IN THE SUPREME COURT OF THE UNITED KINGDOM

HER MAJESTY'S ATTORNEY GENERAL

Applicant

-v-

TIM CROSLAND

Respondent

RESPONDENT'S SUBMISSIONS ON COSTS

To support the Crowdfunder for the Respondent's £5K fine, click here:
https://www.crowdfunder.co.uk/tim-croslands-court-fine/comments#start

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A. INTRODUCTION

1. Parties to legal proceedings are entitled to know in advance the procedures that will be followed in the conduct of their case. Specifically they should be enabled to assess the risks of litigation, whether civil or criminal, in good time. It is inherent to Article 6 of the European Convention on Human Rights (the right to a fair trial), that parties are not taken by surprise by the procedures adopted by the court, and in particular that they are not taken by surprise by procedures which impact on them adversely.

2. There is no set procedure for a contempt of court hearing before the Supreme Court. In so far as the Civil Procedure Rules apply to the case, the Court has an obligation pursuant to Rule 1.1 and 1.4 to "actively manage" the case to support the overriding objective of dealing with it justly and proportionately.

3. The Court's unequivocal communication to the Respondent, prior to its adverse order for costs, was that this case would be dealt with as a criminal case and not as a civil case.

4. There was no indication that a "pick and mix" approach to procedures would be adopted, such that, for the purposes of the Respondent's application for the live-streaming, for example, the case would be treated as a criminal case, leading to rejection of the Respondent's application; while for the purposes of the Applicant's application for costs, the case would be treated as a civil case, such that the Applicant's application for costs would be accepted, without regard to the Respondent's means.

5. The only common thread to such an arbitrary approach would appear to be adversity to the interests of the Respondent.

6. The Applicant now claims costs of £22,504. The Respondent, who is experienced in criminal law procedure, has never encountered a situation where a defendant in a criminal trial has been required to pay prosecution costs on this scale.

7. The Respondent is a full-time volunteer and dependent on financial support from others. He does not have the means to pay costs of this order (or anything like it); and had received no indication from the Court or any other party, that contrary to the general principles for costs orders in criminal cases, he was at risk of a costs order of such magnitude.

8. Had the Respondent been made aware that by contesting his trial, he risked incurring costs of tens of thousand of pounds, he would have been compelled to pursue either of two courses of action:

    a. Plead guilty, to minimise costs

    b. Identify an individual or corporate sponsor to indemnify him against such cost risk.

9. Such economic pressure to plead guilty in a criminal trial is contrary to principles of the common law, criminal law procedure and ECHR Article 6. If such an approach were adopted generally to criminal law cases, only the wealthy could afford to contest a criminal prosecution. Law enforcement agencies and prosecution authorities could secure convictions simply by targeting the impecunious.

10. Likewise, if the Respondent's "right to appeal" is in fact contingent on his accessing another £10,000 (or whatever it may be), which he does not have, that would be no right at all. The Respondent's capacity to exercise that right would be contingent on the identification of a sponsor. In such an eventuality, the Respondent would (subject to the views of the sponsor) wish to be transparent about what was occurring:

    "TIM CROSLAND'S APPEAL AGAINST CONVICTION - BROUGHT TO YOU BY COCA COLA!"

11. For these reasons, there is a distinct regime for costs orders in criminal cases, as set out in the *Practice Direction (Costs In Criminal Proceedings) 2015 [2015] EWCA Crim 1568 Consolidated With Amendment No. 1 [2016] EWCA Crim 98*.

B. THE COURT'S COMMUNICATION TO THE RESPONDENT REGARDING THE APPLICATION OF CRIMINAL PROCEDURES TO THESE PROCEEDINGS

12. The Court had been explicit with the Respondent that criminal procedures (as opposed to Civil Procedure Rules) would be adopted in these proceedings.

13. On 18 March 2021, for example, the Respondent had emailed the Court as follows:

    "Assuming the trial takes place in court (as opposed to online) COVID restrictions will limit the number of people who can safely attend in person, potentially leading to those attending being turned away. In any event it may be difficult or impractical for some of those who wish to follow proceedings to attend Court in person. As I understand it, it is standard practice for the Supreme Court to live-stream its proceedings, so the issue may not be contentious. Were there to be any dispute about the appropriateness of live-streaming these proceedings, that would, in my submission, be a matter to address as a preliminary issue.

    One other preliminary matter. As I understand it, the ordinary procedure for a criminal trial is:

    1. *Prosecution case*
    2. *Defence case*
    3. *Prosecution closing speech*
    4. *Defence closing speech*

    That may be unwieldy to the circumstances of this case, but the key principle, in my submission, is that a person at risk of criminal conviction should be afforded

the last word. Were there to be any dispute about that, that might also need to be addressed as a preliminary matter." (emphasis added)

14. On 26 March 2021, the Court Registrar replied on behalf of the Court as follows:

> *"2. As for live streaming, criminal trials are not live streamed and the Justices have decided this practice should be followed in this case. The criteria of a public hearing are met without live streaming.*
>
> *3. As for the procedure at the hearing the sequential procedure will be as you have outlined."* (emphasis added)

15. Consequently, it was at all material times the Respondent's understanding and legitimate expectation that any application on behalf of the Applicant for a costs order would be subject to the ordinary principles applicable to the context of criminal trials. He had been given no indication to the contrary.

16. Had the Court, for any reason, concluded that the ordinary principles applicable to criminal proceedings should be ignored in this case, exclusively in the context of costs, departing from the previously stated principle that the case would be dealt with as a criminal trial, that should have been clearly communicated to the Respondent in advance.

C. THE CORRECT APPROACH TO COSTS ORDERS IN THE CONTEXT OF CRIMINAL PROCEEDINGS

17. The *Practice Direction (Costs In Criminal Proceedings) 2015 [2015] EWCA Crim 1568 Consolidated With Amendment No. 1 [2016] EWCA Crim 98* establishes the following principles for costs orders against a defendant in criminal proceedings:

> **"The court may make such order payable to the prosecutor as it considers just and reasonable"** (§3.1)
>
> **"An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay ... An order should not be made on the assumption that a third party might pay"** (§3.4) (emphasis added)
>
> **"The prosecution should serve upon the defence, at the earliest time, full details of its costs so as to give the defendant a proper opportunity to make representations upon them if appropriate … There is no provision for assessment of prosecution costs in a criminal case, such disputes have to be resolved by the court, which must specify the amount to be paid"**[1] (§3.6)

[1] See R v Associated Octel Ltd [1996] EWCA Crim 1327; [1997] Crim LR 144

> **"The Divisional Court has held that there is a requirement that any sum ordered to be paid by way of costs should not ordinarily be greatly at variance with any fine imposed."** (§3.7)

18. Since the Court had stated clearly that the principles applicable to criminal proceedings would be followed in this case, it was reasonable to assume that these were the principles that would be applied to costs in this case. It was incumbent upon the Applicant to draw these principles to the attention of the Court, and for the Court to apply them.

19. At the hearing on 10 May, the Respondent attempted to communicate his financial position to the Court, including his financial dependency on his wife.

20. The Applicant asserts that:

> **"The information he gave the Court orally at the hearing was extremely sparse."**

21. Any implication that the Respondent was withholding information is deeply disingenuous. The Respondent summarised his financial position, explaining that a financial penalty would in reality be a penalty on his wife, and responded to the Court's questions at the level of detail the Court's questions appeared to invite. At no stage prior to 24 May did the Court request more detailed information concerning the Respondent's financial position.

22. In any event, the Applicant had failed to provide the Court with a schedule of his costs, as he was required to do, so that the Respondent had no information as to the level of costs being sought.

23. The Respondent did not know what inference to draw from the Court's cursory interest in his financial position but assumed the Court had accepted that he was a full-time volunteer, financially dependent on others, and that it would rule justly and reasonably in light of that information.

D. THE CONSEQUENCE OF THE COURT'S DISREGARD FOR THE PRINCIPLES APPLICABLE TO COSTS ORDERS IN CRIMINAL PROCEEDINGS

24. The consequence of the Court's disregard for the principles applicable to costs orders in criminal proceedings is that the Court's order that the Respondent pay the Applicant's costs, to be assessed, is unlawful and subject to both appeal and judicial review.

25. It is far from clear that, now that that error appears to have been recognised, either the Applicant or the Court should get a "second bite of the cherry". The consequence of the illegality of the original order is simply that there is no lawful order for costs. This composition of the Supreme Court is now *functus officio.*

26. Without prejudice to that position, the Respondent provides the Court with information regarding his means, as requested by the Court by email on 24 May 2021 (see Confidential Annex 1 below).

E. THE APPLICANT'S SUBMISSIONS REGARDING COSTS

27. The Applicant asserts that:

> **"In committal applications, costs follow the event in the usual way"**

28. That proposition, however, is contradicted by the authorities he cites in support.

29. The Applicant cites Arlidge 3-96 which states:

> **"It is submitted that, while it is obvious that much of the contempt procedure is sui generis, it would be wrong to minimise the criminal characteristics and consequences of any conduct which is held to be contempt of court…"** (emphasis added)

30. The Applicant further cites Arlidge 14-154:

> **"The court will naturally take into account such facts as will ordinarily weigh in the consideration of such matters; for example, if the contemnor had no sufficient income or other resources to justify making an order …"** (emphasis added)

31. Contrary to Arlidge 14-154, the Court failed to take into account the Respondent's submissions that he is a full-time volunteer for a charity, with insufficient income to pay such an order.

32. Further, the Applicant relies on the first instance order in the case of *HMAG v Stephen Yaxley-Lennon* (aka Tommy Robinson).

33. The Applicant is not assisted by that case.

34. Firstly, in that case the Court did indeed give the Respondent a proper opportunity to submit a statement of means before making an order on costs - an opportunity apparently declined by the Respondent.

35. Secondly, there is no indication as to whether the same circumstances applied in that case as to the present case, ie that the Court had explicitly stated to the Respondent that the procedures to be followed in the case would be those applicable to the context of a criminal trial.

36. In summary, even on the authorities cited by the Applicant, it is clear that the Court should have taken proper account of the Respondent's financial circumstances before making an order for costs. Since it failed to do so, its order was unlawful.

F. OTHER MATTERS AFFECTING THE DETERMINATION OF WHAT IS JUST AND REASONABLE

37. There are three additional factors which the Court would have been bound to take into account had it applied the criminal law principle of what was "just and reasonable" as opposed to the civil law test of costs following the event:

    a. First, the circumstances giving rise to this matter, ie the Government's suppression of the evidence that Heathrow expansion would cause the Paris Temperature Limit of 1.5˚C to be breached, exposing the public to extreme danger;

    b. Second, the Government's involvement in the breach of the embargo concerning the Shamima Begum judgment, and its failure to conclude an investigation into that matter;

    c. Third, the Court's imposition of a £5000 fine on the Respondent without proper regard to his financial circumstances.

The Government's suppression of evidence concerning the extreme danger of Heathrow expansion

38. The Applicant did not dispute the Respondent's evidence that the Government had suppressed from the public domain the evidence that Heathrow expansion would breach the 1.5˚C limit (it would have been difficult for him to do so given the uncontested documentary evidence now available in support of that proposition).

39. Rather, the Applicant's position was that such a matter did not justify breach of the embargo. Accepting for present purposes, the validity of that position, it is nevertheless relevant to the issue of costs that the Respondent has found himself before the Court only as a result of the Government's deadly and criminal dishonesty, which places the Respondent in constant fear for his children's lives.

Breach of the embargo in the Shamima Begum case

40. In his outline submissions, the Applicant states:

> **"... the premature leaking of draft judgement appears to be growing in prevalence and is a matter of serious concern. The Applicant had cause to issue a media advisory notice about this in October 2020 …"**

41. What the Applicant did not mention was that in July 2020, in the high profile case of Shamima Begum, the Government's "serious concern" for the confidentiality of draft judgements was less apparent.

42. The BBC Report into the breach of the embargo in that case reads as follows:

> **"Separately, the court has revealed that the Sun newspaper will be referred to the Attorney General after it obtained a copy of the Court of Appeal's draft judgement - or its "essential contents" - in advance of it being handed down on 16 July …**
>
> **Lady Justice King, the head of the panel of three judges, said they were referring the newspaper to the Attorney General because of a potential contempt of court in publishing a story about the judgement - <u>seemingly leaked from government - before it was announced in court</u> …**
>
> **<u>Sir Jonathan Jones, the head of the government legal department, is now under pressure to identify who leaked it and report that finding back to the judges</u>. There will only be a handful of people inside the Home Office or elsewhere in Whitehall who knew the outcome.**
>
> **But there is also pressure for Attorney General Suella Braverman. She is simultaneously legally responsible for any decisions to pursue newspapers for contempt of court - and a cabinet minister.**
>
> **And that means her decision on this matter will face the utmost scrutiny."**[2] (emphasis added)

43. It does not appear the Government pursued its leak inquiry. Sir Jonathan Jones resigned in September 2020.

44. In March of this year Sir Jonathan Jones tweeted:

> **"This government has an ambiguous attitude to the law. It wants the full "force of the law" to apply to everyone else (immigrants, covid rule-breakers, protesters ...), but not necessarily to itself."**[3]

45. It is material to the question of costs in this matter, that the Government, firstly through its apparent breach of the embargo in the Shamima Begum case, and secondly through its failure to conclude a meaningful inquiry into that breach, contributed so cynically to the "growing in prevalence" problem it now claims to be trying to solve.

46. The Court should not reward the Government for its double standards concerning the confidentiality of draft judgments and its persistent disregard for the rule of law. It is the Government which has breached the social contract.

£5,000 fine, without proper regard to the Respondent's means

47. Third, as intimated by the Applicant, the Court made only cursory inquiry into the Respondent's means before imposing a £5,000 fine.

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[2] https://www.bbc.co.uk/news/uk-53607595
[3] https://twitter.com/SirJJQC/status/1368531955843731461

48. That fine is already a heavy penalty in the context of a full time volunteer, dependent on the financial support of others, who works for a small charity, and who derived no financial benefit from the action he took.

49. Had the Court properly taken into account these factors, it would have made no order for costs in favour of the Applicant.

G. CONCLUSION

50. The proper approach to an order for costs in criminal proceedings is that:

> **"An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay ... An order should not be made on the assumption that a third party might pay"**

51. The Court arbitrarily disregarded this principle in these proceedings and consequently the order it made that the Respondent pay the Applicant's costs was unlawful.

52. The consequence is that there is no lawful order for costs against the Respondent.

53. Had the Court taken into account the Respondent's means and his financial dependency on others, and other considerations regarding what would be just and reasonable in the circumstances (including the Government's previous disregard for the confidentiality of draft judgments), it would have made no order for costs in favour of the Government.

TIM CROSLAND
RESPONDENT
26 MAY 2021