Neutral Citation Number: [2019] EWHC 473 (Admin)

Case No: CO/1833/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

Before:

MR. JUSTICE SWIFT

- -

Between:

THE QUEEN

on the application of

MARIUSZ MAJEWSKI **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

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- -

STEPHEN KNIGHT (instructed by **Public Interest Law Centre**) for the **Claimant**
JACK ANDERSON (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 30th January 2019

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Approved Judgment

Mr. Justice Swift:

A. Introduction

1. Mr Majewski is a Polish national, born in August 1976. The Secretary of State for the Home Department concedes that he was unlawfully detained between 14 March 2017 and 20 April 2017, a period of 38 days.

2. Mr Majewski was detained in the course of Operation Gopik, the Home Office enforcement operation to deport EEA nationals found sleeping rough. The legality of that operation was determined by Lang J in *R (Gureckis) v Secretary of State for the Home Department* [2018] 4 WLR 9. Her judgment contained two conclusions that are material for present purposes: *first*, that the Secretary of State had operated a policy which treated rough sleeping as an abuse of rights under regulation 26 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"); and *second*, that policy was unlawful since under the 2016 Regulations there was no straight-line correlation between rough sleeping and article 26 misuse of rights. As a result of the conclusions she reached, Lang J quashed Guidance issued by the Secretary of State.

3. The judgment in *Gureckis* was handed down on 14 December 2017. This claim is one of a number (approximately 30) held in abeyance pending that judgment. Judgment in one claim in that group has already been given by Soole J.

4. The facts of this case are as follows. Mr Majewski first entered the United Kingdom in 2003. In 2013 he applied for recognition of a permanent right of residence under regulation 15 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). That application was allowed. On 25 October 2016 he was one of a number of people found sleeping rough in Tottenham, by police officers and immigration officers. Mr Majewski was not detained on that occasion, but he was served both with a Form IS.151A (EEA) (a notice that he was liable to be removed from the United Kingdom), and a Form IS.151B (EEA) (a notice of a decision that he would be removed from the United Kingdom). The latter form included information explaining the right of appeal to the First-tier Tribunal. Finally, Mr Majewski was served with a Form IS.96 EEA. This informed him that he was liable to detention, and granted him temporary admission to the United Kingdom subject to a condition that he report to Becket House, the next day at 2pm. He did not report, either the next day or at all.

5. On 14 March 2017 Mr Majewski was again found sleeping rough by police and immigration officers, again in Tottenham. This time he was arrested by the police, because he was wanted for questioning in respect of allegations that he had made threats to kill. Mr Majewski was initially held at Wood Green police station. Later the same day, he was transferred to immigration detention pending removal from the United Kingdom.

6. The detention records state that when, on 14 March 2017, Mr Majewski was asked about his state of health, he told immigration officers that he did not suffer from

any medical condition and was not taking any medication, but that he was heavily dependent on alcohol. He described this as a *"big problem"*. While still at Wood Green Station Mr Majewski was examined by a medical examiner who concluded that he was *"sober and well"*. When in immigration detention Mr Majewski was assessed for the purposes of the Secretary of State's "*Adults at risk in immigration detention"* policy, a policy designed to identify persons suffering from conditions likely to render them vulnerable to harm if detained. Mr Majewski was determined to fall within Level 2 – i.e. that there was some medical or professional evidence that he suffered from a condition that might render him vulnerable if detained. For Mr Majewski, the relevant condition was his dependency on alcohol.

7. In a witness statement dated 11 January 2019 Mr Majewski stated that while in detention he was given *"tablets to calm [him] down"*, and that on his arrival at the detention centre he was hospitalised for two weeks. By contrast, the GCID detention record for 4 April 2017 states that he *"was not undergoing detox or exhibiting signs of withdrawal"* and *"Subject is AAR L2 but a medic is not required"*. The Detention Review completed on 11 April 2017 includes comments to the same effect, and also records *"IRC Healthcare have not stated any contra indicators to detention"*. The precise details of any specific medical treatment received by a detained person would not ordinarily be recorded in the GCID. Even so, it is striking that neither the GCID document, nor any of the detention reviews make mention at all of any period of hospitalisation, or of any need for Mr Majewski to take medication. Mr Majewski did not take the steps necessary to allow the medical records from his period of detention to be obtained for the purposes of these proceedings. It is therefore impossible to know whether what he says in his witness statement about either medication or hospitalisation is true. If matters are put at their highest (from his point of view) it would appear that while detained, he received appropriate medical treatment, and there is nothing to suggest either that the state of his health militated against detention, or that his health suffered during the period he was detained.

8. The claim in these proceedings is for damages for unlawful detention including aggravated damages and exemplary damages. The exemplary damages claim rests on events occurring since the commencement of these proceedings. There is no claim for damages for financial loss, and no claim in respect of any specific personal injury arising from the detention.

9. The proceedings were commenced on 18 April 2017. Interim relief (first obtained on 15 April 2017 on the basis of an undertaking to issue proceedings) prevented Mr Majewski being removed from the United Kingdom. Various applications were made by the Secretary of State to extend time for filing his Acknowledgement of Service and Summary Grounds of Defence. By an order dated 14 August 2017, made by Nicola Davies J, the proceedings were stayed behind *Gureckis* and two other cases (*Cielecki* and *Perlinski*) that were to be heard with it. Following 14 December 2017, when the judgment in *Gureckis* was handed down, the Secretary of State made applications to continue the stays in the 30 or so cases held behind *Gureckis*. Those stays remained in place until lifted by order made on 22 June 2018 by Lang J. When lifting the stay, Lang J gave directions for service of a Supplementary Statement of Facts and Grounds, and the Secretary of State's Detailed Grounds. The Supplementary Statement was filed on 19 July

2018; the Detailed Grounds on 15 August 2018. The Detailed Grounds contained the Secretary of State's admission of liability. In an order made on 28 August 2018 Lang J ordered the Secretary of State to make interim payments on account of damages.

B. Decision

(1) Compensatory damages

10. The assessment of damages for non-financial loss in unlawful detention claims is neither mechanical exercise nor precise science. The leading authorities make it clear that there is no "daily rate", and no tariff which sets the amount of an award. This is helpful, but only up to a point. The lack of prescription means that assessing the value of the loss takes place in somewhat of a void.

11. The overall object is to identify an amount of money appropriate to compensate the claimant for the non-financial loss resulting from unlawful detention. The relevant damage is in the nature of injury to feelings, or the pain and suffering caused by the detention. So far as there are principles, they are summarised in the judgment of Laws LJ in *MK (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 980, at §§8 – 9, and they operate at a relatively high level of generality.

> "8. … There is now guidance in the cases as to appropriate levels of awards for false imprisonment. There are three general principles which should be born in mind: 1) the assessment of damages should be sensitive to the facts and the particular case and the degree of harm suffered by the particular claimant: see the leading case of *Thompson v Commissioner of Police* [1998] QB 498 at 515A and also the discussion at page 1060 in *R v Governor of Brockhill Prison ex parte Evans* [1999] QB 1043; 2) Damages should not be assessed mechanistically as by fixing a rigid figure to be awarded for each day of incarceration: see *Thompson* at 516A. A global approach should be taken: see *Evans* 1060 E; 3) While obviously the gravity of a false imprisonment is worsened by its length the amount broadly attributable to the increasing passage of time should be tapered or placed on a reducing scale. This is for two reasons: (i) to keep this class of damages in proportion with those payable in personal injury and perhaps other cases; and (ii) because the initial shock of being detained will generally attract a higher rate of compensation than the detention's continuance: *Thompson* 515 E-F.
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> 9. In *Thompson* the court gave specific guidance (515 D-F) to the effect that in a *"straightforward case of wrongful arrest and imprisonment"* the starting point was likely to be about £500 for the first hour of loss of liberty and a claimant wrongly detained for 24 hours should for that alone normally be entitled to an award of about £3,000. That case was of course decided more than ten years ago and, while not forgetting the imperative that damages should not be assessed mechanistically, some uplift to these starting points would plainly be appropriate to take account of inflation. Mr Singh for the respondent Secretary of State before us commends in particular the decision of Mr Kenneth Parker QC, as he then was, in *Beecroft v SSHD* [2008] EWHC 3189 (Admin). That is a helpful decision. It is very different on the facts from

the case before us and it is right to say, as indeed *Thompson* itself makes clear, all these cases are fact-sensitive."

12. *MK*, and other cases too, suggest compensatory damages comprise two elements. The first (sometimes referred to as a "basic amount") is damages to reflect the fact of detention and the restrictions and deprivations that are the ordinary consequence of any deprivation of liberty. This amount includes compensation for the "first shock" of detention, as described in *Thompson* – i.e. damages initially at a higher level for the first hour, and the first 24 hours of detention – and also further compensation for the remaining period of the detention.

13. It is clear from the authorities that damages for detention after the first 24 hours are awarded at a substantially lower rate. In *Thompson*, the Court of Appeal spoke in terms of a *"progressively reducing scale"*. This is not to suggest that long periods of detention are anything other than serious. Rather, the reducing scale recognises that, absent anything arising from the specific circumstances of the claimant or the detention, the initial impact of detention is likely to be particularly acute, and that the anxiety and other non-financial harm arising from detention will be greater in the early days, and diminish as time passes. In *MK*, Laws LJ observed that the taper also serves to ensure that the total amount of any award of damages for non-financial loss will bear some relationship to the level of damages available for other torts involving injury to the person. In *B v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin), Kenneth Parker QC (then, a Deputy High Court Judge) took account of the Judicial College Guidelines for awards of damages for severe post-traumatic stress disorder. He did not suggest a direct comparison between severe PTSD and detention (in the case before him for a period of six months), but took account of the broad comparison that could be made between expected emotional consequences of detention and a class of personal injury which may entail similar consequences. This is helpful, so long as the comparison is not pushed too far. Each case must be assessed on its own terms. It is entirely possible that in some instances the emotional harm consequent on detention may substantially cease either when the detention comes to an end, or very shortly after. Thus, where the claim is for wrongful detention, the long-term continuing consequences that can be associated even with less severe cases of post-traumatic stress disorder, may not be present. Conversely, even if it is accepted that where there is an extended period of unlawful detention, emotional distress may diminish over time, the damages awarded must still reflect the continuing deprivation of liberty. That is the essence of wrongful detention; and (equally self-evidently) a feature that will be absent from personal injury claims considered in the Judicial College Guidelines for General Damages in Personal Injury Claims.

14. The second element of compensatory damages reflects any special features of the case in hand that have aggravated the pain and suffering of detention. For example, the circumstances of detention, the defendant's conduct in the course of the detention, and so on. The object remains compensation, this time directed to any aggravated injury to the claimant's feelings including compensation for any continuing consequences of the detention on the claimant's health and well-being, which have not already been taken account of in the basic amount. There is no particular threshold for an award of aggravated damages. In principle, anything concerning the circumstances of the

detention and the effect of those matters on the claimant may be material to the extent of the claimant's injury to feelings.

15. In practice it is likely to be very difficult to draw any sharp distinction between these two elements of any compensatory award. Any distinction is likely to be a matter of impression. This is a further reason for caution when considering any submission to the effect that the award of damages on any previous occasion is a guide to the outcome in the present case.

16. Although counsel before me were agreed that there was no tariff and no "daily rate", both placed significant reliance on outcomes in other cases which they contended, were "comparable". Mr. Knight, who appeared on behalf of Mr Majewski, placed particular reliance on the outcome in *MK*. He drew my attention to the length of the detention in that case (24 days), and to the fact that in that case the detention had been consequent on a conclusion that there had been a cessation in the exercise of EEA treaty rights. On the facts of that case, the Court of Appeal awarded £12,500 as basic damages, and a further £5,000 as aggravated damages. Mr. Knight submitted that if that award were scaled up to reflect the 38 days detention in this case, and the passage of time since the judgment in *MK*, an appropriate award of damages in this case would be £28,000. Mr. Knight also relied on the outcome in *KG v Secretary of State for the Home Department* [2018] EWHC 3665 (Admin). There the court made an award of £17,500 for a period of 30 days unlawful detention which had followed 24 hours of lawful detention, and £2,000 as aggravated damages. Notwithstanding the conclusion that the first 24 hours of the detention had been lawful the damages awarded included some element for initial shock of detention; the award of aggravated damages rested on the judge's acceptance that the claimant's *"... mental vulnerability had been exacerbated in the course of his unlawful detention"*. Mr. Knight's submission was to the effect that if the award in that case were scaled up to reflect the length of time Mr. Majewski was detained, the appropriate award would be £28,000.

17. For his part, Mr. Anderson, for the Secretary of State, placed particular reliance on the judgment in *Mohammed v Home Office* [2017] EWHC 2809 (QB). In that case, the claimant was unlawfully detained for a total of 445 days. This comprised three distinct periods, the first of which had been for 41 days. The judge accepted that the period of unlawful detention had exacerbated the claimant's symptoms of post-traumatic stress disorder, but also noted that those symptoms could have been explained as the consequence of earlier long periods of lawful detention. As to the first period of detention the judge noted that it was not an "initial shock case"; he noted that detention had been in a prison regime rather than in a detention centre; and he also noted various failings on the part of the Home Office. The compensatory award for the first period was £8,500. Mr. Anderson next took me to the judgment in *R(Diop) v Secretary of State for the Home Department* [2018] EWHC 3420 (Admin). There the claimant had been unlawfully detained for 28 days. It was not an initial shock case; the judge accepted that the claimant's frustration had increased when his detention continued beyond an in-principle decision to grant bail; the judge also accepted that the defendant had (at least for a period) failed to take appropriate steps to find suitable accommodation following a decision in principle to grant bail. The overall conclusion was compensation of £9,000. In light of these decisions, Mr. Anderson's submission was that an award of between £12,500 and £15,000 is the appropriate award of damages in the present case.

18. As stated by Jay J in *AXD v Home Office* [2016] EWHC 1617 (Admin) at §34, what has happened in earlier cases is illustrative only; earlier decisions can be helpful to the extent that consistency is an aspect of fair adjudication, but it would be wrong to regard earlier cases as providing either detailed framework for or specific constraint on future decisions. It is trite that all cases depend on their own circumstances; and that is a matter of particular importance in this field. Evaluation of the circumstances case by case is paramount; even more than in personal injury claims, assessment of damages for non-financial loss is more art than calculation.

19. Turning to the present case, this is a case where there must be compensation for the initial shock of detention. Counsel were agreed that if the figures for initial shock specified in *Thompson* are updated to take account of the passage of time since 1998 and the 10% uplift in damages for non-financial loss following the judgment in *Simmons v Castle* [2013] 1 WLR 1239, the relevant amounts are £1,000 for the first hour of detention, and £6,000 for the first period of 24 hours. In *Thompson* the court made it clear that these amounts were starting points, and were appropriate in a *"straightforward case of wrongful arrest and imprisonment"*. So far as concerns the initial period of detention, there is nothing in the circumstances in which detention occurred that takes it out of the category of "straightforward" cases. Mr Majewski was detained when sleeping rough. It is clear from the judgment in *Gureckis* that the premise for the decision to detain was wrong, but that says nothing relevant for the purposes of assessing the initial shock damages. When he was detained Mr Majewski said that although he had been sleeping rough for two days, he lived with his brother. It seems that this was not accepted because Mr Majewski had already been found sleeping rough once before. It is now apparent that Mr Majewski was right to say that he was living with his brother; but the fact that he was not believed when he said this is not a matter that elevates what happened in this case from the straightforward. For example, there is nothing in the facts of this case that comes close to circumstances such as those before the Court of Appeal in *MK*, where the claimant was arrested and detained in front of his wife and child. I do not doubt that Mr Majewski was distressed when he was detained, but not in my view to an extent that is out of the ordinary. That being so, the compensation for the initial period will follow the *Thompson* levels, up-rated as I have described.

20. The next matter is the compensatory award to be made for the remainder of Mr Majewski's detention. Mr Majewski was detained for a significant period. In his witness statement he explains that he did not understand why he was detained, and was *"very stressed"* at the prospect of being removed from the United Kingdom, and was upset that he was kept away from his children. I fully accept that Mr Majewski was upset and fearful at the prospect of being removed from the United Kingdom; that would have been made worse by separation from his family and friends. I note that by March 2017 Mr Majewski had been separated from his wife and children for around three years. In the course of the hearing an issue arose as to whether by March 2017, Mr Majewski's access to his children had been restricted by Haringey Children and Young Person's Services Department. There is evidence that a child protection plan was in place, and there is some indication (in emails from the time) that a Domestic Violence Worker from Haringey's Children and Young Person's Services Department was involved with the family. I have seen an email that records her view that at such time as Mr Majewski was released from detention, unspecified *"safety measures"*

would need to be put in place for the family. I have seen nothing specific addressing limitations imposed on Mr Majewski's contact with his children as at March 2017. Having spoken to his client, Mr Majewski's solicitor told me that Mr Majewski said that both then and now, he had contact with his children. I place more weight on the content of the emails I have seen. On this basis my conclusion is that as at March 2017 the relationship between Mr Majewski and his children is likely to have been tenuous. Nevertheless, I accept that the period of detention entailed some form of disruption. I place little weight on the contention that Mr Majewski did not know why he had been detained. I have seen evidence that Mr Majewski received the usual detention progress reports, I have seen a copy of a Notice of Detention dated 14 March 2017 that was given to Mr Majewski, and I have seen representations made by Mr. Majewski on 3 April 2017 requesting release from detention. All this is consistent with the conclusion that Mr Majewski had been told the reasons for his detention at an early stage.

21. Mr Knight relies on a range of matters as aggravating considerations. His overall submission is that because of these matters any basic amount of compensation should be increased by 50%.

22. The first matter relied on is that because Mr Majewski fell within the scope of the Secretary of State's Adults at Risk policy, the effect of the detention on Mr Majewski was particularly acute. While it is correct that Mr Majewski was assessed as falling within the scope of the Adults at Risk policy because of his alcohol dependency, there is no evidence that the effects of detention on him were aggravated by this condition. It is clear from the detention records that right at the beginning of the detention it was recognised that Mr Majewski suffered from a significant alcohol problem. He was examined by a police surgeon while detained at Wood Green station. The detention records I have referred to (paragraph 6 above) suggest that while Mr Majewski was detained, the Secretary of State had proper regard to the risks that might arise in consequence of his dependency. Mr Majewski has not taken the steps necessary to make his medical records available for the purposes of these proceedings. Based on the information I have, the only conclusion reasonably available is that appropriate steps were taken to safeguard against Mr Majewski's alcohol dependency. There is nothing in the evidence before me to suggest that any medical condition Mr Majewski suffered from was exacerbated by the period of detention.

23. The next matter relied on as aggravating the circumstances of the detention is that Mr. Majewski was detained as a result of an unlawful policy – i.e. the Secretary of State's belief that rough sleeping equated to an abuse of rights under the 2016 Regulations. This is not a relevant aggravating matter. In ordinary circumstances it is highly unlikely that the precise premise for the unlawful detention will impact upon the claimant's pain and suffering consequent on his detention. Certainly, in this case there is no evidence to suggest that detention by reason of a generic error on the part of the Secretary of State (i.e. by reason of the application of an incorrect approach to the meaning and effect of the 2016 Regulations, rather than by reason of an error or errors specific to Mr Majewski's personal circumstances), in any way affected the injury to Mr Majewski's feelings.

24. Mr. Knight then relies on a sequence of matters relating to the conduct of this litigation. He submits that these matters, whether looked at one by one, or in the round, aggravated the effect of the period of detention.

(1) The first two steps in the sequence are that the Secretary of State did not admit liability until August 2018, and that the Secretary of State was responsible for unexplained delays in the conduct of this litigation during 2017 and 2018. Even if it is assumed that these contentions are well-founded on their own terms, I do not see how either is capable of providing grounds for aggravated compensatory damages. The present case is not like the situation before the Court in *R(Bernard) v London Borough of Enfield* [2003] HRLR 4, where the period during which the defendant had failed to provide suitable accommodation for the claimants was extended by the defendant's conduct of the litigation and the pre-litigation exchanges. In that case, there was a direct correlation between defendant's failure to act, and the length of time the claimants went without a suitable home. That pattern is not present in this case. Even if the Secretary of State was responsible for delay in the course of the present proceedings, all that took place well after Mr Majewski had been released from detention on 20 April 2017, and therefore cannot have affected the extent of his pain and suffering consequent on the detention.

(2) In any event, I do not accept that there was either unreasonable or unexplained delay on the part of the Secretary of State in the conduct of this case. The proceedings were filed on 18 April 2017, following a letter before claim dated 11 April 2017. On 20 April 2017 the order was made requiring Mr Majewski's release on bail. By the same order the Secretary of State was required to file an Acknowledgement of Service and Grounds of Resistance by 4 May 2017. No Acknowledgement of Service was served on that date, but on 9 May 2017, the Secretary of State made the first of a number of applications for an extension of time. I have sketched the remaining course of the proceedings above at paragraph 9. Given the number of claims arising out of Operation Gopik, and given the significance of the issues ultimately determined by Lang J in *Gureckis*, it was not unreasonable for some time to be taken to ensure that all the cases were addressed in a coherent way. This did take some months – it was not until the Order made by Nicola Davies J sealed on 14 August 2017 that three claims (including *Gureckis*) were identified as lead cases, and the other claims were formally stayed behind them. I do not consider that the time taken to manage the litigation comes anywhere close to unreasonable conduct of Mr Majewski's claim. Once Mr Majewski's case had been stayed, it was not unreasonable for the Secretary of State to await the outcome in the lead cases before taking steps to deal with this claim. After judgment in *Gureckis*, further time passed, but it was only on 22 June 2018 that Lang J made an order lifting the stay ordered by Nicola Davies J. From that time, this case did progress in sensible time. Mr. Knight's primary complaint, under this head is to the effect that the Secretary of State failed to *"engage with settlement"* of Mr Majewski's claim. I fail to see how, in the ordinary run of cases (including this case), either the lack of offers to settle a claim, or a lack of an offer of settlement that is acceptable to the claimant, will either be material to or aggravate a claimant's pain and suffering by reason of unlawful detention, when that detention has already come to an end.

(3) Mr Knight next relies on the Secretary of State's failure to concede an application for interim payments of damages. I have sketched the material sequence of events at paragraph 9 above. In slightly more detail, the position was as follows: (a) the application for an interim payment was issued on 19 July 2018, when the Supplementary Statement of Facts was served; (b) on 25 July 2018 the Government Legal Department wrote to the court asking for 14 days to respond to the application; (c) the Order requiring interim payments, was made, by Lang J on 28 August 2018, following consideration on paper only. I was told by Mr. Anderson that at the time the Order was made the Secretary of State was waiting for, and had not received a response to the 25 July 2018 letter. Mr Anderson tells me that the Order was made without submissions from the Secretary of State, even though the recitals to Lang J's Order do record that written submissions from the Secretary of State had been received and considered.

(4) Thus, the precise sequence of events is not entirely clear. But even if I assume that having asked for time to respond on 25 July 2018, the Secretary of State should have got on with formulating a response to the application within the period he had requested, that default was not of itself grievous, and in any event, I do not see how that "default" could serve to aggravate Mr Majewski's pain and suffering by reason of his detention.

25. Next, Mr Knight criticises the Secretary of State's conduct during the lead cases. He contends that the arguments advanced in *Gureckis* were *"demeaning to rough sleepers and … calculated to offend"*. Mr Knight also relied on these matters for the purposes of the claim for exemplary damages. I address the substance of these points below in the context of that claim. For present purposes I need say no more than (a) I do not consider that there is any substantive merit in this point; and (b) I do not consider that these matters, even if assumed to be correct, go to compensation for injury to feelings arising from the detention.

26. Mr Knight's final submission is that the Secretary of State has shown a *"lack of contrition"*. In large part this rests on the points above relating to the conduct of the litigation, since the practical manifestation of the asserted lack of contrition is the way in which the Secretary of State has conducted the litigation of this claim, including the approach to the lead cases. I am entirely unconvinced by this submission. In my view it is no more than a rhetorical flourish. While I can envisage circumstances in which some form of appropriate apology, at an early stage, might be capable of reducing injury to feelings, I find it difficult to see how the absence of an apology (or, as Mr Knight put it, contrition) is something that could logically increase compensatory damages. Any apology would be for an event that had already happened; if that event were relevant to the amount of compensation required, then it would already have been taken account of, hence the lack of contrition adds nothing. In the course of his submissions, Mr Anderson stated in terms that the Secretary of State did regret acting unlawfully, and regretted the impact on those such as Mr Majewski who were detained. The Secretary of State was clearly right to give instructions in those terms. When public authorities get things wrong and individuals have been adversely affected, an appropriate apology is both honourable, and tends to maintain general confidence in public administration. But it does not follow from this that the absence

of an apology must sound in damages. In this case, Mr Knight's response was to the effect that that apology, after the event, was just too late. That response confirms my belief that the lack of apology prior to the hearing is not a matter going to the measure of compensatory damages in this case. In this case the significance of the lack of an apology seems to have become something of a fetish.

27. Drawing all these matters together, I do not consider there are any particular features of Mr Majewski's detention that warrant an award of aggravated damages. The compensatory damages payable to him will therefore reflect the initial shock of detention, the continuing lack of liberty for the next 38 days, and the dislocation to his personal and family life during that period. The damages will also take account of the anxiety Mr Majewski must have felt at the prospect of removal from the United Kingdom. I have taken account of the examples provided by the other authorities referred to in the course of the hearing, and in particular the cases I have described in a little detail above. My conclusion is that the compensatory award for the initial period should be £6,400, which is in line with the starting points set out in *Thompson*. Appropriate compensatory damages for the remainder of the period is £8,400, resulting in a total compensatory award of £14,800.

(2) Exemplary damages

28. In *Rookes v Barnard* [1964] AC 1129, the House of Lords identified three classes of case where an award of exemplary damages is appropriate. Class one is relevant for present purposes – *"oppressive, arbitrary or unconstitutional acts by government servants"*. The meaning of this phrase was further explained in the judgment of Thomas LJ in *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453. He stated as follows at §§69 – 71.

> "69. A number of authorities were cited as being helpful in determining how Lord Devlin's summary of the legal position should be refined including *Holden v Chief Constable of Lancashire* [1993] QB 507. In the first case, Puchas LJ considered that, although Lord Devlin used the words *"oppressive, arbitrary or unconstitutional"* disjunctively, it was not enough that the action be simply unconstitutional; there had to be an improper use of *"constitutional or executive power"*. In the second, Sir Thomas Bingham MR (at page 529) after pointing out that Lord Devlin's phrase ought not to be subject to minute textual analysis as it was a judgment, not a statute, considered that there was no doubt what Lord Devlin was talking about:
>
> > "It was gross misuse of power, involving tortious conduct by agents of the government"
>
> 70. Lord Devlin's phrase *"oppressive, arbitrary or unconstitutional"* must be read, as was made clear by Lord Hutton in *Kuddus v Chief Constable of Leicestershire* [2002] AC 122 at paragraph 89, in the light of Lord Devlin's further view at page 1128:
>
> > "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by

> the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."
>
> As Lord Hutton observed, the conduct had to be "outrageous" and to be such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law.
>
> 71. In my view, the guidance given by Sir Thomas Bingham MR and Lord Hutton is sufficient. There is no need for this to be qualified by further looking for malice, fraud, insolence cruelty or similar specific conduct. …"

29. In this case, one strand of Mr Knight's submission was that the Secretary of State knew or ought to have known that the rough sleepers policy was unlawful. Mr Knight relies on three matters: (a) an academic opinion produced in May 2017 by Jean Demars, a Visiting Research Fellow at Goldsmiths, University of London; (b) an extract from the minutes of a meeting of the Mayor of London's "Rough Sleeping Group" which took place on 19 August 2015; and (c) a policy document *"Rough Sleepers and the Immigration (European Economic Area) Regulations 2016"*, which comprised instructions to Home Office staff, issued by the Secretary of State on 30 October 2017. Based on these documents, he submitted that the decision to detain Mr Majewski was in *"flagrant disregard of EU law"*. In my view, that submission is not made out.

30. Mr Demars' opinion came to be part of the evidence in the *Gureckis* litigation. I have seen an addendum to Mr Demars' opinion (of November 2017) which is in the form of a response to the Secretary of State's evidence in that case. As I understand the opinion and the addendum they are not documents that address the legality of the rough sleepers policy, *per se*. Rather they analyse the consequences of the application of that policy. Mr Demars' is not a lawyer by training; he does not state any opinion as to the legality of the approach to rough sleepers. Rather, the report seeks to provide building blocks of empirical support for legal submissions that were later made in the *Gureckis* litigation.

31. Mr Demars' original opinion identifies the August 2015 meeting of the Mayor of London's Rough Sleeping Group as the origin of the policy. Contrary to Mr Knight's submission there is nothing in the minutes of that meeting that indicates recognition that a rough sleeper policy was unlawful. Mr Knight placed particular reliance on §4.3 of the minutes. That part of the minute did record that those present at the meeting *"wanted to see the regulations changed"*, but only for the purposes of removing during the three months period provided by regulation 13 of the 2006 Regulations as the "initial right of residence" period (since re-stated at regulation 13 of the 2016 Regulations). I do not see anything in the minutes of the August 2015 meeting to the effect that it was recognised that the approach to EEA nationals sleeping rough, envisaged at that time, would be contrary to EU law. Thus, neither these minutes nor Mr Demars' opinion and addendum provide support for the contention that it ought to have been obvious to the Secretary of State that his position was wrong.

32. Mr Knight contends that the significance of the October 2017 policy document is that it includes statements that *"rough sleeping is not in itself a misuse of rights, but can indicate a misuse of the rights under the 2016 Regulations"*, and that *"rough sleeping alone will **not** normally amount to a misuse of a permanent right to reside"* (emphasis in the original). Thus, contends Mr Knight, the Secretary of State must have realised that he had no power to detain someone like Mr Majewski who had a permanent right to reside. But prior to the judgment in *Gureckis*, matters were not so clear as that submission might suggest. It is important to have in mind that in the *Gureckis* litigation, the substance of the Secretary of State's policy was disputed. The Secretary of State's submission was that his policy was not to treat rough sleeping of itself as an abuse of rights, rather that only certain types of rough sleeping fell into that category, namely *"the particular type of deliberate, socially and economically harmful rough sleeping"* (see the judgment in *Gureckis* at §57). Lang J did not accept that submission. She noted that the content of policy statements made from time to time, were inconsistent, but her ultimate conclusion was that the Secretary of State's policy had been to treat rough sleeping as an abuse of rights under the 2016 Regulations (see her judgment at §§52 – 74, in particular at §73). In this context, the October 2017 policy document is not evidence of recognition on the part of the Secretary of State that his policy was unlawful, or that it ought never to have been applied to persons such as Mr Majewski. Rather, the document is one of those that Lang J concluded did not accurately reflect the policy applied in practice by the Secretary of State.

33. The other strand of Mr Knight's submission relies on points arising from the *Gureckis* judgment. He submits that the submissions made by the Secretary of State in that case were no more than *"ex post facto rationalisation"*, that it was always *"plain beyond argument"* that the claimant's case would succeed, such that the Secretary of State ought never to have defended the claim. That is not the way that Lang J's judgment reads. There is no doubt she reached a clear conclusion that the Secretary of State's understanding of the 2016 Regulations was wrong. Yet there is nothing in the judgment to suggest she considered the Secretary of State's position as doomed from the start. The Secretary of State's submissions were rejected, but I see no basis for a submission that the submissions made were ones that ought never to have been made at all. Mr Knight also takes exception to arguments advanced by the Secretary of State in *Gureckis*, which he describes as *"tendentious"*. He draws attention to submissions summarised by Lang J at §§88 – 91, 97 and 104, and the extent to which the Secretary of State's case in that litigation and the policy there in issue rested on the social and economic burdens of rough sleeping. This he submits, was derogatory, and akin to a policy of *"social cleansing"*. This submission is entirely overblown. Rough sleeping is a complex social phenomenon; its causes are various, and common experience suggests that there is no single, straightforward solution. Yet rough sleeping undoubtedly does give rise to social and economic burdens. There is nothing in the report of the judgment in *Gureckis* to suggest that the Secretary of State's case was put in extravagant or inappropriate terms. In *Gureckis*, Lang J reached a clear conclusion that Secretary of State's policy was unlawful. But that is as far as the matter goes. Attempting to label the policy as "*social cleansing"* is a misuse of highly emotive language.

34. Overall, I do not consider that there is any case here for an award of exemplary damages. The Secretary of State operated a policy, equating rough sleeping with an abuse of rights under the 2016 Regulations. That policy was unlawful; and has been

declared to be so by the Court. I see nothing either in the judgment in *Gureckis*, or in the other material I have been shown, that makes good the contention that maintaining that policy amounted to *"outrageous conduct"* in the sense explained by Lord Hutton in his speech in *Kuddus*.

C. Conclusions

35. For the reasons set out above, Mr Majewski shall receive compensatory damages of £14,800.

36. Since receiving this judgment in draft, the parties have agreed the terms of an order, save for certain matters relating to payment of interest, some aspects of the costs order, and whether Mr Majewski should have permission to appeal. The parties are agreed that I should decide those matters on the basis of written submissions.