Neutral Citation Number: [2009] EWHC 873 (Admin)

Case No: CO/9617/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday, 18th February 2009

B e f o r e:

SIR GEORGE NEWMAN
(Sitting as Deputy High Court Judge)

- -

Between:
THE QUEEN ON THE APPLICATION OF N

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

- -

Mr N Armstrong (instructed by Refugee Legal Centre) appeared on behalf of the **Claimant**
Ms J Richards (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

- -

J U D G M E N T

1. SIR GEORGE NEWMAN:

2. In this case the Secretary of State for the Home Department has through counsel, Ms Richards, conceded that the claimant was unlawfully removed to Uganda on 18th September 2008. It has been conceded that there should be appropriate declaratory relief. The issue for determination is whether there should be a mandatory order requiring the defendant to use her best endeavours to return the claimant to the United Kingdom. It is elementary that this is a matter for the discretion of the court, such discretion to be exercised judicially. In my judgment, in connection with this case, it requires consideration to be given, first of all, to the nature of the unlawful conduct and appropriate characterisation of the gravity of the conduct; and secondly, consideration of the consequences as they effect the claimant, and also whether any public interest consideration should be taken into account.

Between 17th September 2001 and 9th September 2008, the claimant having arrived in the United Kingdom was, from time to time, involved in proceedings in connection with his human rights and asylum claims directed to preventing him being removed to Uganda. The significant underlying factual substance of his claims, has been and remain the fact that, he is a homosexual. There is no issue as to that.

Moving therefore forward through those years, some 7 years, I will go to 30th June 2008, when Mrs Justice Dobbs dismissed an application for reconsideration in connection with further claims which had been advanced on his behalf. He was then in a situation where he was required to report and he did. On 9th September he was detained on reporting and served with removal directions which were set for the 14th September 2008. On 11th or 12th September, the Refugee Legal Centre accepted instructions from him and a fresh human rights claim was submitted. On the 13th September that claim was refused and notice was given in that letter to the effect that he would be removed tomorrow namely the 14th, at 6.40 am.

On 14th September, the attempts to remove him were unsuccessful, and as necessary I will come back and deal with some of the facts surrounding that occasion. It is clear that the unsuccessful removal on 14th was made public. It was reported in a Ugandan newspaper published in Uganda on 15th September. The publication gave rise to further representations from the Refugee Legal Centre dated 16th September. That letter included what was described as:

> "...the following fresh evidence ...
>
> "1. The New Vision Online: Uganda's leading newspaper - e-mail print out of the newspaper's front page dated 16th September 2008.
>
> "2. The New Vision Online: article from the newspaper's front page - "Gay refuses to return to Uganda" dated 16th September."

Before coming to the documents put into court today by the defendant, I will complete this stage of the chronology by referring to a fax dated 17th September which was sent to the Refugee Legal Centre, the next day (the 18th) at 11.57am, being the day upon which he was removed in accordance with a process, which commenced at about 4.30 in the afternoon.

I will now back track in order to cover the position which had been going on behind the

scenes and without the knowledge of the Refugee Legal Centre until a letter dated the 18th September was dispatched at 16.54 hours by the Border Agency. That letter, in its most material part, responded to the~request by the Refugee Legal Centre that the claimant should not be removed without further removal directions responded being served and the passage of the minimum notice period which policy required. It stated:

> "As you are aware the Enforcement Instruction and Guidance policy provides for departure of the minimum notice period for the service of removal directions. The Detention Services Order 07/2008 provides a specific additional instructions relating to the service of removal directions.
>
> "We have been given the requisite authority to withhold the service of removal directions on your client for reasons provided by the aforesaid order. This authority has been obtained in advance by the Deputy Director (Head of Operations) for Detention Services."

The passage I have just quoted was not only opaque in its content but on any analysis of what in fact had gone on was simply inaccurate. In truth, after the unsuccessful removal on 14th, which was a Sunday, the future course was determined on the next day.

On Monday 15th September at 2.26 pm an email was sent to Alan Kittle. The email was sent by Tracy Smith, the Operational Casework Manager, UKBA Portsmouth and was sent to Alan Kittle who, I believe, was at Croydon. Anyway, the effect of Tracy Smith's email was as follows:

> "I have been asked by Tony Erne, if I can email you regarding the above named applicant currently detained at Tinsley.
>
> "This applicant was detained on 9th September 2008, when he reported to the local reporting centre. Removal directions were set for 14th September 2008 at 6.40 am. On Friday 12th September 2008, Portsmouth were bombarded with letter of support [presumably letters of support] that this applicant should not be removed; this case also attracted media coverage. E-mails were also sent to Brussels regarding his removal by the campaigners.
>
> "The applicant failed to leave the holding room for his flight on Sunday. Removal directions have therefore been reset for 18th September 2008, along with two escorts, applicant has now been booked onto a direct flight with British Airways.
>
> "I spoke to Tony Erne this morning to see if we could serve the removal directions on day of removal or if we can serve the removal directions today but leave out all the flight information and just let him know that he is being removed on Thursday 18th September 2008.
>
> "Could you also confirm that if we have RD's booked [removal directions booked] and for some unknown reason removal does not proceed and new directions are set within five days, then we do have to give them another 72 hours notice of removal.

"Tony is happy with the above but has requested that I email you for clarity."

Clarity came because Mr Alan Kittle responded, within a short space of time, 3.16 pm:

"As discussed, I am hope happy to authorise this as a same day removal on the grounds that he was previously given 72 hours notice of removal which was cancelled because of his disruptive behaviour.

"I am copying in Fiona Cooper from DEPMU and Debra Weston at Tinsley House for information. Please note that we just inform Mr N when he is collected by the overseas escorts that he is being removed to Uganda, not the flight details. The removal directions paperwork will reflect this and just contain the destination of his removal."

The events which occurred on 18th were set on 15th. On the 16th September 2008, there having been further representations, the response was drawn up on 17th but not faxed until 18th.

I am satisfied that the decision reached on the 15th September by Mr Alan Kittle, which resulted in the conduct on 18th September, was manifestly unlawful. I will break down the heads of unlawful conduct. On my analysis Mr~Kittle's decision was driven, because it was a decision made on 15th September, firstly by a completely wrong headed conclusion that fresh removal instructions did not trigger a 72 hour notice requirement; or at least did not trigger a 72 hour notice requirement when there was evidence of disruptive behaviour. That equally was completely wrongheaded because disruptive behaviour cannot of itself alter the obligation which exists that there is by reason of declared policy to allow 72 hours by way of moratorium between the service of removal directions and actual removal. It seems to me that anybody in the position of Mr Alan Kittle, or anybody else concerned as officers of the Border Agency, must have known that the 72 hour requirement was designed to provide an opportunity for the person to be removed to have access to a lawyer for legal advice and to enable, in accordance with the policy as laid out, any application for judicial review to be commenced and for the court to become involved.

I am not concerned on this application to consider what circumstances could arise in which, as the DSO7/2008 suggests, the 72 hour notice can be dispensed with, namely a record of non compliance and such a level of serious disruptive behaviour which might, in certain practical circumstances, lead to the need to dispense with the 72 hour requirement. That, if it is to be challenged as part of the policy, seems to me to arise for another day, it is not something I need determine here, since I am content to decide, on the material about which I am certain, what the appropriate relief should be without entering into that area of contention.

The facts surrounding the removal on 18th September have been deposed to by the claimant in a witness statement and he states as follows, paragraph 16:

"On Thursday 18th September, security in Tinsley House came for me at around 4.30 pm. They confiscated by mobile phone and said that this was procedure. I was very worried and I asked them where I was going. They said to me, "we're taking you for an interview with an Immigration Officer." I remember directly asking them whether I was going be sent back to Uganda and they said, "no" and not to worry; it was only an

interview.

"Because they said it was just for an interview I agreed to go with them. There were four guys and they kept saying, "we will bring you back." I remember them telling me that I should eat something, as I would not be back to Tinsley House for several hours. I was put in a van and we drove for just a short period of time and then stopped somewhere; I could not see where. The two men in the back with me where called Michael and Paul. Michael was quite nice and asked me a few questions. Paul told me to shut up when I tried to tell him I was worried. The other two men sat in the front and I don't know their names. One of the guys got out from the back with me and said he was going to get the Immigration Officer and wouldn't be long.

"When he returned he had bits of paper with him and it said, "Removal Directions". It did not specify a date or a time. This would have been at around 6.00 pm. I questioned the security men as they had promised I was going for an interview and to be honest they looked a bit confused too and said they thought I was seeing an Immigration Officer first.

"I asked if I could talk to a solicitor or a friend but they said this was not allowed. From there I was driven straight to the plane. I felt sick and stressed and was starting to cry. I couldn't believe that this was happening to me and no one even knew.

"The van stopped outside the plane for what felt like around 30 minutes and Paul and Michael stayed in the back with me. After 30 minutes or so I was told to get out of the van. When I refused all four men entered into the van to get me. I backed away and struggled and said, "I want to see an Immigration Officer" and asked again if I could call my solicitor. The security men said there was nothing they could do and I had to get on the plane.

"I did not fight them, I was just trying to resist leaving the van. All four of the security men pulled me outside of the van and I was handcuffed. I refused to stand up when I was outside so they lifted me off the ground and then pushed me back on to the ground and the man who had been driving the van punched me in the private parts to make me straighten my legs and then they tied my legs with a sort of belt like you find for a wheelchair. The other men who had sat in the front of the van was hovering his fist over my face and I was crying and asking him not to hit me. I remember there were people there loading things onto the plane and two policemen.

"All four men lifted me off the ground with my face facing upwards and on to the plane. I am afraid I don't recall exactly how they did it and where they were holding me, just that I could not see around me and I was being carried horizontally to the floor. I think that two were by my

> legs and two by my arms. I was crying because of where the driver had hit me and also the handcuffs hurt and I was trying to tell this. Everything happened so fast and I was in a bad way."

He goes on to say that he sat in the back of the plane. There is, of course, no evidence from the defendant in respect of that account of events but in so far as one can form a view about its central contents, it is not really in dispute, because we have the documents from the defendant, being important formal documents headed, "the use of force incident report". They describe that indeed he was handcuffed and that his legs were bound so that there were restraints put on his legs. He was placed in handcuffs and also his legs were secured so that he could be lifted from the vehicle.

What then should the court conclude so far as this conduct is concerned? How serious a view should the court take of actions, such as now accepted undeniably as being unlawful, which involve the use of force and physical restraint to get the claimant to the plane? Credibly, it seems to me, this probably did involve him not being told when he left Tinsley House that he was being taken to a plane, that no doubt was all part and parcel of the essential strategy which had to be employed, namely that he should not know that he was being removed until the very last minute when, if he caused trouble, he could be restrained. So it seems to me credible, at this stage, to conclude that indeed he was told that he was going to an interview and that he would be returning to Tinsley House.

Why he had his mobile phone removed from him might be not so clear, but at least, on one view, it would be consistent with the strategy that there was that he should not be able to contact anybody. That he was not able to contact anybody and indeed deliberately prevented from contacting anybody is available from the evidence I have read because he requested contact with his solicitor he was told that that was not allowed.

Thus, so far as this breach is concerned, I am satisfied that the actions of the officers of the Border Agency were deliberate. They were deliberately calculated to avoid any complication which could arise from removal being publicly known. It was a deliberate decision that he should not be told the flight details. They deliberately misled him in order to prevent him making any contact with the Refugee Legal Centre when it might have been possible for him to do so. Then later when it was impossible for him to do that, he nonetheless requested it, and they flatly refused to allow him to do it. They took these steps to restrain him, and to restrict the opportunity he might have, to cause difficulty which could complicate their intention to remove him.

What can one conclude was the reason for this conduct? First, it was thought to be justified upon a completely wrongheaded approach to the 72 hour requirement, namely the suggestion in the e-mails, which I have recited, that if removal directions fail and fresh removal directions are required, as long as they are served within five days no fresh 72 hour requirement arises. Miss Richards has very properly accepted that that is simply not right. It follows the removal was unlawful on that ground alone.

The decision seems to have been driven by some awareness of the Detention Service Order (7/2008), but it is clear from the documentation, namely the letter to which I have referred and from which I have quoted, that the DSO was applied where the factual circumstances came nowhere near falling within the exception which the DSO contemplates. Further it was action taken in respect of a DSO which had never been adequately or properly published. I shall return to that feature in a moment.

The DSO in its material part, under the rubric, "Service of Removal Directions in

Exceptional Cases", in paragraph 11, states:

> "An exception to the minimum 72 hour notification period (three working days in the case TCU and NSA cases) may be made in the following circumstances:
>
> "(a) The detainee (or a member of his or her family who is also detained) is subject to an open Assessment, Care in Detention and Teamwork procedure and is considered to be at risk of either potential suicide or other self harm;
>
> "(b) The detainee (or a member of his/her family who is also detained) has a history of non compliance either with the operator and/or the UK Border Agency and there is strong evidence to suggest that an attempt to remove him/her with advance notification poses a risk to good order and discipline of the Centre, which cannot be managed effectively in another way. In such circumstances, the detainees should normally be removed from association 24 to 48 hours in advance removal. Removal Directions should then be served by a member of the UK Border Agency team in the Immigration Removal Centre as soon as possible. Only in very disruptive cases or where it is not possible to remove the individual from association (e.g. a family where there are no suitable rooms available) should removal directions be withheld completely."

It is clear to me that when Mr Alan Kittle reached his decision on 15th September to the effect that the circumstances of this case justified same day service of removal directions and the use of the various devices which flowed from his advice, that there was no evidence at all of what could be regarded as a history of non compliance with either the operator or the UK Border Agency. The only history, so called, could be the conduct in which he refused to move from the room on the 14th September. There was plainly no strong evidence to suggest that an attempt to remove him with advanced notification posed a risk to good order and discipline which could not be managed effectively in another way.

Having regard to the content of the exchange of the emails, it seems likely that more weight was actually paid not to what had happened on 14th September but to the fact, as it had been described by Tracy Smith to Mr Kittle, that on 12th September Portsmouth was bombarded by letters of support that this applicant should not be removed, that the case attracted media coverage and because emails were sent by campaigners to Brussels regarding his removal. It seems likely that the considerations which drove Mr Kittle had nothing to do with the claimant but more to do with what he thought might be a public protest which could be generated by campaigners and supporters. That, needless to say, was completely immaterial to a decision as to what obligations were owed to the claimant.

Further, it seems to me, very difficult to understand how the conclusion was reached on such source material, that notice of removal had been cancelled because of the claimant's disruptive behaviour. All that Mr Kittle had been told was that he failed to leave the holding room for his flight on Sunday. As was pointed out, in so many cases where different people are involved, conveying messages at different levels to different personnel, once something gets on to the record, for example, that somebody has

behaved in a disruptive way, there is little evidence that anybody thereafter makes any enquiry as to precisely what it was that occurred. It gets past on through the records so that you end up with preparations taken for the day in question in which four people set out to take one man to a plane, themselves prepared for the task with handcuffs and leg a brace or leg restraints and engaging in deceptive measures, in order to keep him ignorant as to what is happening. At the very least, one would expect that in cases such as this, if it is disruptive behaviour which is to form part of the policy in connection with removal directions and to have an impact upon the 72 hour period, the very least one would expect is that those responsible for implementing the policy should carry out enquiries into the nature of the disruption and the relevant facts. No one, exercising a reasonable judgment, assuming it was a permitted conclusion to which the person could come, could have been satisfied that the exception sets out in the DSO7/2008 was supported on a proper evidential basis.

What then about the lack of publication? I confess it is difficult to understand why this DSO, containing as it did a very important exception in connection with what are now almost day to day events, namely the implementation removal directions, was not published. It is even more bemusing that it was not published or known by any of the agencies with whom the Border Agency, on a regular basis, are liaising, for example, with the detention user group. I need not go into the details, but there are statements before the court from those involved in those agencies, from those who attend the quarterly meetings. There is evidence from the Refugee Legal Centre, a detention user group, being a stakeholder group convened by the Director of Detention Services for the UK Border Agency comprising immigration practitioners and members of NGOs. They have an interest in immigration detention. The minutes of the various meetings relevant to this are before the court.

It is apparent that information was given of DSOs in 2008, but none of the relevant agencies were informed of the existence of DS07/2008. It possible that part of the explanation for this chapter of events is that those in the Border Agency did not really know much about DSO7/2008.

In the circumstances, I pick up and echo what was said by the Deputy President of the Asylum and Immigration Tribunal, Mr Ockelton, in a case notified on 7th January of this year by the Asylum and the Immigration Tribunal, in which he observes:

> "In the present case the problem is different: the policy was published in different versions to different groups of interested people, with the result the Secretary of State's officers were themselves not aware of its terms. It has become in general apparent that litigation is now often necessary to enable even the government to discover what its immigration policies are."

Of course publication to effective parties of policy is elementary, it has to be done, but as it seems to me this case could well demonstrate that the unavailability of it as a published document, as a recognised document, led to those in the agency not being familiar with it. Of course, these things only work if those involved on all sides know what is meant to happen. It is the whole point of having the user group. Then at least if somebody slips up in the agency the user group can refer to it and proper decision making will take place. The thrust of the matter is that these decisions should be made by involving the teams of people, who have different interests, but who all operate from the same legal base. It remains a mystery, why it was not published. The matter should be the

subject of question and inquiry.

How do I categorise this breach? I take a very serious view of the way in which these events evolved. The initial decision taken on 15th December was a decision to which nobody should have come. Those responsible for the contents of the letter dated 18th September, which made reference to the DSO, manifestly failed to alert themselves to the relevant material. It follows, and this is before one travels to Uganda, the claimant was treated unlawfully and in a manner which was quite outside anything which was contemplated even by the policy laid down in 7/2008. It amounts to a grave and serious breach and it was accompanied by grave and serious circumstances. An individual was taken out of the place where he was held, in circumstances which I have described, placed in a van with four people and he did not know where he was going. He was then decieved, denied assistance and was manhandled.

Next, what view should one take in connection with the second aspect? I refer to namely the consequences, I will not repeat what I have said about the consequences in the United Kingdom, let us turn to the consequences as they occurred in Uganda. The claimant arrived back at Entebbe, he was asked lots of questions at immigration. For a short time, he was still in the presence of security people but they went. He was then told he had to report to the police as they were holding his suitcase. He reported to the police and the lady police officer said something to him, "I have read about you in the newspaper and know all about you and I can arrest you now, you know it is not allowed in this country". That was obviously a reference to homosexual behaviour. She then asked him what he had to give her to let him go and he gave her £40 as a bribe and he was allowed to go. He has described the circumstances in which he made contact in the United Kingdom and he has described how he felt desperate.

According to the second statement made by him, he tried to obtain Ugandan identification papers, tried to get a copy of his birth certificate. He did that on 7th October 2008. He was then recognised again at the reception desk by reason of the newspaper article in the New Vision newspaper. Then people in uniform arrived. He was taken to a room in the hospital and searched and his UK driving licence was found. He was then told he was not Ugandan. Next he was taken by three men to the Ministry of Internal Affairs. He was there further questioned. He was then taken to the police station where he was detained from the 7th October until 10th October. He was denied access to a lawyer and was not allowed to call anybody, nonetheless he was not charged with anything.

He had obviously been recognised from the newspaper photograph and he was maltreated. People hit him with batons on his ankles, knees and elbows. He asked why he was being held and was told by the police that being gay was part of western culture and why would he want to do something that was illegal in Uganda. He was kept in custody, other inmates were hostile to him. Lots of people in the police station knew he was gay. Then he was taken on 10th October to another prison where the conditions were as bad as he described in the police station. He was in a room with 156 people and the people knew his story. Then he was taken to court and was accused of having falsely identified himself because he did not have a Ugandan passport. It will be one year in prison, he was told, or 200,000 shillings. He said he would pay the fine and he did. He was told on his release to report to the police station. "As I had another charge to answer based on the newspaper article based on my sexuality." He says, he is too scared to go back to the police because he was beaten up in detention. That is what

happened when he went back to Uganda.

Ms Richards, again correctly, accepts that I should consider and pay regard to what happened when he went back to Uganda when considering exercising of my discretion. In my judgment the consequences, really go to the question of what is the effective relief to which this claimant is entitled. In that regard the issue between Ms Richards and Mr Armstrong is essentially focused on the merits of any claim he might have for human rights protection or other legal protection wise, if he was here in this country in a position to pursue it. Ms Richards submits that the letter by way of rejection of the representations based on the Kenyan article was rational and lawful.

In that letter the publication of the article in the newspaper, was considered by reference to the credibility or lack of credibility which the claimant attracted through manufacturing another article which was in evidence before the immigration judge. Whatever might be determined to be the ultimate lawful character of the decision letter, the response to the Article 8 claim seems to me to be unimpressive. There was sufficient material before the decision maker, contained in what had been sent, for it to be unlikely that this was yet another article he had been able to manufacture. It might have been believed that it was an article for which he was in some way responsible, but that is not the basis of the comment in the letter. If there was any doubt about whether it was a genuine article in the newspaper, it was on the website. Enquiries could have been made in Uganda. That said this aspect is really almost by the way. It seems to me that the material parts of the case, as they now present themselves, are that there was an article in the Ugandan newspaper, and on the evidence before me it is perfectly plain that the article gave rise to enquiries and to a period of detention. The article must have come to the notice of authorities in Uganda, and thereby the risk of his human rights being breached by reason of his homosexuality had been increased. Ms Richards submits that one should have a qualified approach to the evidence because his detention by the police and being charged in court in respect of documents suggest he was being treated in that way, not by reason of his homosexuality but by reason of his lack of proper papers. I am reluctant to conclude that the underlying agenda in connection with his arrest, charging and the behaviour to which he was subjected, can be separated from the fact that he was a known homosexual. He was warned that he needed to go back to the police station because his conduct could be the subject of another charge.

So what does it all lead to? I am unable to accept the submission that he has such a weak case that the need for him to return and to pursue it simply does not arise. On the low threshold, which of course I have in mind and have been reminded is the circumstances in which a fresh claim can arise, I find it impossible to conclude that there is not a real possibility that a judge might find that he is at risk if he is returned to Uganda by reason of his homosexuality. Nothing I have said is meant to be understood as prejudging that issue. I have merely expressed it in the terms I have for the purposes of dealing with the contentious issue which is before me today. I am satisfied that on both the limbs that I have examined, namely the seriousness of the unlawful conduct, the consequences as they are worked out upon the claimant, and the facts as they now exist in connection with such human rights claims as he would wish to make, that justice requires that he should, if possible, be brought back to this country so that he can make his claim as effectively as he can.

Therefore, without hesitation, I exercise my discretion to grant the claimant a mandatory order that the Secretary of State should use her best endeavours to secure the return of

the claimant to the United Kingdom. The precise terms of the declaration, and the precise terms of the mandatory order can be drawn up by counsel, if they so wish, rather than be taken from this ex temporary judgment. That disposes of the issue I had to decide.

3. MR ARMSTRONG: My Lord, yes, I am grateful, some supplementary matters which can be taken very briefly. Firstly, as a matter of timescale, I suspect this needs to be left between my learned friend and myself, my instructions are that he can present himself to an embassy in Uganda, quickly and probably within days. I understand that Ms Richards has no information as to how quickly a travel document can be produced for him there, although his mother is behind me who will know much more about this than I do, so other than a quickly functioning embassy and even there it appears to be quite quickly. So it is right in my submission to put that on the record that that ought to be done with as greater degree of speediness as possible.

4. Moving on, the other matter is, I do not know if my Lord wants to say anything about this, but I am content to take the course that Ms Richards has suggested which is that any damages are left over.

5. SIR GEORGE NEWMAN: Yes, sorry, I take it there is no dispute in connection with that. You can include that in the order.

6. MR ARMSTRONG: I am grateful.

7. SIR GEORGE NEWMAN: The only other matter that we have to deal with is the matter raised by the press.

8. MR ARMSTRONG: Yes, my Lord, the only matter, of course, is that I do seek my costs in relation to today. The only matter in relation to that that I would raise in addition is that I do say this is a case that indemnity costs is the case, just on the basis that the tests is whether it is something outside the norm and given, particularly the lateness of the concession, the urgency of the matter and the accepted urgency of the matter in October. There is then a measure of criticism of the way the Secretary of State, I do not say for moment that it is Ms Richards who has become involved late, but there is an overall criticism to be made and this is the case where the burden ought to shift in order. The effect of the indemnity costs order is that they have to show that our costs are unreasonable, rather than the other way around; and that this is an appropriate case to make the order on the indemnity case rather than the standard basis.

9. SIR GEORGE NEWMAN: I shall, no doubt, be castigated for asking the question, but have you the advantage of legal aid or Legal Service Commission.

10. MR ARMSTRONG: My Lord, I do.

11. SIR GEORGE NEWMAN: You are not privately funded.

12. MR ARMSTRONG: No, we are not privately funded and I do also seek a legal aid order in the usual form. One needs that as well, but the effect essentially of getting an indemnity costs order is that, in practical terms, the effect of the costs order is that the Legal Services Commission does not pay any of it but the effect of the indemnity costs

is that if there are disputes about individual items then the burden in relation to whether those are reasonable or not lies on the Secretary of State on the indemnity basis and not us on the standard basis, that is the effect of the indemnity costs provision.

13. SIR GEORGE NEWMAN: Yes. What about the press? We seem to have a working formula. Are we still content to work on that one, namely no reference to his name but to X or --

14. MR ARMSTRONG: Yes, my Lord, my position was simply X, not a reference to Uganda and the only other matter is just as a catch all, is nothing else capable of identifying him. Beyond that, I mean there is an element of judgment required in that, but beyond that I do not think I need to go; unless my learned friend has any remarks on that.

15. SIR GEORGE NEWMAN: No. You are content with that after reflection are you, so far as the press are concern.

16. MEMBER OF THE PRESS: Yes, my Lord, one other thing arising is whether we can use fuller detail once we know that he is back in this country and then be able to name him because the purpose of the order will then have been served. Given the amount of publicity the case has had in this country, local newspapers have used it, and one of the effects of today's ruling is, of course, the local newspaper where all the people supporting his case are, will not be allowed to know that this is their particular case that has gone through today. There is nothing you can do about that.

17. SIR GEORGE NEWMAN: No, you are making me rethink really, where we are and why we are. Let us me see with Mr Armstrong, what are we trying to do? On the assumptions that he is to be protected so far as possible in Uganda, I can see the need for the order. But once he has returned here, is there any case that you put forward for him on anonymity?

18. MR ARMSTRONG: Well, it is once he is back and has status essentially.

19. SIR GEORGE NEWMAN: You mean, if he is always on risk of going back again --

20. MR ARMSTRONG: Well, the risk of that is always real.

21. MS RICHARDS: My Lord, that must be a possibility because assuming that his return is facilitated to the United Kingdom, and I have no instructions as to this, but assuming in light of your Lordship's judgment that he is able to put forward, and chooses to put forward, a fresh claim that is accepted as being a fresh claim, he may well still fail in front of an immigration judge and end up being perfectly lawfully removed back to Uganda within a relatively short period of time. Although, on that hypothesis, he would have failed because it is not at real risk of persecution, does not mean he could not be exposed to consequences which are less than a real risk of persecution that he might want to avoid. So, my Lord, it does seem to me that the formulation ought to be the making of the order with, of course, there being liberty to the press to apply, as would be inherent at any event, at some future stage if they so wish to. I mean, your

Lordship, does not make have to make an order that is incapable of being set aside if the circumstances require.

22. SIR GEORGE NEWMAN: In a sense this is a self denying ordnance which really the claimant should, through Mr Armstrong, engage in because if he does not it might actually have consequences which could effect the strength of his claim because when the Secretary of State has to consider his decision, and the immigration judge if it ever comes to that, the position could have been altered by the fact that this case has received publicity; it could actually make it a stronger case on one view than it might otherwise have been. So it seems to me probably in the interests of the status quo that a self denying ordnance is the proper one and therefore we should do what we were on the lines to do, namely that there should be alphabetical reference to him only, no mention of Uganda, return to an African country, and the press are at liberty to make application in the case.

23. MR ARMSTRONG: I am grateful, my Lord.

24. My Lord that only leaves the matter as I suspect, whether it is indemnity costs or not.

25. MS RICHARDS: My Lord, before we come on to that, can I just deal with the question of relief. It would be that, in my submission, the terms of the relief should be resolved by the court now, rather than have the matter go back --

26. SIR GEORGE NEWMAN: Certainly, I am perfectly happy with that.

27. MS RICHARDS: I am happy with the terms of the relief that was sought by my learned friend at page 13 of his grounds, the last page at tab A in the claimant's bundle. The declaration sought was a declaration that the claimant's removal was unlawful and that is not a declaration that I have any submission to oppose, it seems a perfectly straightforward formulation.

28. SIR GEORGE NEWMAN: 13 in typescript?

29. MS RICHARDS: Internal pagination, my Lord.

30. MR ARMSTRONG: It is the last page, my Lord.

31. SIR GEORGE NEWMAN: Yes, I have it now.

> "Declaration claimant's removal unlawful. Mandatory order that the Secretary of State use her best endeavours to arrange and or facilitate the claimant's return from Uganda."

32. MS RICHARDS: My Lord, yes. Both those forms of relief appear to completely accurately reflect your Lordship's judgment and it would avoid any further need for instructions to be taken.

33. SIR GEORGE NEWMAN: Absolutely, sorry, in all the reading I have done that is not somewhere that I have focussed but that is obviously satisfactory.

34. MS RICHARDS: Then, my Lord, just dealing with the question of costs. I do oppose the application for costs on an indemnity basis, I cannot oppose the application for costs as a matter of principle. My Lord, the guidance in the White Book, I do not know if your Lordship has a copy of the white book?

35. SIR GEORGE NEWMAN: Surprisingly, I have, Volume 1, I take it. I have 2007.

36. MS RICHARDS: My Lord, I have before me an extract from the 2008 White Book.

37. SIR GEORGE NEWMAN: Well, it is probably the same.

38. MS RICHARDS: Page 1145, it may not be the same pagination, it is the notes on rule 44.4 (3). The last five or six lines certainly in the version I have read:

> "Where the court is considering whether a losing party's conduct is such as to justify an order for costs on an indemnity basis. The minimum nature of the conduct required is accepted in very rare cases where there has been a significant level of unreasonableness or otherwise inappropriate conduct in its wider sense in relation to that party's pre litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself."

39. My Lord, it is clear from these notes as a whole, that it is conduct in relation to the litigation, not the initial basis for the claim, that is the potential foundation for an indemnity costs order. My Lord, the only point which my learned friend makes in relation to the conduct of the claim is the lateness of the concession. Of course I have to accept that the concession was late, but that, in my respectful submission, does not bring the case within the relatively rare category of cases where indemnity costs should be awarded and could, of course, discourage defendants from making late concessions. Late concession are better surely than a body turning up and fighting points which lack no merit simply so as to avoid an indemnity costs order being made against them. So, in my respectful submission, the appropriate order in the present case would be the ordinary for costs to be assessed on a standard basis and the reality is that unless the claimant have incurred costs unnecessarily or disproportionately there should be no measurable difference from their perspective which would disadvantage them.

40. SIR GEORGE NEWMAN: Anything in reply?

41. MR ARMSTRONG: Yes, I am unfortunately operating from the Brown Book rather than White Book but I just note one point which is one of the authorities that is quoted in the note to 44.4 in the Brown Book. One of the purposes of indemnity costs is to redress the injustice of costs which would otherwise accrue to a successful claimant for having to fight a case for longer than was really necessary. This has gone on longer than it ought to have gone because of the lateness of the confession, he has been left in the Uganda while that happened. My Lord, my submission is as narrow as that.

42. SIR GEORGE NEWMAN: No, I am not satisfied that this is an appropriate case for indemnity costs although, obviously, there has been a late concession, I am not satisfied

that that on its own falls within the character of the conduct in connection with the litigation which justifies indemnity costs.

43. MR ARMSTRONG: Grateful, my Lord.

44. SIR GEORGE NEWMAN: Thank you all very much.