COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 139 of 2022

BETWEEN

OUSMAN BOJANG

Appellant

AND

ATTORNEY GENERAL OF THE BAHAMAS

First Respondent

MINISTER OF IMMIGRATION

Second Respondent

DIRECTOR OF IMMIGRATION

Third Respondent

OFFICER IN CHARGE OF

THE CARMICHAEL DETENTION CENTRE

Fourth Respondent

BEFORE: **The Honourable Sir Michael Barnett, President, Kt**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane-Scott, JA

APPEARANCES: **Mr. Frederick Smith, KC, with Mr. Roderick Dawson Malone and Ms. Raven Rolle, Counsel for Appellant**
Mr. Keith Cargill, Counsel for Respondents

DATES: **18 May 2023; 4 & 5 July 2023; 13 February 2024**

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Civil Appeal – Appeal Against Award of Damages –The Immigration Act section 40 – Civil Procedure (Award of Interest) Act section 3 – Exemplary Damages – Damages for Breach of Constitutional Rights – Claim for Damages for Assault and Battery – Whether awards of both exemplary damages and damages for breach of constitutional rights would be duplicitous – whether the judge erred by failing to award aggravated damages – Costs on indemnity basis

Mr. Bojang entered The Bahamas as a visitor and was permitted a 14 day stay. He went to the Department of Immigration seeking an extension which had expired a day earlier. Mr. Bojang was

arrested and detained at the Carmichael Road Detention after the authorities realized he had overstayed his visit. He was detained for some 531 days without being brought before a court. He sought damages for his unlawful detention. After a trial, he was awarded i. Compensatory damages for false imprisonment $125,000.00 ii. Exemplary damages $ 40,000.00 iii. Cost of his personal belongings $ 1,100.00 for a Total Award of Damages of $166,100.00.

Mr. Bojang has appealed the decision of the judge on numerous grounds inter alia, "The learned Judge erred in preferring the hearsay evidence of the Respondents' witness, Supt. Joseph, over the Appellant's own detailed evidence on the question of his treatment and the conditions of his detention in breach of Article 17(1) of The Constitution. The learned Judge erred in finding that the Appellant had not made out his claim in relation to assault and battery. The learned Judge erred in failing to award aggravated damages. The learned Judge failed to award constitutional damages so as to reflect public outrage, the gravity of the breaches over an extended period, and requirement for such an award to have a deterrent effect. The learned Judge erred in law regarding the grounds on which costs should be ordered on the indemnity basis, and accordingly wrongly failed to award such indemnity costs."

He seeks that "1. Judgment (insofar as it relates to the quantum of damages and interest) be set aside; 2. Appellant's award of damages be increased as to be determined by the Court on appeal plus the interest on such sum from the date of the Tort and breaches of Constitutional rights specifically the 30 December, 2015 until payment in full; 3. Appellant's costs of and occasioned by the Supreme Court Action be paid by the Respondents on an indemnity basis; and 4. Costs of and occasioned by this Appeal be paid by the Respondents to the Appellant." The court heard the parties and reserved its judgement.

Held: this appeal is dismissed; the appellant shall pay the respondent's costs to be taxed if not agreed.

There is no basis for this court to set aside the judge's rejection of Mr. Bojang's evidence as to the conditions that he endured at the Detention Center and her finding that the appellant did not prove that there was a breach of his Article 17 rights under the Constitution for protection from cruel and inhumane punishment.

Mr. Bojang cannot pursue a claim for both exemplary damages and breach of constitutional rights.

The sum of $40,000.00 awarded by the trial judge was sufficient to vindicate him for the breach of the right given to him under Article 19 and to serve as a deterrent to future breaches of the rights of aliens found in the Bahamas. There is no reason to believe that given the recent decisions of this Court in **Ngumi**, **Lop** and this present case, the Immigration authorities will continue to detain persons without first obtaining a deportation order.

The judged awarded interest at the rate of 6.25 per cent from the date of the Writ. The awarding of interest is a matter of discretion. There is no statutory obligation on the part of the trial judge to award interest from the date of the cause of action. It is purely discretionary.

AXD v Home Office [2016] EWHC 1617 (QB) considered
Deutsce Bank AG v Sebastian Holdings Inc [2023] EWCA Civ 191 applied

Douglas Ngumi v. The Attorney General of The Bahamas & Others, [2023] UKPC 12 considered
Griffiths V TUI (UK) Ltd [2021] EWCA Civ 1442 considered
MBR Acres v Markou [2022] EWHC 2072 QB considered
Minister Responsible for Crown Land v Findeisen SCCivApp No 79 of 2022 applied
Newbold v Commissioner of Police [2014] UKPC 12 considered
Ramon Lop v The Attorney General et al SCCiv App No 118 of 2022 considered
Rowlands v Chief Constable of Merseyside Police [2007] 1 WLR 1065 considered
Takitota v. The Attorney General et al, [2009] UKPC 11 applied
Volpi & anor v. Volpi [2022] EWCA Civ 464 applied
Walter Lily & Co v Clin [2021] EWCA Civ 136 mentioned

JUDGMENT

Judgment delivered by The Honourable Sir Michael Barnett, P:

Background

1. This is an appeal by Ousman Bojang ("Mr. Bojang"), a Gambian national, against the amount of the award of damages made by Charles J (as she then was) with respect to the unlawful detention by the Respondents.

2. Mr. Bojang entered The Bahamas as a visitor on 5 December, 2015. He was permitted to stay for 14 days. On 30 December, 2015 he went to the Department of Immigration to seek an extension to the 14 days, which by then had expired. Realizing that he had overstayed his time, Mr. Bojang was arrested and taken to the Carmichael Road Detention Center. Mr. Bojang was not taken before the courts nor was he subject to a deportation order. He was simply arrested and detained.

3. The judge found that at the time he attended the Department of Immigration, he did not indicate that he was seeking asylum.

4. On 25 May, 2016 an attempt was made to deport Mr. Bojang back to the Gambia, notwithstanding that there was no deportation order against him. That attempt failed and he was brought back to The Bahamas. He was taken back to the Detention Centre. For some reason which is not found in the judgment, he was taken to the prison at Fox Hill for a short period of time. He was returned to the Detention Centre where he remained until he was released on the 16 June, 2017 following a habeas corpus application.

5. As the result, he was detained for 531 days which is approximately 18 months.

6. By a writ issued on 27 September, 2017, Mr. Bojang sought damages for his unlawful detention. Because the pleadings will play an important part of this judgment, it is necessary to set out the Statement of Claim in its entirety.

1. The Plaintiff ("Ousman Bojang") was at all material times a citizen of the Republic of the Gambia, born on January 1st, 1981 and was a visitor to The Bahamas.

2. The 1st Defendant was at all material times the Attorney General of the Commonwealth of The Bahamas ("Attorney General") and the office issued as representing the Government of The Bahamas and its executive branches and employees as particularized below.

3. The 2nd Defendant was at all material times the Minister of Immigration of the said Commonwealth and was responsible for the conditions under which Ousman Bojang falsely imprisoned, and office is sued in this capacity.

4. The 3rd Defendant, was at all material times the Director of Immigration, being responsible for the conditions under which Ousman Bojang was unlawfully imprisoned in the unlawful facility known as Carmichael Road Detention Centre ("Carmichael Concentration Camp") in New Providence for a period of 531 days.

5. The 4th Defendant was at all material times the Officer in Charge of the Carmichael Concentration Camp" and was responsible for any unlawful conduct committed by immigration officers under his direction and control in the performance or purported performance of their duties.

6. The general nature of Ousman Bojang's claims, as particularized below, is for damages, assault, battery, arbitrary and unlawful detention, false imprisonment, and for breaches of his fundamental rights under Articles 15, 17(1), 19, and 26 of the Constitution of the Commonwealth of The Bahamas.

7. Ousman Bojang further claims aggravated damages, punitive, exemplary, vindicatory damages as the torts and breaches of his constitutional rights by oppressive, arbitrary and unconstitutional conduct by the Government and/or its agents or servants.

FALSE IMPRISONMENT

8. On the 5th of December, 2015, Ousman Bojang arrived as a lawful visitor in Nassau, New Providence, and was granted visa for twenty-one (21) days.

9. Ousman Bojang made inquiries on where to find the Headquarters of the United Nation High Rights Commission with the intention of seeking refugee status in The Bahamas and he was directed to the Immigration Department.

10. Ousman Bojang had a letter from the United Democratic Party (UDP) in the Kombo South Constituency, explaining that he was a young organizer and that he had fled the country, and asking the Bahamian Government for support in granting political asylum to him.

11. On December 30, 2015, Ousman Bojang visited the Department of Immigration seeking an extension to his visitor's status and request political asylum, when he was immediately arrested by two Immigration Officers and taken the Carmichael Concentration Camp, in breach of his rights under Articles 15 and 20 of the Constitution of the Commonwealth of The Bahamas.

12. In breach of the Criminal Procedure Code Act and the Constitution, Ousman Bojang was never brought before any Court of law. There was no warrant for his arrest. He was not taken before a court and charged with having committed an offence. He was not a subject of a deportation order under the Immigration Act. He was falsely imprisoned in an unlawful facility for a period of 531 days.

13. On June 16, 2017 Ousman Bojang was successful in his application for Habeas Corpus but remains in the custody of the Defendants as he required to sign in weekly in the Department of Immigration similar to bail conditions that are imposed on persons charged with an offence and are awaiting trial.

14. Ousman Bojang in an effort to protect his rights and to secure his retained counsel upon his release on the 16t day of June 2017, to further pursue damages for the breach of his rights under Articles 15, 17, 19(1) and 25 (1) of the Constitution.

15. While imprisoned at the Carmichael Concentration Camp Ousman Bojang suffered cruel, inhumane and degrading treatment, In breach of his rights under Article 17(1) of the Constitution. He was deprived of his liberty and subjected to harsh conditions.

16. As a result of this detention Ousman Bojang was discriminated against in breach of his rights under Article 15 and 26 of the Constitution.

17. On the 25th day of May, 2016 the Department of Immigration unlawfully expelled Ousman Bojang and sent him on a flight to Cuba. The expulsion was unsuccessful as the Cuban authorities refused to allow him passage onto Jambur, The Gambia.

18. On June 16, 2017, Ousman Bojang was brought before the Court in shackles on the hands and feet, chained to murder suspects throughout and after his hearing, in breach of his rights under Articles 17 and 17 (1) of the Constitution.

19. An Order for his release was signed by the Honourable Justice Stephen Isaacs on June 16, 2017 but Ousman Bojang was further unlawfully detained immediately, and was again shackled to accused murderers, handcuffed and brought back to the Police Station and was released four (4) hours later, in breach of his rights under Articles 15 and 17(1) 19(1) and 25 of the Constitution. During this time he was not given anything to eat or drink after being in court from that morning.

ASSAULT AND BATTERY

20. On the 30th of December, 2015 Ousman Bojang was forcibly taken to the Carmichael Concentration Camp. In addition he was threatened, beaten, pushed around and manhandled by the Defence Force on numerous occasions.

21. On the 16t of June 2017, Ousman Bojang was forcible handcuffed and shackled to prisoners from Fox Hill Prison and forced to shuffle to the Supreme Court, contrary to the provisions of Article 17 (1) of the Constitution.

DETINUE

22. On a date unknown to Ousman Bojang, between June 16 and June 19th 2017, the immigration officers, misplaced, lost or destroyed his personal clothing items and jewellery which he left in the Camp. None of his personal effects were ever returned to him.

Particulars

a) On June 19, 2017 after being released by the Court, Ousman Bojang returned to the Carmichael Concentration Camp to retrieve his luggage and he was told that they had disposed of it.

b) Ousman Bojang's clothing, jewellery and other personal effects were not returned to him.

c) The immigration officers acted in purported performance of their duties as members of the Department of Immigration and the Officers in Charge of the Carmichael Concentration Camp.

BREACHES OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION

23. On December 30, 2015 Ousman Bojang was arbitrarily and unlawfully imprisoned by immigration officers without reasonable cause and kept him imprisoned for over 2 years without conviction, contrary to the provisions of Article 19(1) of the Constitution.

24. Ousman Bojang was falsely imprisoned in an insanitary hot, and inhumanely overcrowded dorm contrary to the provisions of Article 17 (1) of the Constitution.

25. Ousman Bojang deprived of the basic necessities of human existence and subjected to cruel, inhumane and degrading conditions at the Detention Centre which is in contravention of Article 17 (1) of the Constitution.

26. On June 16, 2017, Ousman Bojang was brought before the Courts in shackles on his hands and feet and chained to other accused murderers even though he was not charged by any court with a criminal offence, contrary to the provisions of Articles 15. 17(1) and 19(1) of the Constitution.

27. As a consequence of the actions of the Defendants and in breach of Ousman Bojang's rights under Articles 15 and 21 of the Constitution, he was searched and several personal items including cash confiscated on his detention.

28. The Defendants subsequently destroyed, misplaced or lost some of those items as they were not returned to him upon his release from the Detention Centre.

29. As a result of the matters aforesaid, Ousman Bojang has been deprived of his personal liberty as aforesaid and suffered injuries, sustained loss and damages:

PARTICULARS OF SPECIAL DAMAGES

Loss of Personal clothing and other item:

Watch ……..……. US$ 300.00

Phone ……..……. US$ 110.00

Bracelet and necklace ……. US$ 200.00

Clothing …….. US$ 500.00

TOTAL ……US$ 1100.00

30. The Plaintiff is entitled to and claims aggravated and exemplary damages arising from his wrongful arrest, false imprisonment, confiscation and conversion of his personal property, wrongful detention and inhumane and degrading treatment:

Particulars

a) The Defendants acted oppressively and arbitrarily in arresting Ousman Bojang when he went to the Immigration Department seeking an extension of his visitor's status;

b) The Defendants detained Ousman Bojang in the Carmichael Concentration Camp knowing that the conditions of detention were inhumane and degrading;

c) The Defendants opposed the Habeas Corpus Application made by Ousman Bojang knowing that his detention was unlawful;

d) The Defendants acted oppressively after his release, in unlawfully disposing of all of his personal effects which he brought to The Bahamas; in particular his clothing and jewelry, which was all that he owned at the time;

e) The Defendants acted oppressively when they forced him to remain in detention for over 531 days in inhumane conditions;

Ousman Bojang therefore claims:

1. **Damages;**
2. **Special Damages of $1100;**
3. **Aggravated Damages;**
4. **Exemplary damages;**
5. **Vindicatory Damages;**
6. **The return of any and all his personal items;**

7. Alternatively, damages in the value of his personal items;
8. Compensation under Article 19 (4) of the Constitution;
9. Damages for breaches of his rights under Articles 15, 17, 19(2), 19(3), 25 and 27 of the Constitution;
10. Interest on each of the foregoing pursuant to statute;
11. Costs on full indemnity and solicitor and own client basis certified fit for 3 counsel; and
12. Such further or other relief as to the Court may seem fit.
13. Costs."

7. At the trial Mr. Bojang gave evidence on his behalf. He called no other witnesses, notwithstanding that the case management order provided that he could call three witnesses. He gave a witness statement which stood as his evidence in chief. The material parts of that evidence were as follows:

> **"4. This Statement is made from my personal experiences and knowledge except where indicated to the contrary. Accordingly, the contents are correct and true to the best of my knowledge, information and belief.**
>
> **5. I am married to Kaddy Gaye Bojang and we have 2 minor children. My son is now 10 years old and my daughter is 8 years old. My wife was pregnant at the time I left the Gambia but the child died as an infant.**
>
> **6. In Gambia I was employed as a truck driver while pursuing mechanical engineering as a career. I was also a youth leader in the United Democratic Party (UDP) a political party in Gambia.**
>
> **7. On the 5th of December 2015, I arrived as a lawful visitor in Nassau, New Providence, and was granted a 14-day visa to remain in The Bahamas.**
>
> **8. My reason for leaving Gambia was to seek political refugee status. It was suggested to me while in Africa that I could consider The Bahamas so I travelled to Nassau to explore my options for asylum. I was not aware that I needed to declare that to the immigration officer at the time of arrival.**
>
> **9. In 2015 my party was in opposition in 2015 the time of my departure and was campaigning to form the new government. It was a very difficult period in our politics in Gambia.**
>
> **10. As a young political activist, I became involved in planning political meetings during the campaign period. In 2015 I was**

falsely arrested for not getting permission to plan a political meeting. Shortly after that I was released after 3 days. However: after my release I was tipped off that I was going to be rearrested and possibly killed. I was also falsely accused of being a homosexual even though it is a known fact that I was married with 2 young children.

11. It is my belief that the allegations were malicious and could have resulted in me being killed in The Gambia. After being tipped off I flew to Dakkar for a few days and I was told by other party activists to leave the Continent all together. I was invited by a friend to travel to The Bahamas and try to seek alyssum here. I was in fear of losing my life over politics.

12. I travelled to The Bahamas through Panama and stayed in a resort for a few days. Miss Adam Njie, a Gambian national, was on the same flight. She is a colleague of mine who was also a member of my party, but she belonged to another constituency. I have not seen Miss Njie since my arrival in The Bahamas. I am not connected to her romantically as is being suggested by the Defendants. We were not a couple or partners. She was on the same flight and I knew her through our political connections.

13. Between the 5th and 30th of December 2015, I asked local people how to find the United Nations High Commissioner's office and no one could confirm where they were located. After about 2 weeks I was directed to go to the Department of Immigration.

14. I was challenged with moving about so I had to seek out the location of the Immigration Department. I visited the Department a few times but the lines were very long or they were closed before I could get access to service. A number of persons waiting in line told me that are usually busy around Christmas and I should try after Christmas holidays, which I did.

15. On December 30, 2015 after numerous attempts to get assistance to extend my stay and asylum, I was finally able to get before an immigration officer. I explained to the officer that I was from Gambia and I was in fear for my life and I was seeking political asylum. I gave him documents that I brought from the Gambia which included a letter from the United Democratic Party (UDP) in the Kombo South Constituency, a police certificate from Gambia and my passport. I asked the officer if

he could assist me with extending my stay and also with how to go about applying for political asylum.

16. The immigration officer took the documents and went into an office. When the officer returned, he asked me to follow him outside which I did. They asked me to travel with them in a motor vehicle and I complied. They asked me to direct them to where I was staying to verify my address and I did so.

17. We drove to the address where I was staying and the officers asked me to take my luggage with me. Once I had picked up my luggage and got back to the vehicle, they placed handcuffs on me and drove me the Detention Centre where I was imprisoned without explanation as to what may have been any charges against me.

18. I was taken to main office at the detention centre where they completed a form and took a photograph of me. After that they searched my luggage and took 2 cell phones, 2 chargers, MP3 players, my passport, the letter from the UDP of Gambia and cash in the amount of US$22.00. I was able to take my suitcase with all my clothing to the back of the detention centre where I was placed in a large overcrowded dorm.

19. The dorm had about 300 to 400 people. There were not enough beds to accommodate the number of detainees in the dorm. Some detainees had beds and others were sleeping on the floor. For the first 2 weeks I slept on the floor until I found an old dirty mattress which I used after that. I slept on this mattress up to the point of my release by the Supreme Court on June 16, 2017.

20. For many days I went without food as they would serve pork chops with white rice. Due to religious reasons I do not eat pork which was a frequent item on the menu so most days they would serve me 2 slices of bread for breakfast and white rice without any form of protein for dinner. Occasionally they served rice with tuna. We had to drink tap water. After a year they changed to bottled water but we were limited to one bottle for the day. After some time, we had a water cooler placed at the outside of the dorm.

21. Every night we were awakened at around midnight by the defence force officers and we all had to stand outside, sometimes for hours, sometimes all night. The defence force officers didn't care whether it was cold or not. We were made to stand there

until they counted off the detainees by nationality and they would search the dorms while we stood outside.

22. While in the Detention Centre I was interviewed by a representative from the UNHCR but I was not made aware of any attempts to assist me or even consider my situation.

23. After about 8 months an officer came and told me the Centre has a ticket for me to return to Gambia. I asked him where they ticket came from and he said my family sent them the ticket.

24. On May 25, 2016 I was placed on a Bahamas-air flight to Havana Cuba. The Cuban immigration officials took my documents, looked them over and asked me if I was sure I had a ticket as they didn't see one in the system. They said I didn't even have a ticket from the Bahamas and so they have to returned me to the same flight.

25. I returned to the Bahamas on the same flight. When we got back to The Bahamas, I was taken back to the Detention Centre. They took my pictures again. Shortly after that I was taken to Fox Hill prison. I was told that there was a hurricane coming and I had to stay there. The first night I was placed in a small balcony room with no beds with 14 other men. The room had no walls. It was like a balcony with iron bars around it. The area was flooded, so we had nowhere to sleep. The following night I was placed in a small cell approximately 3 x 8 square feet with over 20 other prisoners. There were no beds, mattress or blankets. We had to sleep on the concrete floor. The cell was hot and had no windows.

26. We had 2 buckets in the cell one for urine and one for feces. All 20 of us had to share the 2 buckets to defecate and urinate. The buckets remained in the cell until they were taken out the following day. I could not eat as the stench in the cell was so bad that it was impossible for me to eat in that condition. Even there in Fox Hill we had limited food and water. There was nowhere to bathe and I, so I went without taking a shower for first 8 days in the Fox Hill prison.

27. I was in Fox Hill for 4 weeks and after that I was returned to the Detention Centre. Again I had to sleep on the floors in a hot, dirty and overcrowded dorm. The toilets were always clogged and there were no cleaning products provided to properly clean the bathrooms. We tried our best to clean the place but with no detergent and cleaning agents.

28. I had to bathe in dirty water that rose nearly a foot off the floor in the clogged open showers. There was no privacy. The floors were dirty and stunk all the time. The detainees tried to clean as best as possible.

29. I was not brought before any court. After a few weeks one of the immigration officers came for me in the back and they gave me a form to complete and then placed me back on the back. No one explained what was happening. I thought I was going to be taken to court as the others, but I was not.

30. Shortly after that, sometime in May 2016, I was again brought from the dorm to the main office at the Carmichael Concentration Camp to be interviewed by Ms. Deneisha Moss-Balboni a representative of the UNHCR in The Bahamas.

31. Mrs. Moss-Balboni told me she was there to interview detainees who were there for over 6 months. After my interview I completed an application for refugee status. At that time an application was made by the UNHCR to secure refugee status I was in custody for over six months.

32. On June 16, 2017, while I was waiting on a response from UNHCR my habeas application was heard before the Supreme Court.

33. The day of court I was not advised that I was going to court. I was not even served breakfast. I was manhandled and dragged to a car like a criminal and taken to the Central Police Station. At the police station they took my fingerprints. After that I was brought to the Court handcuffed and shackled to other prisoners.

34. While listening in court I realized I was shacked to prisoners who were on trial for murder.

35. The court found that my imprisonment was unlawful and ordered my release on June 16, 2017.

36. After my release I was again handcuffed and shackled to accused murderers and remained in custody without food or drink for a further 4 hours at the Central Police Station.

37. The following day I went back to collect my clothing and other personal items and I was told that they were disposed of. My clothing and other personal effects were never returned to me.

38. Shortly after my release, the media published various articles in which I was labelled as a "gay Gambia activist". There was an article published by the Nassau Guardian on June 16, 2017. The Punch carried a similar story on Thursday June 22, 2017. I believe the Tribune may have published a similar story. I was not aware of the articles until I received calls from friends and family from outside of The Bahamas. They mentioned that they had seen them online.

39. These publications were malicious and caused me to fear for my safety and well-being even while being in The Bahamas as it made it appear as if this was true. I recalled this coming up in court but this was misrepresented in the media.

40. In Gambia at the time homosexuality carried a minimum sentence of 14 years in prison. Homosexuals in Gambia who often flee the country if they were in fear of being killed. For example, Camara, a soccer player who fled the country was granted asylum in Canada. Camara was quoted in the media saying, "No matter who rules Gambia, they will never accept homosexuality. Even of the wants to legalize it or something, the society will never accept it

41. Although I am not a homosexual, I believed that based on the chain of events I would have been killed if I had returned to Gambia. I remained in The Bahamas until the UNHCR completed their thorough investigations. Thankfully, the UNHCR granted me a temporary certificate to remain in The Bahamas until the determination of my case.

42. On August 5, 2020 after hearing my case and doing their background checks I was granted refugee status by the UNHCR to remain in The Bahamas. The Refugee certificate recognized me as a refugee and granted me protection from being forcibly expelled and sent back to Gambia. My lawyer was advised that a copy was sent to the Director of Immigration.

43. 1 still do not feel safe returning to the Gambia at this time."

8. He was cross examined on his evidence.

9. The evidence on behalf of the Defendants, who are the Respondents to this appeal, was given by Mr. Peter Joseph and Mr. Stephen Laroda. Mr. Joseph was the Immigration Officer in Charge of the Carmichael Road Detention Center. Mr. Laroda was the Immigration Officer in charge of Refugee Administration and the Trafficking in Persons Unit. Both gave their evidence in chief by way of a witness statement. Counsel for Mr. Bojang elected not to cross-

examine either Mr. Joseph or Mr. Laroda. Mr. Joseph's witness statement was in the following terms:

> **"2. I am employed with the Bahamas Department of Immigration, and currently hold the rank of Superintendent.**
>
> **3. 1 have been so employed for approximately 40 years, having been enlisted as an Immigration Officer in August 1980.**
>
> **4. 1 am presently the Officer-In-Charge of the Bahamas Department of Immigration's Carmichael Road Detention Centre, and was so charged at all material times relative to the instant action.**
>
> **5. I am authorized to make this Statement on behalf of the Defendants herein, and so make this Statement based on information within my personal knowledge, from information obtained by me, and from sources with whom I work, in my aforesaid employment capacity.**
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> **6. In accordance with Section 2(2) of the Immigration Act and Regulation 18(b) of the Immigration General Regulations, S.I 47/1969, Statute Laws of The Bahamas, the Carmichael Road Detention Centre is a specially designated place for the purpose of detaining undocumented immigrants, and foreign persons having served local prison sentences, awaiting deportation to their home country. Therefore, my duties primarily entail the general management, administration, and supervision of the Carmichael Road Detention Centre.**
>
> **7. I am advised and verily believe that sometime in December, 2015, a male immigrant named Ousman Bojang, identified as a citizen of The Gambia, West Africa, was admitted to the Carmichael Road Detention Centre for processing and subsequent deportation to The Gambia, pursuant to Bahamas Immigration Detention Centre Committal Order.**
>
> **8. I am advised and verily believe that during Mr. Bojang's stay at the Carmichael Road Detention Centre he was never threatened, beaten, pushed around and manhandled by any officer of the Royal Bahamas Defece Force. Additionally, 1 have neither received any reports from Immigration or Defence Force Officers, nor am I aware of any formal complaints being lodged at the Centre on behalf of Mr. Bojang.**
>
> **9. A detainee's contact with Royal Bahamas Defence Force officers attached to the Department of Immigration's**

Carmichael Road Detention Centre is limited, and only arises during a customary security secondary search of new detainees or detainees returning to the Centre from a temporary custodial pass. Otherwise, the only circumstance by which Royal Bahamas Defence Force officers may have reason to interact or physically encounter a detainee is to bring peace and civility at the Centre, where an insurgence of violence ensues among detainees.

10. Upon Mr. Bojang being detained at the Carmichael Road Detention Centre, I am advised and verily believe that Immigration Officers received only the following personal items from Mr. Bojang for safe keeping: two (2) cellular phones; a lighter; one (1) telephone charger; earphones; earplugs; earpiece; and twenty-three dollars in the currency of the United States of America (USD $23.00).

11. It is the standard practice and operation at the Carmichael Road Detention Centre that upon detainment of any person, to take into their possession any personal effects found on a detainee's person, except where a detainee expresses their desire to personally hold such effects (provided that any item expressed to be held personally by the detainee does not pose threat to the security of the Centre). Further, once personal items are retrieved from detainees, they are listed and recorded in a property log book; after which, a receipt is generated by the collecting officer, confirming the Centre's receipt of the items, and produced to the detainee for his record. Upon receiving a property receipt, a detainee is required to sign the property log book upon deposit and withdrawal of property to and from the custody of the Centre.

12. I am advised and verily believe that Mr. Bojang, while at the Carmichael Road Detention entre, was afforded: three balanced cooked meals daily; access to prompt medical care, if need be; frequently cleaned environmental services; maintenance of personal hygiene without restriction or limitation; and non-restricted socialization with the general male population at the Centre. The aforementioned are standard treatments afforded to persons staying at the Centre.

13. Specifically, it my information and belief that Mr. Bojang, while at the Carmichael Road Detention Centre, was continuously provided with basic human necessities, such as running water, soap, towels, bedding (weekly professional

laundering of sheets and blankets), and clothing (if necessary). I am also advised and verily believe that: Mr. Bojang was never restricted to any number of or length of time for baths, The Centre imposed no bedtime or wake time on Mr. Bojang, and provided him with at least three (3) hot meals per day (breakfast, lunch, and dinner). Mr. Bojang had twenty-four (24) hours access to a washer tub and detergent, to clean used or dirty clothing.

14. Moreover, it is a practice at the Carmichael Road Detention Centre that a team of medical professionals visit and assess detainees daily, should they desire medical attention. Nonetheless, more serious medical treatment is provided by a Department of Public Health Clinic or the Princess Margaret Hospital. Therefore, should Mr. Bojang have required medical treatment at any time during his stay, the same was available to him daily upon his request.

15. I am advised and verily believe that, on the 24th May, 2016, a Bahamas Immigration Detention Centre Surrender Order Repatriation form was issued in the name of Ousman Bojang, and on the 25th May, 2016, the Department of Immigration made and unsuccessful attempt to deport Mr. Bojang to his homeland, Jambur, The Gambia, through Havana, Havana Cuba, on board Bahamasair.

16. I am advised and verily believe that Mr. Bojang boarded a Bahamasair flight at the Lynden Pindling International Airport on 25" May, 2016 in route to Havana, Cuba. Upon arriving in Havana, Cuba, Mr. Bojang was refused embarkation by Cuban authorities on to his connecting flight into Madrid, Spain. He was then returned into the custody and care of the Bahamas Department of Immigration, and subsequently returned to Nassau, The Bahamas and into the custody of the Carmichael Road Detention Centre.

17. It is my information and belief that failing Mr. Bojang's deportation to The Gambia, he was recommitted to the Carmichael Road Detention Centre.

18. On or about June, 2017, Mr. Bojang was taken before His Lordship Hon. Mr. Snr. Justice Stephen Isaacs, Justice of the Supreme Court, pursuant to a Habeas Corpus application.

19. Sometime after his appearance before His Lordship, Mr. Bojang was released from the custody, care and control of the

Carmichael Road Detention Centre, and into the Bahamian society at large.

20. I am advised and verily believe that, after Mr. Bojang's release from the Carmichael Road Detention Centre, Mr. Bojang presented himself to the Carmichael Road Detention Centre to collect his property, namely: two (2) cellular phones; a lighter; one (1) telephone charger; earphones; earplugs; earpiece; and twenty-three dollars in the currency of the United States of America (USD $23.00), which were all released to him.

21. To date, I am unaware of any formal complaint and or report made to the Carmichael Road Detention Centre or the Bahamas Department of Immigration's Headquarters alleging any wrongdoing to Mr. Bojang during and or after his tenure at the Carmichael Road Detention Centre."

10. It is not necessary to record the evidence of Mr. Laroda.

11. After the completion of the evidence the trial judge reserved her judgment.

12. On 20 August, 2022, the judge delivered her judgment. Given the challenge to the ruling on this appeal, I set out at length material parts of the judgment:

"Assessing the evidence

[49] On a balance of probabilities, I prefer the unchallenged evidence of Supt. Joseph and Supt. La-Roda to that of Mr. Bojang. In my judgment, Mr. Bojang has exaggerated his evidence about (i) the conditions of the Detention Centre; (2) that he was deprived of the basic necessities of human existence and; (3) he was subjected to cruel, inhumane and degrading conditions at the Detention Centre.

[50] Mr. Bojang told an untruth when, upon his arrival at the Sir Lynden Pindling International Airport, he stated that he was coming here on vacation when he was planning to seek political asylum. Having had the opportunity to see, hear and observe his demeanour, I also did not believe him that the lines were too long at the DOI for him to wait on such an important issue as seeking an extension of time after overstaying. In addition, he never told Supt. La-Roda when he was escorted to the Detention Centre that he was seeking asylum of any sort.

[51] As I stated above, I am of the view that Mr. Bojang exaggerated his evidence about the conditions at the Detention Centre. I prefer Supt. Joseph's evidence in this regard, that a

detainee's contact with the RBDF officers attached to the Detention Centre is limited and only arises during a customary security secondary search of new detainees or detainees returning to the Detention Centre from a temporary custodial pass.

[52] It seems highly implausible and unconvincing that every midnight, RBDF officers would make them stand in the open air from midnight and sometimes all night. I do not believe that these officers are so cruel that they will search the detainees' dorm every day at midnight.

[53] In my judgment, Mr. Bojang was treated humanely as detailed by Supt. Joseph. As I said in Ramon Lop v Attorney General of The Bahamas & Ors (2017/CLE/gen/001180), at para 84, that "while the Detention Centre is not a fivestar facility, it was more likely than not that conditions there are fair" and not unfit for human existence."

13. The trial judge then identified the issue which she considered required determination. She said:

"The issues

[54] The following issues arise for determination:

1. Whether the failure to bring Mr. Bojang before a court after his arrest and/or the failure to issue a deportation order rendered his detention unlawful?

2. Whether the conditions and the treatment of Mr. Bojang's detention at the Detention Centre amounts to constitutional breaches?

3. Whether Mr. Bojang's belongings were unlawfully taken away and retained by Officers at the Detention Centre? and

4. If the Court finds affirmatively to the above, whether Mr. Bojang is entitled to damages and/or compensation and the quantum of such damages".

14. The trial judge then dealt with the first issue of whether the Defendants were liable for unlawful detention. She found that they were. As that issue is not the subject of this appeal, I continue to set out the part of the judgment dealing with the issues that are the subject of this appeal.

"Issue 2: Breaches of Mr. Bojang's constitutional rights

[84] In paragraph 6 of his Statement of Claim, Mr. Bojang also claims damages for breaches of his fundamental rights under Article 15, 17(1), 19 and 26 of the Constitution.

[85] In his pleadings, Mr. Bojang alleged that, in addition to his Article 19 right not to be arbitrarily arrested and/or detained, he suffered cruel, inhumane and degrading treatment in breach of his rights under Article 17 of the Constitution. He also alleged that as a result of his detention, he was discriminated against in breach of his rights under Articles 15 and 26. He further alleged that, after his release on 16 June 2017, he was further unlawfully detained immediately and was again shackled to accused murderers, handcuffed and brought back to the Police Station and was released 4 hours later, in breach of his rights under Articles 15, 17, 19(1) and 25 of the Constitution. During this time he was not given anything to eat or drink after being in court that morning."

15. The judge then set out the material parts of Articles 17 and 19 of the Constitution and continued:

> **"[89] There was conflicting evidence with respect to the conditions at the Detention Centre. However, I prefer Supt. Joseph's evidence (notwithstanding as Mr. Smith submitted, it consisted largely of hearsay) to that of Mr. Bojang. As I stated, I am of the view that Mr. Bojang exaggerated the true conditions at the Detention Centre. In addition, he forgot to mention, in his witness statement, that he had complained about the inhumane conditions at the Detention Centre to the UNHCR Representatives. This, to my mind, was a significant omission.**
>
> **[90] With respect to his Article 25 right, Supt. Joseph stated that detainees are not told what time to go to bed or to wake up. That evidence stood unchallenged. In addition, I do not believe that Mr. Bojang was discriminated against. Therefore, there was no breach of his Article 26 right."**

16. The judge then dealt with the issue of detinue which is again not the subject of this appeal. Afterwards she continued:

> **"Issue 4: Assessment of Damages**
>
> **[95] In his Amended Writ of Summons, Mr. Bojang sought damages under the following heads:".**

17. The judge then sets out the claims in the Statement of Claim recited in paragraph 6 above.

18. The judge then referred to the decision of the Privy Council in **Takitota v. The Attorney General et al, [2009] UKPC 11** and said that an award of both exemplary damages and damages for breach of constitutional rights would be duplicitous and held in paragraph 97 that **"Accordingly, Mr. Bojang is not entitled to both exemplary damages and damages for breach of constitutional rights."**

19. The judge then considered the claim for assault and battery and said at paragraph 98 **"Mr. Bojang did not prove his claim for assault and battery. It follows that no damages in respect of this head is awarded."**

20. The judge then considered the claim for compensatory damages for false imprisonment. She awarded the sum of $125,000.00 as damages under this head. That award is not being challenged in this appeal so it is not necessary to set out that part of the judgment.

21. The judge then considered Mr. Bojang's request for an award for both exemplary and aggravated damages. She said:

> **"Exemplary damages**
>
> **[118] Mr. Bojang seeks exemplary damages of $1 million.**
>
> **[119] Exemplary damages are awarded when the state or government has taken oppressive, arbitrary or unconstitutional action: Rookes v. Barnard [1964] A.C. 1129 is the landmark case for this head of damage. At page 1221, Lord Devlin stated thus:**
>
> > **"Exemplary damages are essentially different from ordinary, damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England. It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an**

> **action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved. Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed".**

[120] The principles derived from Rookes v Barnard were adopted with approval in Takitota. At para 12, Lord Carswell had this to say on exemplary damages:

> **"The award of exemplary damages is a common law head of damages, the object of which is to punish the Defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in Rookes v Barnard [1964] AC 1129 at 1223, [1964] 1 All ER 801, [1972] 2 WLR 269, to restrain such improper use of executive power. Both Lord Devlin in Rookes v Barnard and Lord Hailsham of St. Marylebone LC in Broome v Cassell & Co, Ltd [1972] AC 1027 at 1081, [1972]**

> **1 All ER 801, [1972] 2 WLR 645 emphasized the need for moderation in assessing exemplary damages. That principle has been followed in The Bahamas (see Tynes v Barr (1994) 45 WIR at 26), but in Merson v Cartwright and the Attorney General [2005] UKPC 38, [2006] 3 LRC 264 the Privy Council upheld an award of $100,000 exemplary damages, which they regarded as high but within the permissible bracket." [Emphasis added]**

[121] In this case, the wrongful imprisonment constitutes oppressive, arbitrary and unconstitutional action by the servants of the government. As such, the case is suited for the award of exemplary damages.

[122] In Takitota, the Privy Council determined that the exemplary damages award of $100,000 was appropriate. The appellant in that case was imprisoned for eight (8) years, a much longer time than Mr. Bojang. In the circumstances, an award of $40,000 is appropriate to show the strong disapproval of the courts of the conduct of the government's servants.

Aggravated damages

[123] Mr. Bojang seeks aggravated damages in the sum of $500,000. Aggravated damages are awarded when, among other things, the Defendant's conduct has caused or is capable of causing injury to feelings, for any indignity, disgrace, humiliation or mental suffering occasioned from the conduct.

[124] In Merson and Takitota, the Privy Council stated that aggravated damages form a quite distinct head of damage based on altogether different principles. This is how Lord Carswell puts it in Takitota at para 11:

> **"In their reference to aggravated damages in para 94 of their judgment the Court of Appeal appear to have equated them with exemplary damages, whereas they form a quite distinct head of damage based on altogether different principles. In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of**

liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the conditions in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award. The latter factor, the conditions of imprisonment, is directly material in the present case, and it would be not merely appropriate but desirable that the award of compensatory damages should reflect it. It may be that the Court of Appeal had it in mind when they expressed their intention in paragraph 90 to compensate the appellant "for the loss of more than 8 years of his life and for the misery which he endured by being treated in a less than humane way." They did not spell it out in their judgment, though they were not obliged to do so: see Subiah v Attorney General of Trinidad and Tobago [2008] UKPC 47, para 11. Their Lordships do not find it possible to ascertain with sufficient clarity whether the Court of Appeal included any element of aggravation in their calculation of the compensatory award, and if so, how much represents that element. Although they stated in para 93 of their judgment that the sum of compensatory damages "does not take into account any assessment for aggravated or exemplary damages", it is not possible to determine whether in reaching that figure they had in fact taken account of aggravating factors."

[125] Mr. Bojang seeks aggravated damages for the following:

1. His 531 days' detention; and

2. His imprisonment in inhumane and degrading conditions (which was not established).

[126] The Court has already computed damages for his 531 days' detention so any award here will be duplicitous. I make no award under this head."

22. The judge then considered Mr. Bojang's claim for cost on an indemnity basis and interest. She said:

"Indemnity costs

[127] Mr. Smith submitted that, given the manner in which this case was conducted by the Defendants, Mr. Bojang seeks costs on a full indemnity solicitor own client basis. He relied on the case of R. v Christie Ex Parte Coalition to Protect Clifton Bay 2013/PUB/jrv/0012 Ruling No. 2.

[128] In Douglas Ngumi, Sir Michael Barnett P, in delivering the Judgment of the Court, addressed that issue of indemnity costs at paras 63 to 65 of the Judgment. At para 65, the learned President stated:

> **"Simply put, the power to award costs is in the wide discretion of the trial judge. In this case the court made an order for costs in favour of the appellant who was successful in his claim for damages. The appellant's case is that he wanted an order for costs on an indemnity basis because of the conduct of the respondents. The judge carefully considered that submission and declined for the reasons cogently set out in her judgment and refused to make an order on an indemnity basis. There is, in my view no basis for this Court to interfere with the judge's exercise of her discretion on the issue of costs. The order that costs be paid on a party and party basis and not on an indemnity basis, is in our view, fully justified." [Emphasis added]**

[129] In this case, I am not inclined to award costs on an indemnity basis as the conduct of the Defendants did not rise to the level of being egregious or contumacious. The award of exemplary damages has already taken into account that the Defendants ought to be more proactive and resort to the courts when they have in their custody, persons like Mr. Bojang, who have nowhere to go, either because they are stateless or face persecution in their own country.

[130] I will therefore order that the Defendants do pay reasonable costs to Mr. Bojang on a party and party basis. I will order that Mr. Bojang submits his Bill of Costs within 21 days hereof for it to be taxed if not agreed. If no agreement is reached, then the parties will return to Court on a date to be agreed for this issue to be dealt with before me.

Interest

[131] Mr. Bojang seeks interest not only after judgment but from the date that the cause of action arose. He relied on the judgment in Cara Chan v Wendall Parker (1999) No. FP/88 [unreported], a personal injury case, to ground pre-trial interest.

[132] In para 66 of Douglas Ngumi, the Court of Appeal varied the order which I made in the Supreme Court and stipulated that interest will run from the date of the filing of the Writ of Summons.

[133] In the present case, I will make an order that interest will run at the statutory rate of 6.25% per annum from 27 September 2017 (date of the filing of the Writ of Summons) to the date of payment. This is in accordance with section 2(1) of the Civil Procedure (Award of Interest) Act 1992 as amended by the Civil Procedure (Rate of Interest) Rules, 2008."

23. She summed up her award as follows:

"Conclusion

[134] Accordingly, there will be judgment for Mr. Bojang in the following sums:

i. Compensatory damages for false imprisonment $125,000

ii. Exemplary damages $ 40,000

iii. Cost of his personal belongings $ 1,100

TOTAL AWARD OF DAMAGES $166,100

[135] There will be interest at the statutory rate of 6.25% from the date of the filing of the Writ of Summons (27 September 2017) to the date of payment. Cost to be taxed if not agreed."

24. Mr. Bojang has appealed. By this appeal, Mr. Bojang seeks:

"1. Judgment (insofar as it relates to the quantum of damages and interest) be set aside;

2. Appellant's award of damages be increased as to be determined by the Court on appeal plus the interest on such sum from the date of the Tort and breaches of Constitutional rights specifically the 30 December 2015 until payment in full;

3. Appellant's costs of and occasioned by the Supreme Court Action be paid by the Respondents on an indemnity basis; and

4. Costs of and occasioned by this Appeal be paid by the Respondents to the Appellant."

25. The grounds of the appeal were summarized in the written submissions as follows:

"5.1. The learned Judge erred in preferring the hearsay evidence of the Respondents' witness, Supt. Joseph, over the Appellant's own detailed evidence on the question of his treatment and the conditions of his detention in breach of Article 17(1) of The Constitution.

5.2. The learned Judge erred in finding that the Appellant had not made out his claim in relation to assault and battery. This was perverse because the Appellant's evidence on this was unchallenged and no evidence was adduced to counter it. No reasons were given for this decision.

5.3. The learned Judge erred in failing to award aggravated damages.

5.4. The learned Judge's award of $40,000.00 for exemplary damages was unreasonably low and was not at a level that would have a proper deterrent effect.

5.5. The learned Judge failed to award constitutional damages so as to reflect public outrage, the gravity of the breaches over an extended period, and requirement for such an award to have a deterrent effect.

5.6. The learned Judge erred in not awarding pre-judgment interest on damages from the date of the cause of action.

5.7. The learned Judge erred in law regarding the grounds on which costs should be ordered on the indemnity basis, and accordingly wrongly failed to award such indemnity costs.

26. I will now consider each ground.

Ground One - <u>The learned Judge erred in preferring the hearsay evidence of the Respondents' witness, Supt. Joseph, over the Appellant's own detailed evidence on the question of his treatment and the conditions of his detention in breach of Article 17(1) of The Constitution.</u>

27. In paragraph 12 earlier I set out the trial judge's evaluation of the evidence. There is no need to repeat it. As the trial judge said in paragraph 89 of the judgment also recited earlier she preferred the evidence of defendant's witness to that of the plaintiff/appellant.

28. The assessment of testimony given at a trial is primarily the responsibility of the trial judge. This is particularly so when the evidence is given orally and not contained in documentary evidence. The judge has the advantage of watching the demeanour of the witness and determining whether the judge believes or accepts the evidence as truthful.

29. It is settled law that a judge's factual findings can only be overturned on appeal if they are plainly wrong or the judge's decision is one that no reasonable judge could have reached or is rationally insupportable. This point has repeatedly been made by this Court. A recent example is that of **Minister Responsible for Crown Land v Findeisen SCCivApp No 79 of 2022.** As recently as this year this was pointed out by the English Court of Appeal in **Deutsce Bank AG v Sebastian Holdings Inc [2023] EWCA Civ 191** where the court considered and applied the decisions of the English court in **Volpi v Volpi [2022] EWCA Civ 464 and Walter Lily & Co v Clin [2021] EWCA Civ 136.**

30. The court pointed at paragraph 54 of the **Deutsche Bank Case**:

> **"54 These considerations apply with particular force when an appeal involves a challenge to the judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the judge has made so serious an error that her assessment must be set aside."**

31. Earlier, in **Volpi v Volpi** (which was applied in **Deutshe Bank**) the court regarded the following as settled law:

> **"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.**
> **(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.**
> **(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.**

> **(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.**
> **(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.**
> **(vi) Reasons for judgment will always be capable of having been [sic] better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."**

32. Even if the evidence of Mr. Joseph contained hearsay evidence, it was admitted into evidence without objection by counsel for Mr. Bojang. It was evidence which the trial judge was entitled to consider. Counsel elected not to cross-examine Mr. Joseph on his evidence simply relying on submissions that the judge should place very little weight on it because it was not of Mr. Joseph's own knowledge.

33. That was a forensic strategy not without risk because the judge was still entitled to accept that evidence and assign to it what weight she considered appropriate. In this case, the trial judge did not accept the evidence of Mr. Bojang as to the conditions that he encountered at the Detention Center. She preferred the unchallenged evidence of the Officer in Charge of the Detention Center as to the conditions that detainees at the Detention Center undergo.

34. Mr. Smith on behalf of Mr. Bojang submitted that Mr. Joseph's evidence was hearsay and not of his own knowledge of the conditions at the Detention Center. That it only spoke to conditions generally and did not contradict Mr. Bojang's evidence as to the conditions that he personally had to suffer. With respect, Mr. Joseph was the officer in charge of the Detention Center and clearly spoke of his own knowledge as to the conditions at the Detention Center and the conditions under which detainees are kept.

35. The judge was not obliged to accept Mr. Bojang's evidence even if Mr. Joseph did not direct his evidence as to what Mr. Bojang specifically said.

36. The point was made by Nugee LJ in **Griffiths V TUI (UK) Ltd** [2021] EWCA Civ 1442 where at paragraph 81 he said:

> **"81. As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be**

> **derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons."**

See also **MBR Acres v Markou** [2022] EWHC 2072 QB at paragraphs 87 to 90.

37. In this case, the judge saw Mr. Bojang give his evidence and clearly took notice that Mr. Bojang never in his witness statement said that he complained about his conditions to the UNHCR and was evasive as to why he did not. Mr. Bojang was challenged in his cross-examination about this issue and the judge had the opportunity to see the manner in which he responded to the challenge. Mr. Joseph was not challenged in cross-examination about the conditions at the Detention Center and the judge cannot be faulted for preferring his evidence over that of Mr. Bojang. It is perhaps not too surprising that the judge considered that Mr. Bojang was exaggerating his claim. This was perhaps best illustrated when in his Statement of Claim he continued to refer to the Carmichael Road Detention Center as "the Carmichael Concentration Camp", a term usually associated with the camps established by the Nazis during World War II to house the Jewish people to await execution.

38. Counsel for Mr. Bojang submitted that as the trial judge found in favour of another litigant in a different case as to the conditions in the Detention Centre Detention, it was perverse to make a different finding in this case. There are three points to be made in response to that submission. Firstly, findings in a different case based on evidence led in that case are not material to findings in this case. Secondly, in that other case, unlike the present one, there was no evidence led by the defendant as to the conditions in the Detention Center. Thirdly, in a different case the judge on the evidence led said that *"while the Detention Centre is not a five star facility, it was more likely than not that conditions there are fair"* Counsel on behalf of Mr. Bojang made no reference to this latter decision..

39. As part of this ground, counsel for the appellant also argued that the assessment of the evidence was flawed because the judge wrongly refused to accept into evidence Mr. Bojang's statement about the conditions at the Fox Hill prison when he was detained for a short period of time. I do not accept this criticism. The conditions at the Fox Hill prison were irrelevant to the pleaded case. In the Statement of Claim there is no reference to the conditions at the Fox Hill prison. Moreover, in Mr. Bojang's "Plaintiff's Statement of Facts and Issues" filed prior to the trial, Mr. Bojang identified the issues to be determined by the court as follows:

> **"1. Whether the Plaintiff was unlawfully arrested and detained <u>at the Detention Centre</u>?**
>
> **2. Whether such detention amounts to false imprisonment?**
>
> **3. Whether the conditions and the treatment of the Plaintiff's detention <u>at the Detention Centre</u> amounts to constitutional breaches?**
>
> **4. Whether the Plaintiff's belongings were unlawfully taken away and retained by officers <u>at the Detention Centre</u>?**

5. If the Court finds affirmatively to the above, whether the Plaintiff is entitled to damages and/or compensation from the Defendants and the amount of such damages and/or compensation?"

The issue for determination was whether the conditions and treatment **"at the Detention Centre"** not **"the Fox Hill Prison"** amounted to constitutional breaches. The judge was -in my judgment- correct to strike out the irrelevant parts of Mr. Bojang's witness statement which concentrated on the conditions at the Fox Hill prison or BDOC.

40. In my judgment ground one must fail. There is no basis for this court to set aside the judge's rejection of Mr. Bojang's evidence as to the conditions that he endured at the Detention Center and her finding that the appellant did not prove that there was a breach of his Article 17 rights under the Constitution for protection from cruel and inhumane punishment.

Ground Two - <u>The learned Judge erred in finding that the Appellant had not made out his claim in relation to assault and battery. This was perverse because the Appellant's evidence on this was unchallenged and no evidence was adduced to counter it. No reasons were given for this decision.</u>

41. In paragraphs 20 and 21 of the Statement of Claim Mr. Bojang pleaded his case on assault and battery, He said:

> **"20. On the 30th of December, 2015 Ousman Bojang was forcibly taken to the Carmichael Concentration Camp. In addition he was threatened, beaten, pushed around and manhandled <u>by the Defence Force</u> on numerous occasions.**
>
> **21. On the 16th of June 2017, Ousman Bojang was forcible handcuffed and shackled to prisoners from Fox Hill Prison and forced to shuffle to the Supreme Court, contrary to the provisions of Article 17 (1) of the Constitution."**

42. In paragraph 98 of the judgment, the judge simply said, "Mr. Bojang did not prove his claim for assault and battery".

43. Surprisingly the trial judge made no reference to the evidence of Mr. Bojang in his witness statement at paragraphs 33 to 36, which his counsel relied upon as evidence of assault and battery.

44. Those paragraphs were in the following terms:

> **33. The day of court I was not advised that I was going to court. I was not even served breakfast. I was manhandled and dragged to a car like a criminal and taken to the Central Police Station. At the police station they took my fingerprints. After that I was brought to the Court handcuffed and shackled to other prisoners."**

34. While listening in court I realized I was shacked to prisoners who were on trial for murder.

35. The court found that my imprisonment was unlawful and ordered my release on June 16, 2017.

36. After my release I was again handcuffed and shackled to accused murderers and remained in custody without food or drink for a further 4 hours at the Central Police Station."

45. It is not without significance that Mr. Bojang did not say that he was "he was threatened, beaten, pushed around and manhandled by the Defence Force on numerous occasions" as pleaded in paragraph 20 of the Statement of Claim. Indeed, there was no claim against any Defence Force Officer or the Commodore of the Defence Force. The plea in paragraph 20 of the Statement of Claim was not supported by any evidence.

46. It is unfortunate that the judge made no comment on the evidence in paragraphs 33 to 36 of Mr. Bojang's witness statement. In her judgment, the judge did make it clear when she accepted a part of the evidence of Mr. Bojang. An example is at paragraph 94 of the judgment when on the issue of special damages the judge said: **"On this issue, I prefer the evidence of Mr. Bojang over the evidence of Supt Joseph."**

47. However, in my judgment the finding by the trial judge that Mr. Bojang did not prove his pleaded claim for assault and battery is not surprising. The only evidence that could have supported the pleaded claim at paragraph 21 of the Statement of Claim *that: "On the 16th of June 2017, Ousman Bojang was forcible handcuffed and shackled to prisoners from Fox Hill Prison and forced to shuffle to the Supreme Court, contrary to the provisions of Article 17 (1) of the Constitution"* was Paragraph 36 of his witness statement. I am not prepared to say that the mere allegation, without more, that a person who is handcuffed and shackled to other persons whilst being transported to and from court amounts to the tort of assault and battery. A person being transported to court may be considered an escape risk. However, a person who has been released by the court ought not to be restrained by the police unless there is some other reason for restraining him. Even if the restraint after he was released on the habeas corpus application amounted to an assault and battery, the amount of damages to be awarded under that claim would in my judgment be nominal or at least relatively small. Unlike **Ngumi,** Mr. Bojang did not give evidence that he was constantly beaten by police, prison or immigration officers. Again, I note that there was no claim against the Commissioner of Police, the Commodore of the Defence Force or the Commissioner of the Department of Corrections. Paragraph 21 of the Statement of Claim does not make it clear as to whom are the persons who wrongfully shackled Mr. Bojang when he was released from court and detained at the Central Police Station after he was released on the habeas corpus application. If it was the police officers, there is no claim against them. I am aware that the Attorney General was made a party to the proceedings, but it is clear that he was joined as "representing the Government of The Bahamas and its executive branches and employees as particularized

below". Those employees appear to be the persons in the Department of Immigration. There was no claim for assault and battery against any police officer.

48. This ground must fail.

Ground Three - <u>The learned Judge erred in failing to award aggravated damages.</u>

49. Counsel for Mr. Bojang asserts that an award for aggravated damages should be made. He cited several reasons.

50. In paragraphs 123 to 126 of her judgment (which were referenced earlier in this judgment at paragraph [21]) the trial judge dealt with this claim for aggravated damages.

51. Mr. Smith's argument on this ground is as follows:

> **"20. The learned Judge refused to award aggravated damages on the basis that the court has already awarded damages for the 531 days false imprisonment so any award would be 'duplicitous' ($126). She also refused on the basis that the Appellant's article 17 claim had not been made out ($125).**
>
> **21. The learned Judge erred in treating it as a duplication. The damages awarded for false imprisonment were purely as compensation for the length of the detention and took nothing else into account. At § 114 the learned Judge stated: "having regard to the period of time for which Mr Bojang was unlawfully detained and taking into account the privy council guidance at paragraph 16 in Takitota, a daily rate of $300 per day is reasonable in the circumstances." The learned Judge then calculated the compensatory award as 531 days x $300 daily = $159,300.00. She then further reduced the sum to $125,000.00. This sum was reached without taking into account any aggravating factors. On the contrary, the Judge intentionally reduced the sum to $125,000 so as not to duplicate/overlap with the separate aggravated and exemplary damages awards. At § 103:**
>
> > **"I do not accept Mr. Smith's argument that the compensatory award should not be tapered down in this case to send a message to the State. That is the very purpose or rationale of aggravated or exemplary damages. It would therefore be duplicitous to refuse to reduce the sum to account for length for that reason."**
>
> **22. It was perverse for the learned Judge to refuse at § 103 to disapply a taper in recognition of the seriousness and**

aggravated nature of the offence because that was the job of aggravated and damages.

23. Even if the Appellant does not succeed in overturning the lower court's finding in relation to the inhumane and degrading conditions (his article 17 claim), he is entitled to aggravated damages for all the other aggravating factors, none of which were taken into consideration by the learned Judge when she refused to award aggravating damages.

24. The loss and damage suffered by the Appellant by being unlawfully imprisoned for 531 days (which is already compensated for by the conservative figure of $125,000) is aggravated by:

24.1. The conditions in which he was kept (outlined above).

24.2. The attempt to unlawfully expel him for forcing him to board an aircraft to Cuba on 25 June 2016 without any deportation order.

24.3. The attempt to unlawfully deport him to Gambia (via Cuba) where he knew his life to be in danger causing him distress.

24.4. He was only released after habeas corpus proceedings (vigorously defended) were brought in June 2017 and then he was kept in unlawful detention for a further 4 hours.

24.5. He was taken to court for the habeas corpus hearing shackled to dangerous Fox Hill inmates.

24.6. The Respondents' conduct after his release and in particular in the conduct of these proceedings including:

24.6.1. Unlawfully disposing of his personal effects (all that he had when he fled The Gambia) including clothes and jewellery;

24.6.2. Refusing to concede liability–defending the indefensible–when there was never any arguable defence to the charge that the detention was unlawful because the Appellant was not taken before a court and no deportation order was made;

24.6.3. Seeking an extension of time to file a defence (delaying the Appellant's access to justice and

compensation) only to then file a defence that consisted of bare denials when there was no arguable defence;

24.6.4. Refusing to give discovery in defiance of a court order;

24.6.5. Failing to file any evidence by the date for exchange of evidence (2 November 2020);

24.6.6. Filing evidence late on the eve of trial;

24.6.7. That evidence was pure hearsay and unsupported by any documentary evidence;

24.6.8. When Supt. Joseph admitted in his oral evidence that the Appellant had been unlawfully detained, refused to make an interim payment despite the Appellant's attorney suggesting a figure ($50k) that the judge indicated was reasonable as her award was likely to exceed it. Promised to respond in 7 days to written application for an interim payment and then failed to respond [ROA vol 1pp.111-114]; and

24.6.9. To this day, failing to offer any apology to the Appellant for his illegal detention or his treatment.

25. In all the circumstances, the Appellant submits that aggravated damages in the region of $50,000 is appropriate."

52. In **Rowlands v Chief Constable of Merseyside Police [2007] 1 WLR 1065,** the English Court of Appeal had to consider an appeal against an assessment of damages, assault, false imprisonment and malicious prosecution. On the issue of aggravated damages, it said the following at paragraph 26:

> **"It is now generally recognised that an award of aggravated damages is essentially compensatory in nature, notwithstanding the fact that it may have a punitive effect by increasing the overall amount the defendant is ordered to pay. That was explicitly acknowledged by Lord Woolf MR in Thompson's case as one can see from the passages cited earlier. Whether damages awarded to compensate the claimant for distress, humiliation and injury to feelings are treated as part of the basic damages (as Thomas LJ suggested in Richardson v Howie [2004] EWCA Civ 1127; The Times, 10 September 2004) or are separately identified by the name of aggravated damages, the important factor to bear in mind is that they are primarily intended to be compensatory, not punitive. It follows that any injury for which compensation has been given as part of the award of basic damages should not be the**

subject of further compensation in the form of an award of aggravated damages. However, the distinction between basic and aggravated damages will continue to have a part to play as long as the right to recover for intangible consequences such as humiliation, injury to pride and dignity as well as for the hurt caused by the spiteful, malicious, insulting or arrogant conduct of the defendant attaches to some causes of action and not others."

53. It is important to note that there is a distinction between aggravated damages and exemplary damages. Aggravated damages are awarded when a plaintiff suffers increased distress because of a defendant's actions. For example, where the conduct of the defendant has caused the plaintiff to suffer indignity or outrage to his feelings. In short, it is compensatory in nature and is awarded to compensate for injury to his feelings. On the other hand, exemplary damages are not compensatory in nature. They are awarded when the court finds the conduct of the defendant to be particularly reprehensible. It looks to deter others from engaging in the conduct in the future.

54. In this case, Mr. Bojang was detained pending deportation without being brought before the court and obtaining a deportation order. He ought not to be detained or deprived of his liberty pending deportation or the making of a decision on his request for asylum. Notwithstanding his counsel's efforts to paint the circumstances of this case as particularly heinous or egregious. The trial judge did not find that Mr. Bojang was kept in inhumane and degrading conditions in breach of Article 17. There is no evidence that the defendants were acting violently toward Mr. Bojang, were acting maliciously toward him, were abusing their power or the power of the State against him.

55. This case was always about quantum and it shows an attempt by Mr. Bojang to extract enormous monies from the government as a result of its mistake in detaining him without first obtaining a deportation order. In his opening submissions counsel for Mr. Bojang was seeking damages in the sum of $1,327,500 of which the claim for aggravated damages was $500,000.00.

56. In my judgment, having regard to the facts of this case the claim for aggravated damages is weak and the judge cannot be faulted for failing to make the award. The circumstances found by the judge in this case were not as egregious as was found in ***Douglas Ngumi v. The Attorney General & Others*** **SCCivApp. No. 6 of 2021**. Mr. Bojang was not detained for as long as Ngumi and not beaten and assaulted as Ngumi was. This case is more akin to that in the English case of **AXD v Home Office [2016] EWHC 1617 (QB).** In that case a claimant, an asylum seeker from Somalia, had been detained pending deportation at a prison in the United Kingdom (HMP Woodhill) between November 2011 and 14 May 2014. He was then transferred to a removal centre (the Verne). He contended at HMP Woodhill he had been locked up in his cell for long periods. He also complained that he had been bullied after other prisoners had found out that he was gay. The court held that the defendant was liable to for damages under the common law tort of false imprisonment for a period of 614 days. The court

considered: (i) the basic award; (ii) aggravated damages; and (iii) exemplary damages. The court ruled that the appropriate basic/compensatory award should be £80,000, which was about $112,000.00, and £25,000 as aggravated damages, which was about $35,000.00.

57. In **AXD**, the court made no award for exemplary damages. Although Mr. Smith's present claim for aggravated damages of $50,000.00 is more reasonable than his original claim for $500,000.00, in my judgment, having regard for the fact that the judge did make an award for exemplary damages, her refusal to make an award for aggravated damages cannot be faulted.

58. Grounds Four and Five were argued together. They were:

The learned Judge's award of $40,000.00 for exemplary damages was unreasonably low and was not at a level that would have a proper deterrent effect.

The learned Judge failed to award constitutional damages so as to reflect public outrage, the gravity of the breaches over an extended period, and requirement for such an award to have a deterrent effect.

59. The courts have ruled that exemplary damages and damages for breach of constitutional rights are duplicative. In **Takitota** the Privy Council said:

> **"The award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages The relevant provisions of the Bahamian Constitution are Article 17 (inhuman or degrading treatment) and Article 19 (deprivation of personal liberty). The basis of the jurisdiction to award such damages was set out in Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15, [2006] 1 AC 328. Lord Nicholls of Birkenhead, giving the judgment of the Board, said at paras 17-20:**
>
> > **"17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to**

('without prejudice to') all other remedial jurisdiction of the court.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. 'Redress' in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award.

> **20. For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense . . ."**

In Merson the Board regarded the same principles as applying to cases brought in The Bahamas for redress under the comparable provisions of the Constitution. Lord Scott of Foscote said at para 18 that the purpose is not to teach the executive not to misbehave, but to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in The Bahamas free from unjustified interference, mistreatment or oppression. The Privy Council returned to the subject in Inniss v Attorney General of Saint Christopher and Nevis [2008] UKPC 42, where Lord Hope of Craighead, giving the judgment of the Board, cited the guidance given by the Supreme Court of New Zealand in Taunoa v Attorney General [2007] 5 LRC 680, a case brought for damages for breach of the New Zealand Bill of Rights. He related the purpose of vindication of the claimant's rights to the effect of an award in deterrence of executive wrongdoing in a passage at para 27:

> **"The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard."**

Their Lordships consider that it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged, with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved. To make a further award of exemplary damages, as the appellant's counsel sought, would be to introduce duplication

and contravene the prohibition contained in the proviso to Article 28(1) of the Constitution."

60. In this case Mr. Bojang claimed a breach of his rights under Articles 15, 17(1) 19(1) and 21 of the Constitution. The Privy Council has ruled in **Newbold v Commissioner of Police [2014] UKPC 12** that Article 15 is preambular in nature and does not give rise to any enforceable rights. The Judge also found that he had not proven any breach of Article 17(1) which relates to cruel and inhumane punishment. Article 19(1) relates to personal liberty and that is the claim for false imprisonment for which an award was made. Article 21 relates to the protection of the privacy of the home.

61. The trial judge found that the only breach of Mr. Bojang's fundamental rights was a breach of his Article 19 (1) right. That is the right not to be arbitrarily arrested and/or detained. It is effectively the tort of false imprisonment. The compensation for that unlawful detention was found in the award of compensatory damages of $125,000.00. In paragraph 6 of his submission, counsel for Mr. Bojang said: *"In light of the Privy Council decision in Douglas Ngumi v The Attorney General of The Bahamas [2023] UKPC 12, the Appellant is no longer pursuing its ground of appeal against the quantum of compensatory damages*"

62. It is clear that Mr. Bojang cannot pursue a claim for both exemplary damages and breach of constitutional rights.

63. Is the award of exemplary damages in the sum of $40,000.00 too low that this court should set it aside and substitute a higher amount? In this appeal, Mr. Smith has argued that the award should be increased to $50,000.00. That in my judgment is tinkering and there is no basis for an appellate court to increase it from $40,000.00 to $50,000. Mr. Smith has accepted that the award of compensatory damages must be accepted by this court. $50,000 as exemplary damages would be forty percent more than the award for compensatory damages. This would be inconsistent with the admonition of the Privy Council that an additional award should not be of a "substantial size".

64. Mr. Smith argues that this "was a deliberate and outrageous disregard for the Appellants rights in this case (at the time of arrest and incarceration, without being brought before a court; during the incarceration; the forced and illegal expulsion to a country where his life was at risk; the insistence on defending etc etc".

65. The judge accepted that those circumstances warranted an award of exemplary damages. But such an award is still a vindication of his rights and not intended to be punitive of the State. This is not a case where Mr. Bojang was targeted by the State who manufactured a false claim against him. As I said earlier there is no evidence that the State was acting violently or maliciously toward him.

66. The State made the mistake of detaining him pending deportation without taking the steps to actually make a deportation order. There was no dispute that Mr. Bojang was in breach of the Immigration Act in overstaying his permitted time. A deportation order could have been made under section 40 of the Immigration Act. That section provides:

"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.

(2) Where a deportation order is made in respect of a person who immediately before the making thereof was lawfully within The Bahamas under the provisions of this Act, a copy of the order shall be served upon him by an Immigration Officer or by any police officer and he shall be entitled within the period of seven days next following the date of such service to appeal in writing to the Governor-General against the making of the order.

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."

67. In my judgment, the sum of $40,000.00 awarded by the trial judge was sufficient to vindicate him for the breach of the right given to him under Article 19 and to serve as a deterrent to future breaches of the rights of aliens found in the Bahamas. There is no reason to believe that given the recent decisions of this Court in **Ngumi**, **Ramon Lop v The Attorney General et al SCCiv App No 118 of 2022,** and this present case, the Immigration authorities will continue to detain persons without first obtaining a deportation order.

68. I would dismiss these two grounds of appeal.

Ground Six - <u>The learned Judge erred in not awarding pre-judgment interest on damages from the date of the cause of action.</u>

69. In this case the judge awarded interest at the rate of 6.25 per cent from the date of the Writ. Counsel for Mr. Bojang complains that the judge should also have awarded interest from the date of the cause of action to the date of the writ, albeit at a lower rate.

70. The awarding of interest is a matter of discretion. Section 3 of the Civil Procedure (Award of Interest) Act provides:

"In any proceedings tried in any court, whether or not a court of record, for the recovery of any debt or damages, the court <u>may if it thinks fit</u>, order that there shall be included in the sum for which judgment is given interest <u>at such rate as it thinks fit</u> 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".

71. There is no statutory obligation on the part of the trial judge to award interest from the date of the cause of action. It is purely discretionary.

72. Counsel for Mr. Bojang argues:

> **"40. Pre-judgment interest is not awarded as additional compensation. It is awarded because the plaintiff has been kept out of money that should have been paid to him. 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.**
>
> **41. In principle, damages for false imprisonment accrue from the first day of that imprisonment (in this case, 30 December 2015) as the effects of the false imprisonment are experienced from the very beginning. 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 the period (in this case 18 months) of his incarceration. In effect, if interest only runs from the date of the writ, the Respondent benefits from the length of the incarceration. That cannot be right."**

73. The thrust of Mr. Smith's argument is that interest should be awarded from the date of the cause of action as a matter of right and any exercise of judicial discretion to the contrary is wrong in principle.

74. In my judgment, there is no basis for this court to set aside the exercise of that discretion as being unreasonable. The award of interest by a judge is and has always been a matter of discretion. In this case, it was exercised in the same manner as this court exercised its discretion in **Ngumi**. Of the exercise of that discretion awarding interest from the date of the writ and not from the date of the cause of action, the Privy Council said:

> **"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".**

75. Whilst, the trial judge could have exercise her discretion in the manner now being proposed by Mr. Smith, this is an appellate court and this court does not interfere with the exercise of a trial judge's discretion unless the exercise is one that no reasonable judge could have made. As the Privy Council in **Ngumi** expressly approved the awarding of interest from the date of the writ and not from the date of the cause of action it is difficult to how we could find that the judge erred in doing something that the Privy Council approved.

76. This ground must fail.

Ground Seven - The learned Judge erred in law regarding the grounds on which costs should be ordered on the indemnity basis, and accordingly wrongly failed to award such indemnity costs.

77. This ground can be dealt with quickly. The appellant's challenge to the exercise of the judge's discretion not to award costs on an indemnity is identical to the challenge made in **Ngumi.** In that case, we refused to interfere with the undoubted discretionary power of the trial judge in awarding costs. The court of appeal's refusal to award costs on an indemnity basis was upheld by the Privy Council. In that case, the Board said:

> **"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."**

78. Although the Board decision was based upon an appeal to a third-level appellate court, the basic thrust of their argument was that it was perfectly reasonable for a judge in the circumstances of a case such as this to refuse an award of costs on an indemnity basis. There are no material differences to distinguish this case and that of **Ngumi** on this issue.

79. In light of the decision in **Ngumi** on the issue of indemnity costs, it is both surprising and disappointing that counsel pursued this ground of appeal for indemnity costs. This ground is dismissed.

80. In conclusion, having considered all of the grounds, we are satisfied that this appeal must be dismissed. The appellant shall pay the respondent's costs to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

81. I agree.

The Honourable Mr. Justice Isaacs, JA

82. I agree also.

The Honourable Madam Justice Crane-Scott, JA