the award to the date of the writ (27 September 2017), the appellant contends that the Court of Appeal erred. It had no reasoned basis for deciding that interest should run from the date of the writ, and failed to make clear what factors it took into consideration in exercising its discretion in this way.

89. Mr Smith submitted that in principle, damages for false imprisonment accrue from day to day from the first day of that imprisonment. If interest is only awarded from the date of the writ, the appellant will receive no compensation for having been kept out of his money for a period of over six years. The usual measure of damages in tort is to put the plaintiff in the position that he would have been in (so far as money can) if the tortious act had not been committed. Without such interest, the appellant is not properly compensated. Furthermore, without interest being payable, the

respondents thereby benefit from their own wrong, as the amount they are ultimately required to pay to the appellant in relation to the earlier period of his detention is decreased by the reason of their wrongful acts in continuing his false imprisonment.

90. The Board rejects these arguments and considers that the Court of Appeal made no error of principle in the award of interest made. The Court of Appeal well understood that there was power to award interest "... on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment" (see section 3(1) of the Civil Procedure (Award of Interest) Act 1992). It was therefore open to the Court of Appeal to award interest from the date the cause of action first arose or from the date of the writ. In deciding to award interest from the date of the writ, the Court of Appeal accepted what was expressly proposed by the appellant as an alternative to awarding interest from the first day of his unlawful detention. It is difficult to see how the exercise of discretion can be challenged in these circumstances.

91. Moreover, this was a rational approach in the circumstances. Although the cause of action accrued on the first day of unlawful detention, only one day of damage and not 2,316 days of damage accrued at that point. To award interest on the full sum from that date would have over-compensated the appellant. To do so at the generous rate of 6.25% (which is the enhanced rate applicable to judgment debts, rather than a commercial rate) for the full period would certainly have resulted in a windfall. In the circumstances, the Court of Appeal was fully justified in adopting the date of the writ as the start date for the interest award, and no error of principle can be identified.

Issue 3: Did the Court of Appeal err in its approach to costs?

(1) *Indemnity costs*

92. The first ground advanced by the appellant in relation to costs is that the Court of Appeal erred in refusing to allow his appeal against Charles J's refusal to award him the costs of the trial on the indemnity basis.

93. Mr Smith submitted that in accordance with the well-established principle that indemnity costs are awarded when the paying party has conducted the litigation in a manner which takes it out of the norm, indemnity costs should have been awarded and Charles J erred in holding that "the conduct of the Defendants was in no way egregious or contumacious". He submitted that her conclusion is

unsustainable given the serious allegations of repeated physical abuse and inhumane and degrading treatment made by the appellant, and the respondents' decision to contest liability all the way to trial, and yet not to file evidence at trial, conduct described by Charles J as "extraordinary". This was unreasonable conduct that demonstrated that the respondents had no real defence, and falls squarely within the circumstances where indemnity costs are appropriate. Moreover, the respondents behaved unreasonably in other respects: they failed to attend the pre-trial review; were late on the first day of trial; refused a request for an interim payment on account made before the Supreme Court and only made such a payment in March 2022; refused to grant the appellant a work permit; and failed to pay any part of the damages awarded following judgment notwithstanding that there is no respondent's notice. The Court of Appeal declined to interfere with the Judge's exercise of her discretion, but the Judge exercised her discretion on an incorrect factual basis, and the Court of Appeal failed to engage with that argument at all.

94. The Board has no hesitation in rejecting this argument. An assessment of the respondents' conduct of the case and whether this amounted to a basis for awarding indemnity costs was pre-eminently a question for the trial judge. Appellate courts will not interfere with what is essentially the discretion exercised by the trial judge unless the judge has made a material error of principle or exceeded the generous ambit of discretion within which reasonable disagreement is possible. The circumstances in which a second appellate court will interfere on questions of costs or matters of practice and procedure, are even more restrictive: see for example, *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320, paras 40 and 49, and *Arawak Homes v Attorney General of The Bahamas* [2016] UKPC 34, para 50 where the Privy Council declined to interfere with an order for costs which had been upheld by the Court of Appeal in the absence of any alleged error of principle. Moreover, as already indicated above, the Board is reluctant to interfere with the discretion of local courts on matters of practice and procedure: see for example *Ratnam v Cumarasamy* [1965] 1 WLR 8, 12; and *Bank of America National Trust and Savings Association v Chai Yen* [1980] 1 WLR 350, 353.

95. The appellant has identified no error of principle on the part of Charles J. Although the conduct of the respondents was far from satisfactory in a number of respects, the assessment the Judge made of the respondents' conduct of the litigation was open to her, and she was entitled to conclude that the conduct was neither egregious nor contumacious and did not justify an award of indemnity costs in this case. Further, the respondents' main effort at trial was to rebut the very high damages amounts claimed by the appellant, on which they were successful to a significant degree, rather than to contest liability in any serious way. The Court of Appeal affirmed the Judge's decision on the ground that no error of principle could be discerned. Accordingly, in the view of the Board, there is no good reason for the

Board to interfere with the decision to award costs on the standard and not on the indemnity basis.

(2) *Costs of the appeal to the Court of Appeal*

96. The appellant also challenges the Court of Appeal's refusal to award him the costs of the appeal. The appellant accepts the general rule that the successful party pays the costs of the unsuccessful party, and that the court has a wide discretion as to costs to be exercised on the facts of any particular case, but submitted that in holding that the appellant was not the successful party in the appeal, the Court of Appeal erred in law. The appellant relied on the explanation given by the Court of Appeal as to why the appellant was not the successful party, at paragraph 22 of the costs judgment, as follows:

"22. In my judgment it is unrealistic to hold that the appellant was 'successful overall' in this appeal. At all times this appeal was about quantum. The appellant's position both here and in the court below was that he was entitled to general damages in the millions of dollars. The sum of \$11,000,000.00 to be exact. Although this Court increased the amount of general damages by just over \$100,000.00 it was not remotely near the sum being advanced by the appellant and on which this appeal was vigorously argued. Indeed, the appellant does not really consider himself as being successful in his appeal as he has appealed this award to the Privy Council as being 'manifestly too low'."

He submitted that in addition to securing an increase in his general damages from \$641,000 to \$750,000, the appellant obtained an award of interest on the higher judgment sum and from an earlier date, resulting in an overall increase in the award due to him of a little more than \$250,000. This was a successful outcome.

97. Moreover, he did not limit his appeal to a claim for \$11 million, but sought in the alternative, "such other increased sum as the Court may determine on the appeal". Mr Smith relied on *Global Energy Horizons Corporation v Gray* [2021] EWCA Civ 123; [2021] 1 WLR 2264, where the corporation recovered over £3.6 million, but in circumstances where it had claimed just under £227.8 million. The court held that it was the successful party notwithstanding that it had recovered only a small fraction of the sum claimed, and that the respondent could have protected his position by making an appropriate CPR Part 36 offer. He submitted that the same is true here. Nor is this a case where the appellant was found to have lied about or

exaggerated his claims. The fact that \$11 million was claimed, as opposed to some lesser sum, had no real causative effect on the conduct of the proceedings, and reliance was placed on *Widlake v BAA* [2009] EWCA Civ 1256, [2010] 3 Costs LR 353 in this respect, where in a personal injury claim, the correct question to be addressed was identified as to what extent the misconduct of lies and exaggeration caused the incurring or wasting of costs.

98. The Board does not accept these arguments. As the Court of Appeal recognised, although the successful party to an appeal has a reasonable expectation of obtaining an award of costs to be paid by the opposing party, there is no right to this result, and costs are always in the discretion of the court, such discretion to be exercised judicially. Moreover, the question of which party is the successful party is not automatically determined by reference to the fact that the appeal was allowed. There are cases where no clear winner of an appeal can realistically be identified, and such cases may justify no order as to costs.

99. The Court of Appeal concluded that this was such a case. In the view of the Board, the Court of Appeal was entitled to reach that conclusion and did not overlook the issues on which the appellant had achieved success. Nor was it bound by the approach in *Seepersad v Persad* [2004] UKPC 19 (Trinidad and Tobago). In particular, it was open to the Court of Appeal, for the clearly articulated reasons it gave, to have regard to the significant disparity between the quantum of the award achieved by the appellant, and the level of award he sought, both at trial and on appeal.

100. The appellant's failure to obtain the very large award he sought was a function of his failure to persuade the Court of Appeal to adopt his approach to the calculation of damages. He failed to increase the award of exemplary damages (to the sum claimed of \$5 million); and the award of aggravated damages (to the sum claimed of \$1 million). He failed on his appeal on the questions of assault and battery and constitutional damages. Moreover, as the Court of Appeal identified, he also failed on the question of indemnity costs and failed to persuade it to award interest on damages from the first day of his unlawful detention.

101. For these reasons the Board is satisfied that the Court of Appeal was entitled in the exercise of its discretion to conclude that the appellant was not the successful party overall, and consequently, to make no order as to costs in the Court of Appeal. It made no error of principle and there is no proper reason for the Board to interfere with its decision. This ground also fails accordingly.

Conclusion

102. The Board's conclusions on the issues raised by this appeal mean that the Court of Appeal's judgment is undisturbed save in relation to one aspect of this case.

103. Although the law empowered the appellant's detention for the purposes of making a decision to deport him, and thereafter (if authorised by the Governor-General) pending his removal from The Bahamas, no deportation order was ever made. Indeed, nothing was done in the initial three month period by way of arranging either step. Accordingly, there was no basis for the Judge's finding that there was a period of detention, assessed as three months, that was lawful. This period of detention (less a couple of days) was unlawful. The Court of Appeal was wrong to hold otherwise.

104. Damages for this period fall to be assessed accordingly. Since no other aspect of the award is to be remitted, the Board has concluded that it should assess damages for this period. Acknowledging that this is not an initial shock case, and taking into account the findings made by the Judge about the appellant's appalling treatment in, and the conditions of, his unlawful detention (including the fact that he suffered assaults, that the treatment was malicious and oppressive and that his constitutional rights were breached) the global award for this three month period is assessed as \$50,000. There will be interest payable on that sum in accordance with the Court of Appeal's judgment.

105. For all the reasons given above, the Board will humbly advise His Majesty that: (1) the appeal should be allowed against the finding that the respondents were lawfully entitled to detain the appellant for a reasonable period (assessed as three months) pending arrangements for his deportation; (2) the appeal in relation to all other grounds should be dismissed and (3) it should be determined that the respondents should pay damages in respect of the additional period of unlawful detention of approximately three months assessed in the global sum of \$50,000 with interest payable thereon from the date of the writ at the rate of 6.25%.