Neutral Citation Number: [2019] EWHC 794 (Admin)

Case No: CO/3382/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date 3 April 2019

Before :

THE HONOURABLE MRS JUSTICE SIMLER DBE

- -

Between :

MR A HOLOWNIA	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr S Knight (instructed by **Duncan Lewis**) for the **Claimant**
Ms J Anderson (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 27 February 2019

- -

Approved Judgment

Judgment Approved by the court for handing down.

MRS JUSTICE SIMLER DBE:

Introduction

1. This judgment determines the quantum of damages for admitted unlawful detention of the Claimant. The Claimant is one of a number of individuals who are part of a cohort of European Economic Area 'rough sleeper' cases. He was unlawfully detained pursuant to the Defendant's policy of issuing removal papers to, and detaining, EEA nationals who were alleged to be homeless and therefore not exercising Treaty rights pursuant to the Immigration (EEA) Regulations 2006 ("the EEA Regulations"). The detention extended from 12 April 2017 to 11 September 2017, a period of 153 days.

2. Liability to pay damages for unlawful detention has been accepted in this case (as in others) following the decision of Mrs Justice Lang in the lead case **Gureckis and others** [2017] EWHC 3298 (Admin) that among other things there was a systematic verification of the exercise of Treaty rights of those identified as rough sleepers which was unlawful. The findings in the lead case were expressly stated to be the only basis on which liability for unlawful detention has been conceded.

3. Psychiatric/psychological injury is not pleaded as a separate head of loss in the Claimant's judicial review claim form as it could and should have been to ensure clarity and avoid uncertainty, although I accept there is no breach of CPR Part 54 in not doing so. However, the Claimant applied for permission (having lodged an application notice dated 12 February 2019) to rely on an expert report prepared by Dr Thomas Sissons MBBS, BSc (Hons), MRCPsych, dated 27 November 2018 in support of his claim for damages for psychological injury said to have been caused by his unlawful detention. The report was served on the Defendant (and court) on 3 December 2018, together with submissions on quantum outlining this claim, in accordance with directions made by Lang J. (That was a few days late but a short extension from 30 November 2018 was sought). However there was no compliance at all with CPR Part 35.

4. The contents of the report are disputed and the application to admit it opposed by the Defendant. Accordingly I heard argument about it at the beginning of the hearing, and for reasons outlined in a short ruling, I granted permission for the Claimant to rely on the report but only at a further hearing directed at consideration of psychiatric or psychological injury. That will enable the Defendant to respond to the report by obtaining his own report if so advised, and for disclosure of medical notes and records to be given. It also enables directions to be given and complied with for experts to meet and narrow the issues, and for cross-examination to take place in due course if necessary. At this stage, I have reserved the question of psychiatric injury and loss to myself.

5. This judgment accordingly deals with basic and aggravated damages, and the claim for exemplary damages. It does not address the question of mental health injury which is adjourned to another day.

Procedural history and facts relating to the Claimant's detention

6. There is no witness statement from the Claimant for the purposes of this hearing. I have however, been provided with a number of contemporaneous records relating to the Claimant's detention. In the absence of any evidential basis for doubting the accuracy of this contemporaneous material, I proceed generally on the basis of its accuracy. The documents

include Home Office monthly progress reports, the CID and GCID case records and a calendar of events, Detention Reviews for the period from 12 April 2017 to 9 September 2017, and records for the same period from Healthcare personnel at Gatwick Immigration Removal Centre. I also have the pleadings and the correspondence relating to this litigation.

7. The Claimant is a national of Poland. His date of birth is 5 June 1955. He entered the UK in 1993 or 1994 on a visitor visa. He overstayed the visa but his stay was later regularised. During his time in the UK he has worked as a self-employed carpenter. He has filed tax returns for at least some years with HMRC, prepared by an accountant. There is also evidence of him working in the construction industry and he has filed self-employed tax returns in relation to certain periods.

8. It appears that a status request from police was sought in relation to the Claimant on 28 April 2015 when he was found rough sleeping at Heathrow airport. The documents do not indicate whether this was done or what happened thereafter.

9. On 6 January 2016 the Claimant was encountered by Immigration Officers. He was given form IS.151A (EEA) (a notice to a person liable to removal). The form states that he was "*specifically considered a person who has failed to exercise treaty rights in the UK*". Form IS.151B (EEA) (a notice of immigration decision with instructions on how to appeal) was completed and should have been served on him at the same time, but the Immigration Factual Summary (which I assume to be correct) does not indicate that it was in fact served.

10. Whatever the actual facts, the Claimant appears to have given the following information to Immigration Officers as recorded in the GCID record sheet for 6 January 2016:

> "He has been in the UK for five years and states he is not working. His close ties are to his native country where the rest of his family reside. He has no known assets in the UK that could hinder any barrier to his removal. He has no fixed address in the UK."

11. The Claimant was granted temporary release and required to report to Eaton House on 5 February 2016 at 11am. On reporting he was told he could bring any evidence he had to show that he was in fact exercising EU Treaty rights or of having made an appeal.

12. The Claimant failed to attend the reporting date on 5 February, or provide the evidence requested, and no appeal was lodged on his behalf.

13. Subsequently, on 12 April 2017 the Claimant was detained by the Defendant whilst sleeping rough at his work site.

14. He was kept at Brook House Immigration Removal Centre ("the IRC") for the duration of his detention. On arrival he was recorded as suffering from asthma for which he took salbutamol sulphate and it was recorded that he had a month's supply on 12 April 2017. No other medical conditions are identified.

15. Removal directions were set for removal to Poland on 28 April 2017, but he refused to leave the UK and this removal did not take place. The Gatwick IRC Healthcare records has an entry for the Claimant (as a new arrival from Luton airport, presumably after this failed return

on 28 April 2017) stating that he had no intention of self-harm but had tried to kill himself three years earlier "when he became homeless, after his wife divorced and sold the house".

16. A GCID entry for 2 May 2017 records a discussion with the Claimant about the consequences of not complying when removal directions are set. The Claimant said he had been living in the UK for 25 years and believed that he had medical problems (asthma and other health issues) which had caused him to stop working and therefore become homeless. The note records his wish to stay in the UK and prove his claim. The note records that G4S was to carry out their own induction which included signposting the services available to him within the IRC, in other words legal assistance, bail for detainees etc.

17. A GCID entry for 24 May 2017 records the view that the Claimant was an EEA national found not exercising Treaty rights and considered to be misusing his freedom of movement rights. Removal directions were in place for 8 June 2017. The note records that the IRC had not raised any concerns that his condition could not be managed in detention, and states the view that there were no mitigating circumstances warranting his release so that detention continued to remain appropriate with a view to removal.

18. By a pre-action protocol ('PAP') letter dated 5 June 2017 Duncan Lewis, solicitors acting on behalf of the Claimant, set out the Claimant's history in the UK including his long residence here. They said his removal from the UK would be in breach of the EEA Regulations, that he had acquired a right of permanent residence in the UK and had been exercising Treaty rights while in the UK. They asked the Defendant to stay removal and release the Claimant from detention. They also requested disclosure of all detention reviews and GCID notes. Although the letter makes express reference to human rights representations, it does not in fact contain any substantive representations about the Claimant's human rights.

19. The Claimant's removal on 8 June was deferred in consequence of these representations.

20. On 7 June 2017 the Claimant was seen by an IRC officer and served with a monthly progress report. He said that he should not be detained and that he would protest by not accepting food. The officer explained to him that refusing to eat would not affect his case. He responded saying he understood but "his job was his job and his protest was his protest". No other issues were raised.

21. By a decision letter dated 9 June 2017 the Defendant refused and certified as clearly unfounded the so-called human rights submissions made by the Claimant. In Annex A to the letter it was explained that the Claimant was removable because he had ceased to have a right to reside by ceasing to work in the UK. The letter stated that the Claimant was interviewed on 6 January 2016 under caution, but could not provide any evidence that he was working. He was advised to report on 5 February and to bring evidence that he was exercising EU Treaty rights. The letter noted that to date Duncan Lewis had not provided any evidence to show that the Claimant was employed prior to being detained and although reference was made to accountancy and tax return evidence, none had been provided. The letter referred to Regulation 19(3) of the EEA Regulations (which states a person who has been admitted to, or who has acquired a right to reside in the UK, may be removed from the UK if he ceases to have a right to reside) and stated that the Claimant had ceased to have a right to reside by virtue of the fact that he was no longer exercising his Treaty rights because he was not working.

22. The Defendant's PAP response letter dated 14 June 2017 repeated the points made above in relation to the Claimant having ceased to have a right to reside by virtue of no longer

exercising Treaty rights in the UK. It repeated the fact that no evidence had been provided to support the fact that the Claimant was employed prior to being detained. The GCID record sheet indicates that the Claimant was seen and served with the letter. The document was explained to him and he said he would speak to his solicitors.

23. Having been asked by Duncan Lewis for a copy of form IS.151A said to have been handed to the Claimant on 6 January 2016, by letter dated 15 June 2017 the Defendant responded to say that the form was not copied to the Home Office file.

24. On 16 June 2017 the GCID record indicates that the Claimant was classed as a

> "day two food/fluid refuser as he has not eaten an IRC issued meal since the 13 June (excluding breakfast) he will remain on FFR until he eats two consecutive meals. He has advised the service provider he is protesting against the Home Office. Healthcare monitor daily and currently have no concerns..".

25. From that point onwards there are daily entries in the GCID record sheet indicating that Healthcare was monitoring his condition on a daily basis and had no concerns about him notwithstanding his food refusal protest. The Claimant continued to drink daily according to observations of officer's and made small food/drink purchases on at least 27 June, 2 July and 12 July.

26. The Claimant was seen regularly throughout his detention by Healthcare. A further prescription for his asthma medication was obtained on 15 June 2017.

27. So far as toothache complained of during his detention is concerned, an entry for 19 June 2017 in the Healthcare records states: "has toothache and requested a dental appointment. He has been placed on the dental waiting list. Was advised regarding the effects of taking pain relief on an empty stomach. Continues his protest due to deportation issues." An entry for 21 June refers to ongoing complaints of toothache but states that he had an appointment to see the dentist the following day. Although the notes indicate that he was unlikely to be prescribed with medication for toothache if he was not eating as most medication prescribed for this states that the medication has to be taken after food, there is an entry indicating that he saw a GP regarding his toothache and was given paracetamol on 21 June. An entry for 23 June indicates that he made no complaint of toothache. The next time toothache is referred to in the Healthcare notes is on 19 July, after the Claimant failed to attend a GP clinic appointment for 12 July 2017. On 20 July 2017 he was seen by the dentist and an infection was identified. He appeared in pain with his face swollen from toothache. He ate toast and cereal in order to receive medication. It appears that he attended for x-rays at East Surrey Hospital on 27 July 2017 and was referred to a specialist in oral surgery for "extraction of LL4 root and grossly carious UR8" on 31 July 2017 by the Senior Dental Officer at the Hospital. It appears that he had dental surgery on 11 August 2017 at the East Surrey Hospital.

28. By a further PAP letter dated 16 June 2017 Duncan Lewis repeated the previous submissions made and in addition, challenged the Claimant's detention as unlawful. They urged his immediate release to a NASS address. There is nothing on the face of the letter to indicate that they did (as is contended) provide evidence of the Claimant's permanent residence obtained through the exercise of Treaty rights right up to the removal decision being made.

29. An entry in the GCID record sheet for 20 June records that an "FFR interview" was conducted "where he mentioned that HO has detained him for no reason. He has been in and out of jobs so unable to provide the evidence of work." On 20 June 2017 the Claimant signed a pro-forma document recording the fact that it had been explained to him that refusing food and/or fluid would not lead to progress of his case being halted or delayed, or to removal directions being deferred, or to the grant of permission to stay in the UK and would not lead to his release from detention.

30. A further entry for 21 June 2017 records:

> "No current concerns have been expressed by Brook House IRC that his condition cannot be managed in detention, and his medical issues are being satisfactorily managed in the IRC. Case owner to monitor case closely with IRC, should there be any further developments or arising concerns that the applicant is no longer suitable for detention. The presumption in favour of the detainee's release has been considered as well as the grounds for maintaining his detention. Having considered these reasons, the proposal to maintain detention outweighs the presumption to release him. His detention remains necessary for removal arrangements to proceed. RDs have been set for 7 August 2017…".

31. Further entries for 21 June 2017 indicate that the Claimant was placed on constant supervision on that date having presented a ligature/noose to a member of staff, and stated that he would use it. I note that the Healthcare record for 22 June 2017 records: "Denies any thoughts of self-harm. States it wasn't his noose it was the Romania men messing around."

32. The Claimant was seen by someone in Healthcare every day from then on as the Healthcare records disclose. In a number of entries he made clear that he was not going to eat until released and would prefer to die than return to Poland. In several other entries he is recorded as having told Healthcare staff that he was not eating for health reasons in order to lose weight.

33. The Defendant responded to the second PAP letter by letter dated 26 June 2017, maintaining the Defendant's decision of 9 June 2017. In addition to rejecting potential human rights claims, the letter said it was attaching a copy of the IS.151A form served on the Claimant on 6 January 2016. The letter referred to some tax records and accounts having been provided for the Claimant but to the absence of any such records for 2017. It said that in light of the lack of evidence that "your client is not misusing his Treaty rights, his detention remains lawful and the SSHD will continue to seek to enforce removal…".

34. By letter dated 28 June 2017 Duncan Lewis repeated their position and stated that their PAP letter attached evidence of the Claimant having worked for five years and therefore of having acquired permanent residence. They asked for a final response by 5 July 2017.

35. Further submissions were made by Duncan Lewis by letters of 6 July 2017 (expressly stated as attaching tax returns dating back as far as 2011) and 13 July 2017.

36. A GCID entry for 17 July records representations made by Duncan Lewis to the effect that the Claimant had been in detention for three months, had an ongoing appeal and his

removal was not imminent. Temporary release was requested. The note also records Duncan Lewis as having claimed: "client was harassed by a member of staff at the Home Office, the member of staff at the Home Office touched our client inappropriately. He took advantage of our client who wanted to smoke and could not. Our client is vulnerable and therefore unsuitable for detention." The allegation was submitted to IRC for further investigation according to the note.

37. The claim for judicial review was filed on 20 July 2017 and served on the Defendant. Time was abridged for service of the Acknowledgment of Service, which is dated 3 August 2017, and resisted the claim. By order dated 23 August 2017 Davies J imposed a stay on the Claimant's removal.

38. There is reference in the GCID notes to a video link bail hearing on 27 July 2017 with Taylor House but it is not clear whether that took place. The Defendant refused (in response to a request from Duncan Lewis to do so) to grant the Claimant section 4 bail accommodation on 8 September 2017 because he was an EEA citizen, and in his view, release onto the streets would not breach the Claimant's Article 3 rights given that he could find employment.

39. The Claimant was unconditionally released from detention on 11 September 2017. Following the judgment in **Gureckis** there was further correspondence between the parties, but it was not until 17 August 2018 that the Defendant conceded liability for unlawful detention in this case.

Gureckis

40. On 14 December 2017 judgment was given in **Gureckis**. On the question whether the Defendant's enforcement of Regulation 19(3) was unlawful because it was being systematically applied to persons believed to be rough sleepers, Lang J held:

> "101. During the extended period, an EU citizen must qualify under one of a number of categories. In the test cases, the qualification claimed was that the Claimants were workers or were seeking work, and the policy envisages that many rough sleepers are residing in the UK to obtain work. The term "worker" in regulation 4 of the 2016 Regulations is defined by reference to Article 45 TFEU. It has been broadly defined in the case-law. In Case 53/81 D.M. Levin v Secretary of State for Justice, the CJEU held that it included "the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary" (at [17]). This test has been widely applied.
>
> 102. The relevant question was whether, by rough sleeping, they were engaging in an activity which artificially created the conditions required to satisfy the requirements in the Regulations. In my judgment, the answer was "no". Rough sleeping was incapable of amounting to an artificial means of satisfying the requirement to be a worker or job seeker because it was not an economic activity and it could not generate the conditions required to establish economic activity.

> 103. Moreover, where it was accepted that an EEA national was a "worker", by definition he was engaging in "genuine" activities, and it would be inconsistent and illogical to find that he had at the same time artificially satisfied the condition of being a worker by rough sleeping.
>
> 104. As the Claimants correctly pointed out, Mr Eadie QC misstated the second limb of the test in paragraph 20(b) of his skeleton argument and in oral submissions by submitting that it was met where there was no intention to fulfil the purpose of the free movement right by integrating, economically and socially, into the host State. This confused the first and second limbs of the test.
>
> 105. It followed that the second limb of the test was not met because the rough sleepers could not be said to be engaging in an activity which artificially created the conditions required to satisfy the requirements in the Regulations. It made no difference whether the Defendant's policy was to treat rough sleeping *ipso facto* as an abuse of rights, or only to treat intentional, harmful rough sleeping as an abuse.
>
> 106. For these reasons, the Claimants succeed on ground 1. The policy was unlawful because to treat rough sleeping as an abuse of the right to freedom of movement and residence was contrary to EU law."

41. At paragraph 113 she further concluded that:

> "the Defendant could not justify its less favourable treatment of EEA rough sleepers on the grounds that they were suspected of abusing their rights to freedom of movement and residence, in breach of the 2016 Regulations. The justification upon which the Defendant relied was unlawful."

42. In relation to systematic verification, she held:

> "121. The Defendant relied on the reasoning in *Commission v UK* and *the Aire Centre* case, the evidence showed that the initial questioning only occurred because, under the terms of the policy, EEA nationals who were rough sleeping were presumed to be abusing their EEA rights of residence by sleeping rough. That was the reason why EEA nationals who were sleeping rough were targeted on the streets by police and immigration officers. Operations Adoze and Gopick were large scale comprehensive operations undertaken for these purposes. In my judgment, the Claimants were correct in their contention that this was a blanket policy of verification, which was systematic and therefore unlawful. Therefore the Claimants succeed on ground 3.

Legal principles applicable to the assessment of compensation in unlawful detention cases

43. There is no dispute as to the types and recoverability of damages in an unlawful detention case. Further, there is broad agreement on the principles that apply to the assessment of basic, aggravated and exemplary damages in cases of unlawful detention. The difference between the parties centres on questions of assessment and valuation in financial terms; and in relation to aggravated and exemplary damages in particular, whether such awards are justified at all – the Claimant contends for substantial awards under both heads; the Defendant contends no such awards are justified on the facts of this case.

44. So far as the relevant principles are concerned, I was referred to a number of authorities including **Thompson v Commissioner of Police** [1998] QB 498; **MK(Algeria) v SSHD** [2010] EWCA Civ 980; **Rooks v Barnard** [1964] AC 1129. In addition, I drew counsel's attention to the helpful guidance provided (albeit in a different – unlawful discrimination – context) by Underhill P (as he then was) in **Commissioner of Police of the Metropolis v Mr H Shaw** [2011] UKEAT/0125/11. From these authorities, the following principles can be identified as well established, and agreed by the parties.

Basic and aggravated damages

45. Basic damages are to compensate for the inherent consequences of unlawful detention. A basic award of general damages for unlawful detention may reflect at least three elements: (i) compensation for the claimant's loss of liberty; (ii) compensation for any consequential injury to the claimant's feelings; and (iii) compensation for any consequential injury to his reputation where relevant. Thus a basic award should compensate fully for the inherent consequences of the unlawful detention itself, putting the claimant in the position he or she would have been in had the tort not been committed, but without punishing the tortfeasor.

46. The assessment of basic damages is a fact sensitive exercise that focuses on the particular case and degree of harm suffered by the particular claimant. Damages are not assessed mechanistically by reference to a notional figure to be awarded for each day of detention. Further, while the gravity of unlawful detention may be said to increase with its length, the inevitable initial shock of sudden detention and loss of liberty is regarded generally as attracting a higher rate of compensation; and although long detention is less than desirable, it is well established that damages will taper off over time. The cases recognise the need for basic awards to maintain a relationship of proportionality to sums recovered by reference to basic damages awards made in other areas of the law (for example personal injury etc).

47. An award of aggravated damages is available in unlawful detention cases but only and to the extent that there is some increase in the seriousness of the effect of the unlawful conduct on the claimant and in consequence, the experience of loss of liberty itself and/or the injury to his or her feelings. Aggravated damages are not conceptually different from basic damages in that they are compensatory and not punitive. They compensate for the aggravation or increase in seriousness of the impact of the wrongful act on the claimant as a result of some additional feature not inherent in it.

48. The additional features identified in **Rooks v Barnard** [1964] AC 1129 as potentially attracting awards of aggravated damages are, as they apply to claims of unlawful detention, as follows:

(a) *the manner in which the unlawful detention was committed*: in other words, where the unlawful detention occurs or is handled in an exceptionally distressing, humiliating or insulting way that seriously increases the claimant's distress;

(b) *the motive for unlawfully detaining the claimant*: where the motive for unlawful detention is based on malice, personal animosity, prejudice or is intended to harm and the claimant's knowledge (whether gained at the time or after the unlawful detention has come to an end) of this motive causes increased distress;

(c) *conduct during or subsequent to the unlawful detention but that is directly relevant to it*: this covers conduct that can be seen as "rubbing salt in the wound". It can cover acts other than the tort in question. For example, where a defendant has conducted subsequent litigation in an unnecessarily offensive, oppressive or intimidating manner. A failure to apologise might fall into this category but whether it is a significantly aggravating feature will inevitably depend upon the particular circumstances of the case. A difficulty recognised in **Shaw** is the risk that compensation might be awarded for subsequent conduct under this category that has not been examined in evidence or properly proved (see paragraph 22(c) Underhill P.)

49. The measure of compensatory damages (both basic and aggravated) is not an exact science and translating hurt feelings into a financial payment is bound to be an artificial exercise. The so-called comparable cases to which reference was made in writing and orally, reflect a wide variety of contexts (save perhaps for the recent case of **Deptka**) and in consequence no doubt, a wide variety of awards. Given the highly fact-sensitive nature of the exercise, it seems to me that there is little precedent value in so-called comparable cases.

50. The artificiality of the exercise is increased by the difficulty of distinguishing between the injury caused by the unlawful detention itself and the injury attributable to any aggravating features found, since injury to feelings is not clearly divisible and is inevitably a product of both. The absence of any clear dividing line also gives rise to a risk of double-counting (a problem particularly emphasised in unlawful discrimination cases like **Shaw**). As Underhill P explained in consequence in **Shaw**, the ultimate question must be not so much whether the respective compensatory awards considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.

51. Also in the context of assessing compensatory damages for unlawful discrimination (again in **Shaw**) but it seems to me equally applicable in unlawful detention cases, Underhill P addressed the fact that faced with the difficulty of assessing the additional injury specifically attributable to the aggravating conduct, it is easy to focus on the quality of that conduct which is inherently easier to assess. He pointed out that the more heinous the conduct the greater the impact is likely to have been on the claimant's feelings so that this approach is not necessarily illegitimate. However, he emphasised the caution necessary in this regard because a focus on the defendant's conduct can too easily lead to compensation being assessed by reference to what might be thought appropriate by way of punishment, which would be illegitimate. As he said,

> "… the ultimate question is "what additional distress was caused to this particular claimant, in the particular circumstances of this case, by aggravating feature(s) in question?", even if in practice the approach to fixing compensation for that distress has to be to some extent "arbitrary or conventional".

52. The artificiality of the exercise and the risk of double counting have led some to suggest that a global award focussed on what injury a claimant has suffered in consequence of unlawful detention, including as a consequence of any aggravating features, would be better and would provide compensation, so far as money can do, for the loss of liberty and overall injury to feelings suffered as a result. The approach has much to commend it but was not an approach that either of the parties in this case particularly welcomed.

Exemplary damages

53. Exemplary damages are different. In **Rookes v Barnard** the House of Lords identified the categories for imposing exemplary damages as follows:

(a) cases of oppressive, arbitrary or unconstitutional action by the servants of the government.

(b) Cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant. This category is not confined to financial profit in the strict sense but extends to cases where the defendant is seeking to gain at the expense of the claimant some object. Exemplary damages can be awarded where it is necessary to teach a wrongdoer that tort does not pay.

(c) Cases in which exemplary damages are expressly authorised by statue.

In other words, exemplary damages are punitive and not compensatory, and payable to the victim where the tortious conduct involves a gross misuse of power or "outrageous" conduct that calls for "exemplary damages to mark disapproval, to deter and to vindicate the strength of the law" (see **Muuse v SSHD** [2010] EWCA Civ 453 (Thomas LJ at [70] and [71])).

54. In **Thompson** Lord Woolf MR gave the following further guidance:

> "(13) Where exemplary damages are appropriate they are unlikely to be less than £5000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent."

Up-rated for inflation those figures are £10,000, £50,000 and £100,00.

Application of these principles to the facts of this case

Basic and aggravated damages award

55. Mr Knight invites me to fix the basic award by reference to **Thompson** (where £1,000 and £6,000 – uprated for inflation- were identified as appropriate for the first hour and 24 hours respectively), and submits that guidance as to the range of awards available here is provided by **Muuse** (where the equivalent of £35,000 – as uprated – was awarded for only 128 days, in a case where there was no initial shock) and **Deptka** (where £35,000 each was awarded for 154 days to two EEA nationals detained for rough sleeping in similar circumstances to this case). He made similar submissions in relation to the award for aggravated damages in each of those

cases, contending that aggravated damages should be set as a proportion of any basic award made.

56. As I have already indicated, these cases (and others to which I was referred) can only be illustrative. They are not guideline cases. The facts surrounding the detention in those cases are different to the facts of this case, and in any event, I judge both of these cases to be more serious in terms of injury to feelings than this one. In particular, in **Muuse** the facts involved particularly egregious conduct by the defendant: conclusive evidence that Mr Muuse was a Dutch national was ignored. The detention had a particularly serious effect on Mr Muuse, whose concern and anxiety as to whether he would be deported to Somalia were significant and increased the longer he was detained. Mr Muuse's family circumstances were taken into account and the Judge found that the detention to which Mr Muuse was subjected was aggravated by racist remarks calculated to degrade and humiliate. In **Deptka**, the couple's separation was regarded as a particularly serious aspect of the detention which was particularly distressing for D due to her vulnerability and which caused Z more distress as a result. In addition, there was undue delay in admitting liability which was held in that case to have compounded the harm to them because they were kept out of their damages; there was delay in making an apology; and there was a parallel FTT appeal which should have been conceded sooner by the defendant but was not and was found to have prolonged their detention.

57. Nonetheless, I accept that cases such as **Deptka**, in particular but others also, provide an indication of the level of compensatory awards made in cases of this kind and that some regard to them can be had if only to achieve a degree of consistency in the amounts awarded.

58. The Claimant is clearly entitled to be compensated for his loss of liberty for 153 days. His detention was unlawful from the very start. The amount of compensation for unlawful detention broadly attributable to the increasing passage of time normally falls to be tapered and there is no reason to depart from this general approach here.

59. In relation to injury to his feelings, the Claimant had not previously been deprived of his liberty or lived in immigration detention and the initial shock of detention on 12 April must have been significant for him. On the other hand, it appears that he had no home to go to and there is no evidence that he had any family to return to either. Beyond those bare facts, the absence of any witness statement from the Claimant makes it harder to assess the value of this claim.

60. Mr Knight relied on a number of particular factors relevant to his treatment during detention as increasing the Claimant's suffering as a result of his detention. They are: (i) the fact that he suffered serious tooth pain but was denied medication because he was on hunger strike and thereby suffered additional pain; (ii) the lack of treatment and delay resulted in an otherwise medically unnecessary dental operation; and (iii) the fact that the Claimant went on hunger strike and was subjected to callous, indifferent and high-handed treatment by the Defendant's staff who failed adequately to deal with him as a person evidencing an intention to starve himself to death rather than be unlawfully removed.

61. I have set out above the only evidence I have in relation to the Claimant's toothache and treatment for it. In summary, he first referred to toothache on 19 June according to the records. He saw a GP on 21 June and was given paracetamol. An appointment was made for him to see a dentist on 22 June although it is not clear whether the appointment took place. The Claimant was seen by Healthcare personnel on 23 June and made no complaint of toothache. The Claimant failed to attend a number of Healthcare appointments according to the records and

having complained again about toothache on 19 July (by which time his face was swollen), was seen by a dentist on 20 July. He had x-rays and dental surgery was recommended on 31 July 2017 and appears to have taken place on 11 August 2017. There is no basis in this evidence to conclude that the Claimant was denied medication or caused any additional pain in consequence. Furthermore, there is no evidence whatever to support the assertion that the lack of treatment of his toothache led to what would otherwise have been medically unnecessary surgery.

62. So far as the Claimant's partial hunger strike is concerned, there is no evidence to suggest that the Defendant dealt with the Claimant other than entirely in accordance with his policy for dealing with those on hunger strike and there is no evidence of callous or indifferent treatment. The Claimant was subject to daily observation and regular reviews by Healthcare personnel. I can find no evidence whatever of a callous, indifferent or high-handed approach to his position. The pro-forma document the Claimant was asked to sign (and signed on 20 June 2017) is not evidence of such treatment contrary to Mr Knight's submissions. The Claimant's condition was monitored (from 16 June on a daily basis). He was observed drinking and eating snacks. He was prescribed asthma medication. FFR interviews were conducted and the question whether his condition could be satisfactorily managed in detention was considered and addressed regularly.

63. On the other hand, to the extent that the hunger strike was clearly a protest against the Claimant's detention, it is a reasonable inference that he was reacting to the detention in the only way he felt was available to him. Similarly I accept that the fact of being on hunger strike (while a personal choice for him) must have made his experience of detention worse. I accept that these factors should to an extent be reflected in the compensatory award.

64. In addition, Mr Knight submits that the Claimant was caused additional suffering and affront to his dignity by failures of the Defendant to comply with policy. In summary he contends that there was: (i) a failure to carry out a minded to remove interview before making the removal and detention decisions so that the Claimant could provide evidence of his permanent residence; (ii) a failure to tailor decisions to take account of the Claimant's individual circumstances or requirements; and (iii) a failure to consider the proportionality of removal at all. Mr Knight also submits that there was a failure at the moment of detention to serve IS.151B which sets out rights of appeal and includes information about how to pursue an appeal. Further the Defendant ignored evidence in relation to each of these factors that was presented on the Claimant's behalf.

65. The points raised by Mr Knight have not been investigated in evidence and findings of fact have not been made about them. What is clear however is that at the time of the Claimant's detention the policy applied in this case was in place and afforded a legitimate basis for detaining the Claimant and for maintaining his detention. There is no evidence of bad faith in the formulation of the policy which led to the Claimant's detention or in its application to his case. Mr Knight expressly disavowed any allegations of bad faith in this regard.

66. In the context of the policy (adopted to address those viewed as intentional and harmful rough sleepers) it seems to me that the documents provide some explanation for why the approach taken was adopted. For example, the Claimant was first encountered sleeping rough in 2015 and then again on 6 January 2016 when he said he was not working. Thereafter he was given the opportunity but failed to attend as requested on 5 February 2016 with evidence that could have proved his permanent residence and that he was exercising Treaty rights. His failure to do so no doubt influenced the decision to detain without offering a second 'minded to

interview' on 12 April, as could have been done. Mr Knight was critical of this, submitting that the officers might have thought he was not exercising Treaty rights but could not have thought he was *clearly* not doing so. It seems to me that was a judgment call to make, and absent any evidence of bad faith or malign motivation, I cannot see how this decision can give rise to aggravated damages or be criticised as clearly wrong. It is also unsurprising in the circumstances of the policy, that the only reason given on form IS.151A (EEA) was that the Claimant was considered a person who had failed to exercise Treaty rights, and in light of the history of being found rough sleeping and failing to attend and provide relevant evidence, that the detention decision was made.

67. I accept that it is likely that form IS.151B was not served on the Claimant on 6 January 2016 as it should have been. However, I cannot see this as anything but a slip. There is no evidence of wilful or deliberate obstruction by the Defendant in relation to the Claimant's appeal rights. So far as concerns the submission that the Defendant ignored evidence provided on the Claimant's behalf, the correspondence indicates that such evidence as was provided in June 2017 to the Defendant was incomplete and was regarded as insufficient. Even now the tax returns produced by the Claimant are limited to periods to 5 April 2012, 5 April 2014 and 5 April 2015. There is no tax return for the year to 5 April 2013, or 5 April 2016 or 5 April 2017 and no documentary evidence has been provided to show that the Claimant was working in the period immediately leading to his detention.

68. Mr Knight also relies on the Defendant's conduct of the litigation as having aggravated the harm caused to the Claimant very significantly. He submits that the Defendant ought to have been aware that the Claimant was not removable by at least the date of service of the claim form and yet he continued to detain and attempt to remove the Claimant, ignoring submissions made on the Claimant's behalf in what was an 'abusive and disempowering way'. He relies on documents showing what reputable people said about the impact of the policy, and the concerns raised in 2016 and repeatedly thereafter, to submit that the Defendant should have known the policy was unlawful much earlier but failed to heed any of the warnings. Further, the Defendant has not apologised for his wrongful conduct or offered any adequate explanation for the delays in the litigation (the most significant being the delay in admitting liability between 15 December 2017 and 17 August 2018) and failures to comply with timescales set by the court. Yet further, he submits that the Defendant has advanced arguments in the lead litigation which were demeaning to rough sleepers and calculated to offend. This constellation of factors justifies an award of aggravated damages at the higher end in Mr Knight's submission.

69. While I accept that some criticism of the Defendant's conduct of the litigation can be made (for example there are factual and dating errors in some of the Defendant's correspondence and documents, and there were failures to meet deadlines and delays), there is no evidence that it was conducted in bad faith or in a manner calculated to offend, or with any improper or unlawful motive. This was contested litigation, involving both the lead cases and a large number of other claims. The Defendant was entitled to take some time to evaluate his position at each stage of the litigation. In the context of the wider litigation, and having regard to the conduct of the litigation in the Claimant's case itself, there is nothing to suggest deliberate obstruction, nor any evidence that the Defendant behaved in an abusive or disempowering way as Mr Knight submits and there is nothing in Lang J's judgment to support these submissions.

70. Likewise I cannot see any basis for concluding that the litigation was so badly handled as to rub salt in the Claimant's wounds or increase the injury to his feelings or his experience

of detention. There is in fact no evidence that the Claimant was affected by what was happening in the litigation. The records to which I have been referred (some of which are summarised above) do not support this inference, save only insofar as the Claimant protested against his detention (without reference to the litigation) by refusing food. The same is true of the delay between 15 December 2017 and 17 August 2018 when liability for unlawful detention was admitted. There is no evidence that the timing of the admission of liability had any impact on the Claimant at all. To the extent that there has been unreasonable conduct in litigation (and I emphasise that no such findings have been made in **Gureckis** or any other linked case to my knowledge) that can properly be reflected in costs.

71. So far as concerns the absence of any apology from the Defendant, this seems to be a rather artificial claim in the context of this case. I can see that in the context of an ongoing employment (or other similarly close) relationship an apology for unlawful discrimination (or tortious conduct) can make a real difference to a claimant and his or her attitude to the ongoing relationship. But it is difficult to see how an apology from a remote defendant (as in this case) could make any real difference to the Claimant once liability was admitted and the Claimant knew he would receive damages for his unlawful detention. I appreciate that Mr Knight said on instructions at the hearing that it would make a difference, but that is mere assertion and easy to say. I struggle to see how an apology adds anything of substance in this case to the admission that the detention was unlawful and damages are payable.

72. Accordingly, I must make a judgment as to the amount of compensation to which the Claimant is entitled for his loss of liberty for 153 days and the injury to feelings he suffered in the light of my view of the facts and as compounded in the ways I have accepted above. The award must put him in the position he would have been in had the tort not been committed, as closely as money can do. It must not be disproportionate to general damages payable in cases of personal injury, and should bear some consistency to other similar awards. Doing the best I can, I assess basic damages at £32,000 including the initial shock (which I have assessed as £6000). To reflect the 'hunger strike' element (whether as basic or aggravated damages) in addition I award damages of £5000. This makes a global compensatory award of £37,000 which I regard as appropriate and proportionate on the facts of this case.

73. There was some controversy between the parties about the proper interpretation of the majority judgments in **R (Lumba) v SSHD** [2012] 1 AC 245 in relation to claims for exemplary damages in cases involving detention policies found to be unlawful. Ms Anderson submits that Lord Dyson JSC's statement in **Lumba** that "the category which is relevant for present purposes is that there has been "an arbitrary and outrageous use of executive power" (see [150]) is to be read as a statement of principle limiting claims of exemplary damages in unlawful detention policy cases to this category alone. I do not accept this submission. I cannot see that the claim for exemplary damages in **Lumba** was argued by reference to either of the other two categories identified in **Rookes v Barnard**. There is no discussion of other categories in his judgment or the other majority judgments in this case. Rather, I agree with Mr Knight that at [150] Lord Dyson did not limit the scope of when exemplary damages could be awarded, but rather commented on the category which was relevant for present purposes in the context of that case; a fact specific statement rather than a statement of general principle was made. Accordingly, I do not rule out as a matter of principle, the possibility of exemplary damages on the basis of the second category.

74. Mr Knight pursues an award of exemplary damages without alleging bad faith on the part of the Defendant in the formulation or pursuit of the policy. However he submits nonetheless that the first two categories for the award of exemplary damages are met on the facts of this

case. First, he submits in summary that there was a flagrant disregard of European and domestic law so that the conduct in formulating the policy was oppressive, arbitrary and unconstitutional. He relies for example, on minutes of a meeting dated 19 August 2015 of the MRSG attended by Patrick Mahon for the Home Office (the man in charge of formulating the policy) and the statement that the group, including Mr Mahon, was "strongly supportive of amending UK Immigration EEA Regulations". He submits that this gives rise to the inevitable inference that the Regulations required amendment in order to make the policy legal. Accordingly he submits there must have been a general fear that it was illegal and vulnerable to challenge from the outset. Furthermore, he submits that the Defendant must have known that his policy was unlawful when defending the case of **Gureckis** given the obvious misstatement of a well-established European and domestic law test (see paragraph 104) and all the other information available. Secondly, he submits that the Defendant's conduct was calculated to make a profit. The Defendant put his case as reducing the social burden of rough sleeping and his explicit policy was one of social cleansing. The Defendant sought to gain political profit from the reduction in visible rough sleeping caused by the policy and has claimed credit for a reduction in rough sleeping occasioned by unlawful detentions and removals.

75. I do not accept Mr Knight's submission that the facts of this case justify an award of exemplary damages. First, in my judgment the facts do not amount to "oppressive, arbitrary or unconstitutional action by the servants of government" so as to fulfil the first category in **Rookes v Barnard**. While the Home Office did not cover itself in glory in formulating and pursuing the policy which has now been declared unlawful, there is no evidence of conscious wrongdoing whether by the conscious decision to operate a policy known to be illegal or vulnerable to challenge or any other conduct. To the contrary, the Defendant's case in **Gureckis** was that on a proper interpretation of the relevant law the policy was lawful. If so there was no need to amend the Regulations. Although that argument failed, there is nothing in the judgment of Lang J to suggest that the arguments were pursued in bad faith or known to be wrong. There is no adverse comment on the defence pursued by the Defendant by Lang J nor did she make findings of any kind of deliberate misconduct that could justify the award of exemplary damages in these cases. Nor is there evidence to support the contention that the policy was wilfully misapplied in the Claimant's case. I agree with Ms Anderson that there is no public law obligation to be infallible or correct in every interpretation of EU and domestic law however desirable that would be. It is significant that there is no suggestion that officials acted out of malice or in bad faith towards the Claimant.

76. Secondly, I am not satisfied on the evidence available that the Defendant's conduct was calculated to make a profit in this case. There is no evidence of this or other ulterior motivation. The so-called clean-up costs saved were saved by local authorities and not by the Defendant who in fact incurred significant costs in the operation of the policy that would not otherwise have been incurred.

77. Furthermore, I accept as Ms Anderson submits, the point of general principle militating against awards of exemplary damages to claimants in cases where there are many potential victims of the tortfeasor's conduct not all of whom are before the court (discussed at [167] in **Lumba**). Unless all claims are quantified at the same time, the true punitive effect of an award of exemplary damages cannot properly be calibrated or assessed.

78. The unlawful detention in this case is very different from the conduct analysed by the judge in **Muuse v Secretary of State for the Home Department** [2009] EWHC 1886 (QB).

Moreover the Defendant's conduct has not been shown to have been calculated for profit. In short, in my judgment this is not a case where it is appropriate to award exemplary damages.

79. I have dealt in this judgment with the main points advanced in written and oral arguments but the parties can be assured that I have considered all points raised even if not expressly dealt with above.

Conclusion

80. For the reasons given above accordingly, the Claimant is entitled to compensatory damages of £37,000. Exemplary damages are not appropriate. The question of damages for psychiatric injury remains to be resolved, and directions will be made in due course to enable that resolution to take place.

81. The parties are invited to agree any consequential orders, including further case management directions if any. I am grateful to both counsel for the assistance they gave me.