Neutral Citation Number: [2025] EWHC 212 (KB)

Case No: KA-2023-BHM-000008

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE BIRMINGHAM DISTRICT REGISTRY

Date: 04.02.2025

Before:
MR JUSTICE RITCHIE

- -

BETWEEN

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant/Defendant

- and –

NADRA TABASAM ALMAS
Respondent/Claimant

Julie Anderson of counsel (instructed by the **Government Legal Department**) for the **Appellant**
Zainul Jafferji of counsel (Direct Access) for the **Respondent**

Hearing date: 22.1.2025

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.00am on Tuesday 4th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Ritchie:

The parties

1. The Appellant/Defendant is the Secretary of State for the Home Department and is responsible for immigration decisions. The Respondent/Claimant is a member of the public who was detained pending imminent removal by the Appellant and then released and whose fresh claim application for asylum took the Appellant 2 years and 9 months to determine.

Bundles

2. For the hearing I was provided with an appeal bundle, two authorities bundles and two skeleton arguments.

Summary of the claim, decision below and appeal

3. The Claimant sued the Defendant for unlawful detention (the UD claim) alleging that on 9.4.2018 she was detained unlawfully when she was reporting to the Defendant under her immigration reporting conditions. She was released on 23.4.2018 after she provided fresh submissions to the Defendant to justify her claim for asylum. The Claimant also claimed damages for breach of her right to family life under Article 8 of the *European Convention of Human Rights* (ECHR) and the *Human Rights Act 1998* (the Art. 8 claim) because, during the delay period during which the Defendant made a decision on her fresh asylum application which took 2 years and 9 months, she was under restrictive conditions: (1) preventing her from working or earning anything and requiring her: (2) not to travel, (3) to live at one address, and (4) to report monthly.

4. At the trial the Claimant gave evidence and the Defendant relied on a witness statement from an employee who had no part in the decision making processes relating to the Claimant. The Defendant applied during the trial for an adjournment to put in more evidence but this was refused. The refusal was not appealed. Recorder McNeill allowed the claim on both grounds, awarded damages totalling £98,757.04, awarded indemnity costs to the Claimant and ordered a payment on account of costs of £30,000.

5. The Defendant/Appellant puts forwards 6 grounds of appeal based on errors of law seeking to set aside the Recorder's decisions on liability, quantum and costs. Permission was granted (I think) by Julian Knowles J on 30.7.2024 at a renewal hearing (the name of the judge is not stated on the face of the Order so it is defective as a matter of form but neither party took the point, so I move on). The Order set out the slightly restricted scope of the grounds which were permitted, so that various procedural grounds were omitted from permission but the asserted errors of law were permitted to go forwards. No application to expand permission was made by the Appellant.

Appeals - CPR 52

Review of the decision

6. Under CPR r. 52.21 this appeal is a review of the decision of the lower Court, not a rehearing and will only be granted if the decision below was wrong or unjust due to a serious procedural or other irregularity. In this appeal the Appellant asserts in the grounds that the relevant decisions were wrong.

Fresh Evidence

7. This appeal is restricted to the evidence before the lower Court unless, under CPR r. 52.21(2), an application is made to adduce new evidence and this Court grants it. No such application was made.

Findings of fact and credibility

8. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per Lord Reed at [67]; *Grizzly Business v Stena Drilling* [2017] EWCA Civ. 94, per Longmore LJ at [39-40] and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, by Lord Justice Males at [48] - [55], that any challenges to findings of fact in the Court below have to pass a high threshold test. The trial Judge had the benefit of hearing and seeing the witnesses which this appellate Court does not. The Appellant needs to show the Judge was wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision, or that the Judge took into account an irrelevant matter or failed to take into account a material and relevant matter. Two deferential principles are applied. Firstly, where the trial judge heard and saw the evidence being given live over the course of the trial he/she was better placed to assess the evidence than the appellate court is having only the transcript an documents. Secondly, there is a generous ambit for disagreement allowed on such findings. The threshold for appeals against findings of fact was summarised by Lord Justice Lewison in *Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2-4 and 52. No appeal was raised as to the findings of fact of the Recorder.

Case management decisions

9. Appeals against case management decisions likewise face a high threshold and I note that there was no appeal in this case against the Recorder's decision to refuse to adjourn the trial for the Defendant to obtain and rely on further evidence.

Unchallenged findings of fact by the Recorder

10. The Claimant was born in Pakistan and came to the UK on a student visa in 2004. This expired after 5 months but she stayed. In February 2008 she was served with a notice of removal. Between 2005 and 2014 she made 6 applications, which I have not seen, for permission to remain. The Defendant issued a notice of temporary admission at one stage. She was informed that she could not work or run a business, had to live at a specified address and had to report. She complied diligently with the reporting requirements and other conditions. The Claimant's Asylum claim was refused in March 2015. It was certified as clearly unfounded. The Claimant submitted a fresh claim on

15.5.2015. The Recorder noted the Defendant's policy which required that claim to be made in person in Liverpool (she lived in Leicester). The Claimant sent more submissions in 2017 asking to be excused from personal submissions to Liverpool. The Defendant did not reply. At paras. 6-7 the Recorder made findings of fact on the asserted 2015/2017 fresh claim and how the fresh claim and later submissions were handled. The Defendant had breached its own processes and kept the claim on file (rather than rejecting it and sending it back or accepting it and determining the application) but did nothing about it and did not return the claim or submissions or decide them. On 30.1.2018, the Claimant's son, who was born in February 1991, was granted asylum by the FTT on appeal from a decision of the Defendant and on the basis of evidence which included the Claimant's unchallenged evidence. The decision was given to the son (and the Claimant) in February 2018. He was therefore granted refugee status (which occurred 3 months later due to administrative matters). It was an agreed fact that in March 2018 the Claimant rejected the Defendant's offer to leave the UK permanently. Despite the pleasure of her son's result, on 9th April 2018 things did not go as the Claimant expected when she reported to the reporting centre (EMRC). She was handcuffed and detained, imprisoned in a room with two men she did not know and was told she was going to be flown back to Pakistan on 17.4.2018.

11. The Recorder's key findings of fact about the Claimant's detention on 9th April 2018 were as follows. I note that GCID means General Computer Information Database.

> "9. On 26 March 2018, a note was made on the GCID evidencing planned detention of the claimant at EMRC on 9 April 2018. A brief summary of the claimant's immigration history was set out. It was noted that the claimant had been offered voluntary departure on 24 March 2015 and on 13 March 2018, but had not left the UK. It was stated there were no barriers to removal. Removability was assessed as high but absconding was assessed as low, and indeed was still assessed as low on 2 April 2018 in another note, as the claimant was compliant with reporting. It was reported in the case notes that the claimant had high blood pressure for which she took medication. In answer to the question: "What alternatives have been considered for detention?", the answer given was: "Subject has not voluntarily left the UK". This was not an answer to the question posed, and I concluded that no consideration was given to possible alternatives to detention.
>
> 10. The section for reasons for recommending detention was left blank, as was the section for completion by the detention gatekeeper to give their decision and reasons. The section for onward action plan was also left blank. A further note, dated 2 April 2018, contained similar omissions. In short, there was no evidence before me either that the defendant considered alternatives to detention or that there was any reason for the decision to detain the claimant beyond that she was to be imminently removed.

> 11. I will come to the specific wording of the decision in a moment, but on 9 April 2018 and in accordance with the plan recorded in the notes, the claimant was detained on reporting at EMRC. She was with her son. He was not detained. The only recorded reason for her detention was that she was at high risk of absconding. **The defendant submitted that this decision was based on a recognised escalation risk given that there was now no other disposal than removal.** There was no direct evidence to this effect, but clearly the claimant's imminent removal was the only reason for treating her as being at high risk of absconding. No other reason was given.
> 12. On being detained, the claimant was inducted at Yarl's Wood. It was stated that it was ensured that she understood the reasons why she was in detention and it was explained how the case would progress during her stay, and the role of the contact management team of the RIC. The claimant stated that she did not wish to return to Pakistan. She stated her son was aged over 18 and resided in the UK, and she wanted to stay here with him. She also stated she arrived in the UK in 2004 and she feared for her safety if she returned to Pakistan, as she is a Christian. In the GCID note of 10 April 2018 it was recorded as follows:
>
> > "This case was considered an imminent removable case by the Gatekeeper. After reviewing the case on CID removal appears imminent. Am waiting to review the Home Office file to confirm this.
> > ... The subject has no barriers to removal."
>
> It stated that the subject was served with an enforcement notice and assertive letter. She could depart using an agreed ETD and had RDs (removal directions) in place, set for 17 April. In spite of the reference to "waiting to review the Home Office file", there was no evidence that the file was reviewed. If it had been reviewed, the letter of 15 May 2015 and the 2017 submissions would doubtless have been seen." (My emboldening).

12. I should mention here that a note dated 9.4.2018 recorded that the Defendant served removal directions (RDs) on the Claimant for a flight on 17.4.2018.

13. The Recorder went on to find that the Defendant reviewed detention at 24 hours. The legal basis for continued detention was stated as para.16(2) of Schedule 2 of the *Immigration Act 1971* (the power to detain persons liable for removal) and the Claimant was due to be removed on 17.4.2018. The reason for detention was found by the Recorder as follows:

> "13 … In section 4, in relation to the risk of absconding, the reviewing officer did not specifically indicate whether the risk was high, medium or low, but stated that the subject, "is likely to abscond if released as will be aware removal is imminent as RD's set". There was no ticking or crossing of the boxes for high, medium or low risk, but that was the reason stated. The only reasonable inference that can be drawn from this note, in the

> absence of any witness being called to explain the reasoning, is that the reason for assessing the claimant as likely to abscond was simply that she would be aware that removal was imminent if she was released. This interpretation is reinforced by a further note, "maintained detention as IR case", which I take to mean an imminent removal case. This suggests that no consideration was given to the claimant's particular circumstances in deciding whether she was likely to abscond. The imminence of removal, without more, led to the conclusion that the claimant was likely to abscond.
> 14. The defendant accepted that the claimant had a good record of compliance with reporting. The 24-hour review was carried out by an individual at EO (executive officer) grade, and continued detention was agreed. The form should have been completed by an authorising officer. This was not done. The appropriate authorisation for detention, I find, was not given."

14. The Recorder found that the 7 day review took place on 16.4.2018 and the risk was then dropped to "medium" and the Claimant's further submissions were noted. Recorder found:

> "15. … It was noted under the heading "Recommendations", that the presumption was in favour of release, but that "case circumstances have been reviewed and continued detention remains appropriate and proportionate". It was further stated that there were "strong grounds for believing the subject would fail to comply with any restrictions on release, namely overstaying and failing to depart when required". It was stated that the risk of absconding was heightened due to the late stage of the case, and that these factors outweighed the presumption in favour of release. Detention was recommended as RDs were imminent."

15. At that review the RDs were not "imminent" they had long since been given to the Claimant. The Recorder recited the Defendant's detention policy at paras. 16-19 referencing that it stated that for detention to be lawful it had to accord with the statutory powers, the case law and accord with the published policy. The Recorder then set out parts of Paras. 55.3.1, 55.5 and 55.6.2 of the policy and further the paragraphs setting out the requirement to complete forms IS91 and IS91R evidencing the justification for the decision/s to detain and the requirement for these to be signed by the appropriate senior staff and to keep proper copies. Then the Recorder made findings as to the numerous breaches of the policy at paras. 20 – 26. These were: (1) lack of explanation for detention; (2) inconsistent decisions on the risk of absconding (low then none then high then medium) without explanation, which the Recorder found was unreasonable given the Claimant's good history of reporting; (3) the IS91 and IS91R forms were unsigned and undated. By 16.4.2018 the notes recorded that the RDs had been cancelled yet the Defendant did not release the Claimant. The notes recorded that the RDs would have been deferred anyway due to the Claimant's further submissions (which she lodged on 11, 12 and 13.4.2018) which amounted to a fresh claim and were based on her son's

successful appeal to the FTT and her evidence there and referred back to her 2017 submissions (the year before) and which all needed to be considered. Despite this note the Claimant was detained for a further 7 days and only released on 23.4.2018 and the Defendant provided no explanation or justification for that further detention.

16. Stopping here, not only was there no appeal against the findings of fact relating to the period from 16.4.2018-23.4.2018, but there was no argument put forwards on appeal that detention during that week was lawful. The appeal focussed on the initial detention and the review at 24 hours. This approach rather overlooked what was, in effect, an acceptance by the Defendant that the Recorder was right as to unlawful detention, in relation to the period from 16.4.2018 for the next 6-7 days.

17. In paras. 23-26 the Recorder accepted the Claimant's evidence from her witness statement dated 23.9.2022 and her live evidence. I shall not repeat the findings here. It was noted that the Defendant called no evidence in relation to the 33 month period of delay before making the decision and granting her fresh asylum claim.

The Recorder's rulings

18. Having set out the law based on the submissions made to her at paras. 27-40, the Recorder made the following rulings. On the false imprisonment (unlawful detention or UD) claim, the Recorder considered the competing submissions about whether there was any barrier to removal arising from the 2015 and 2017 submissions and made no finding on that issue (paras 43-44). Instead, she relied at paras. 45-49 on the Defendant's breaches of its own policy to justify her finding that the initial detention was unlawful. The breaches which she found were:

(1) Firstly and fundamentally, the Defendant did not consider any alternatives to detention before or when making the detention decisions. This ruling arose from her findings that the IS91R, IS91 and the GCID notes did not contain any such consideration. The Defendant provided no other evidence so that is all the Court had.

(2) Secondly, the only given reason for detention was the risk of absconding and the Recorder found that:

> "46 … This was not explained. It is not enough simply to assert that someone is likely to abscond just because their removal is imminent, and there was no evidence before me that indicated that anything else was taken into account. A rational and considered decision on the risk of absconding should be taken. The fact that this risk went from low on 2 April, where already the detention on 9 April was being planned, to then becoming high and then being medium seems to lack any rationale. On the evidence, it appears to have been concluded, solely on the basis that there was an imminent removal planned, that the claimant was therefore at high risk of absconding. That decision did not involve any consideration of factors specific to the claimant as envisaged in the defendant's own policies."

(3) Thirdly, the Defendant failed to complete and sign the appropriate authority to detain.
(4) Fourthly, the Defendant failed to keep proper records of its decisions.

19. The Recorder ruled that these breaches were numerous and significant (para. 48) so the detention was unlawful (para. 49) and the continuation of the detention at 24 hours and 7 days were unlawful. There was no evidence that the decision was properly authorised on 10.4.2018 and after the RDs were withdrawn, on 16.4.2018, there could be no legitimate continuation of detention beyond minor administration delays if any necessary to release.

20. In relation to the Art. 8 claim, in paras. 50-58 the Recorder set out the pleaded and pursued basis of the infringements of the Claimant's Art 8 rights as follows:

> "Her case was set out in her particulars of claim, where she said that throughout the period alleged she was required to comply with restrictions placed on her residence in the UK, and she was not permitted to travel, live freely and develop her private and family life as her status in the UK was uncertain. She was unable to work or claim any public funds and had to survive on the basis of very little support provided by the asylum system and relying on assistance from friends and family, which undermined her self-esteem and caused her embarrassment. She relied on particulars, first of all, relating to her son's claim, which she said was in all material respects identical to hers (a submission I did not accept). Then that her claim was not considered within a reasonable period of time, which meant there was delay in determining her refugee status"

21. The Recorder was asked for and allowed further submissions on the correct approach for the Court to take on the issues relating to her asserted Art.8 breaches and delay. The Defendant submitted that if she found a breach she was not tied to the pleaded unreasonable delay start date (1.6.2018) and could decide the right date herself. She accepted that submission. She refused the Defendant's application for permission to call more evidence (the evidence had been completed). At para. 55 the Recorder found that Art.8 was engaged by the restrictions put on the Claimant's private life. She could not travel, she could not move freely, she could not develop her private life, she could not work or earn at all and could not claim public benefits or funds and had only asylum support as income. She felt like a criminal. The Recorder then, in paras. 56-58, considered the second part of the Art.8 test: whether the restrictions were lawful, necessary and proportionate. She took into account the Defendant's policy which required claims to be resolved quickly and the Claimant's circumstances. In particular the Recorder noted that the Defendant called no evidence, so wholly failed to discharge the burden of proof which it carried, to show that the restrictions to the Claimant's Art.8 rights were lawful, necessary and proportionate.

The Grounds of Appeal

22. The Appellant did not number each ground of appeal. Instead, the Appellant gave 6 numbered grounds and put lots of different sub-grounds inside each.

23. **Ground 1 (G1):** The first part of this ground was the assertion that the Recorder made an error in law by ruling that the initial detention was unlawful. The Appellant's submission was that the Recorder relied on the Claimant's 2015 and 2017 submissions when making her decision. I reject that because it is plain from what the Recorder said in para. 44 that she did not. The second submission was that the Recorder misdirected herself by treating the risk of absconding as constant instead of considering all the relevant circumstances objectively. There is no such suggestion in the judgment so I reject that sub-ground. What the Recorder decided was that the Appellant changed their assessment of the risk of absconding three times and did not explain why each time. It was next submitted that there were no or no viable alternatives to detention after the RDs were served because the Claimant had refused voluntary removal and the Recorder had failed to understand the purpose, which was to get the Claimant to the airport. This could be called the "Automatic Detention" submission. The Appellant relied on the judgment of Thomas LCJ in *Fardous v SSHD* [2015] EWHC Civ. 931, at paras. 44 and 45:

> **"The risk of absconding**
> 44. It is self-evident that the risk of absconding is of critical and paramount importance in the assessment of the lawfulness of the detention. That is because if a person absconds it will defeat the primary purpose for which Parliament conferred the power to detain and for which the detention order was made in the particular case. This has been made clear in a number of cases: see for example paragraph 54 of the judgment of Keene LJ *in R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 and the judgment of Lord Dyson in *Lumba* at paragraph 121.
> 45. Although the risk of absconding will therefore always be of paramount importance, a very careful assessment of that risk must be made in each case, as the magnitude of that risk will vary according to the circumstances. It may be very great, for example, where the person has, as in this case, a clear track record of dishonesty and a knowledge of how to "work" the controls imposed to regulate immigration in the European Union. Another example where the risk may be high is where the person refuses voluntary repatriation that is immediately available to him. It is important to emphasise that the risk of absconding is distinct from the risk of committing further offences and not dependent on that further risk. The risk of re-offending requires its own distinct assessment."

24. Finally, the Appellant asserted that the lack of signatures on the key forms was minor and was inadequate to found unlawfulness.

25. The Respondent submitted firstly, that the Recorder did not base her decision on the 2015 or 2017 submissions, which I accept is correct from an objective reading of the judgment. Secondly, the Respondent submitted that the Appellant had not addressed the reasons given by the Recorder for the unlawfulness of the detention. The appeal skeleton only addressed the assessment of the risk of absconding and ignored the failure to consider alternative methods of ensuring compliance with RDs. This partly fell away during submissions because the Appellant did address more reasons in her verbal submissions. Thirdly, the Respondent pointed out that the Recorder was entitled to find that the Appellant had failed to consider reasonable alternatives to detention because no evidence was called by the Appellant and the forms and GCID notes were empty of explanation, where such should be set out.

The Policy relevant to G1 – unlawful detention – breach of policy

26. The 2018 *Home Office Detention Policy,* Chapter 55 was in evidence at trial and before me. The relevant parts were as follows (all italics are my highlighting, the bold was in the text):

> "**55.1.1 General**
> The power to detain must be retained in the interests of maintaining effective immigration control. *However, there is a presumption in favour of immigration bail and, wherever possible, alternatives to detention are used* (see 55.20 and chapter 57). Detention is most usually appropriate:
> • *to effect removal*;
> • initially to establish a person's identity or basis of claim; or
> • where there is reason to believe that the person will fail to comply with any conditions attached to a grant of immigration bail.
> *To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy*.
> …
> **55.1.3 Use of detention**
> **General**
> *Detention must be used sparingly, and for the shortest period necessary*. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process, for example once any rights of appeal have been exhausted if that is likely to be protracted and/or there are no other factors present arguing more strongly in favour of detention. All other things being equal, a person who has an appeal pending or representations outstanding might have relatively more incentive to comply with any restrictions imposed, if released, than one who does not and is imminently removable (see also 55.14).
> …
> **55.1.4 Implied Limitations on the Statutory Powers to Detain**

In order to be lawful, immigration detention must be for one of the statutory purposes for which the power is given and must accord with the limitations implied by domestic and ECHR case law. *Detention must also be in accordance with stated policy on the use of detention.*

…

55.1.4.2 Article 8 of the ECHR

Article 8(1) of the ECHR provides:

"Everyone has the right to respect for private and family life…."

Article 8 is a qualified right. Interference with the right to family life is permissible under Article 8(2) if it is (i) in accordance with the law; (ii) for a legitimate aim and (iii) proportionate. In family cases, the right extends to every member of the household and there should be consideration given to whether there is any interference with the rights of each individual and, if there is, whether it is lawful and proportionate to the legitimate aim. It may be necessary on occasion to detain the head of the household or another adult who is part of the care arrangements for children, thus separating a family. Depending on the circumstances of the case, this may represent an interference with Article 8 rights.

It is well established that the interests of the State in maintaining an effective immigration policy for the economic well-being of the country and for the prevention of crime and disorder, justifies interference with rights under Article 8(1). It is therefore arguable that a decision to detain which interferes with a person's right to family life in order to enforce immigration control and maintain an effective immigration policy pursues a legitimate aim and is in accordance with the law. *It is only by considering the needs and circumstances of each family member that a determination can be made as to whether the decision is, or can be managed in a way so that it is, proportionate. Home Office staff should be clear and careful when deciding that the decision to detain (and thereby interfere with family life) was proportionate to the legitimate aim pursued. Assessing whether the interference is proportionate involves balancing the legitimate aim in Article 8(2) against the seriousness of the interference with the person's right to respect for their family life*.

…

55.2 Power to detain

…

"If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 or 12 to 14, *that person may be detained under the authority of an immigration officer pending* a) a decision whether or not to give such directions; b) *his removal in pursuance of such directions"*.

…

Detention can only lawfully be exercised under these provisions where there is a realistic prospect of removal within a reasonable period. The decision to detain may have been taken under circumstances where an individual claimed

to have a family life in the UK but there was no information reasonably available to allow independent verification or consideration. In such cases, information must be gathered as soon as possible and consideration given at the initial and subsequent detention reviews. *In cases where a family life in the UK is known to be subsisting and detention will result in the family being separated, the separation must be authorised by an assistant director on the basis of a written consideration of the welfare of any children involved.*

…

55.3 Decision to detain (excluding criminal casework cases)

1. *There is a presumption in favour of granting immigration bail - there must be strong grounds for believing that a person will not comply with conditions of immigration bail for detention to be justified.*

2. *All reasonable alternatives to detention must be considered before detention is authorised.*

3. *Each case must be considered on its individual merits,* including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved.

…

55.3.1 Factors influencing a decision to detain

All relevant factors must be taken into account when considering the need for initial or continued detention, including:

• *What is the likelihood of the person being removed and, if so, after what timescale?*

• *Is there any evidence of previous absconding?*

• *Is there any evidence of a previous failure to comply with conditions of immigration bail (or, formerly, temporary admission or release)?*

• *Has the subject taken part in a determined attempt to breach the immigration laws? (For example, entry in breach of a deportation order, attempted or actual clandestine entry).*

• *Is there a previous history of complying with the requirements of immigration control? (For example, by applying for a visa or further leave).*

• *What are the person's ties with the UK? Are there close relatives (including dependants) here? Does anyone rely on the person for support?* If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? *Does the person have a settled address*/employment?

• *What are the individual's expectations about the outcome of the case?* Are there factors such as an outstanding appeal, an application for judicial review or representations which might afford more incentive to keep in touch than if such factors were not present? (See also 55.14).

…

Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

…

55.6 Detention forms

Written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals (in this context, every 28 days). *Recognising that most people are detained for just a few hours or days, initial reasons should be given by way of a checklist similar to that used for bail in a magistrate's court*. The forms IS 91RA 'Risk Assessment' (see 55.6.1), IS91 'Detention Authority' (see 55.6.2), IS91R 'Reasons for detention' (see 55.6.3) and IS91M 'Movement notification' (see 55.6.4) replace all of the following forms.

…

Once detention space is required the IS91RA must be faxed to the detainee escorting and population management unit (DEPMU). DEPMU staff will assess risk based upon the information provided on the IS91RA part A and decide on the detention location appropriate for someone presenting those risks and/or needs. The issue of an IS91 'Detention Authority' will be authorised with the identified risks recorded in the 'risk factors' section of this form.

…

55.6.2 Form IS91 Authority to detain

Once DEPMU has decided on detention location they will forward an IS91RA part B to the detaining office detailing the detention location and the assessment of risk. This must be attached to form IS91 and served by the IO or person acting on behalf of the Secretary of State on the detaining agent. This allows for the subject to be detained in the detaining agent's custody under Immigration Act powers. The IO or person acting on behalf of the Secretary of State must complete the first three sections of the form, transferring the assessment of risk as notified by DEPMU onto section 3, complete the first entry of section 4 transfer record and sign and date the form on page 1.

…

Detaining agents have been instructed not to accept detainees without the correct documentation. The only exception to this will be when there is no Home Office presence at a police station or prison. In these circumstances, a copy of the IS91, complete with photograph, will need to be faxed or emailed. In such cases, DEPMU will advise as to where the original IS91 should be sent.

…

55.6.3 Form IS91R Reasons for detention

…

It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are always justified and correctly stated by the IO or person acting on behalf of the Secretary of State who is completing the form. A copy of the form (fully completed and signed on both sides) must be retained on the caseworking file. If any of the reasons for detention given on the form IS91R change it will be necessary to prepare and serve a new version of the form. *Again, any such changes must be fully justified and correctly stated by the IO or person acting on behalf of the Secretary of*

State who is completing the form. It is important that the detainee understands the contents of the IS91R. If he does not understand English, officers should ensure that the form's contents are interpreted. Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers).

The five possible reasons for detention are set out on form IS91R and are listed below. *The IO or person acting on behalf of the Secretary of State must tick all the reasons that apply to the particular case and, as indicated above, ensure that a fully justified explanation is retained on file setting out why the reasons ticked apply in the particular case:*

• You are likely to abscond if granted immigration bail.

• There is insufficient reliable information to decide on whether to grant you immigration bail.

• *Your removal from the UK is imminent.*

• You need to be detained whilst alternative arrangements are made for your care.

• Your release is not considered conducive to the public good.

…

55.7 Detention procedures

55.7.1 Procedures when detaining an illegal entrant or person served with notice of administrative removal

• *Obtain the appropriate authority to detain;*

• issue BAIL 403 (Immigration Bail Information) and advise the person of his right to apply for bail;

• *conduct 'risk assessment' procedures as detailed in paragraph 55.6.1*

• *complete IS91 in full for the detaining authority;*

• *complete and serve form IS91R on the person being detained, explaining its contents to the person (via an interpreter if necessary);*

• confirm detention to DEPMU as soon as possible and they will allocate a reference number;

• complete IS93 for the port/ immigration compliance and enforcement (ICE) team casework file;

• always attach a 'detained' flag, securely stapled, to the port/ICE team casework file;

• *review detention as appropriate.*"

The Appellant relied on para. 55.3.2 which related to criminal casework and was not in my judgment relevant.

27. I note that in the Trial Bundle and in the Appeal Bundle was a statement by the Home Secretary dated 24.7.2018 which included the following words:

> *"… 95% of people liable for removal at any one time are not in detention at all, but carefully risk assessed and managed in the community instead."* (My italics).

The Law relevant to G1 – unlawful detention

28. The leading authority on unlawful detention is *R* (*Lumba & Mighty) v SSHD* [2011] UKSC 12. The facts related to the deportation of foreign born individuals who had committed crimes in England and were detained pending deportation. Lumba was imprisoned for a crime, then detained pending deportation and then left voluntarily 5 years later. Davis J. found the Appellant was operating an unlawful policy of detention. On appeal the relevant issue related to whether "but for the unlawful detention" the Claimant would have been detained in any event and hence whether only nominal damages would be awarded. Lord Dyson (who gave the judgment of all in the Supreme Court), held at para. 64, that not all breaches of policy made detention unlawful. In civil claims for damages for UD the cause of action is complete on intentional imprisonment without proof of damage (paras. 64-65) and once the Claimant raised intentional imprisonment the burden shifted to the Appellant to prove that it was lawful:

> "[65] … All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said *in Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office* [1991] 3 All ER 733 at 743, [1992] 1 AC 58 at 162: 'The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.'"

Lord Dyson went on to rule that the Appellant had to show that the detention was lawful:

> "[88] To summarise, therefore, in cases such as these, all that the claimant has to do is to prove that he was detained. The Secretary of State must prove that the detention was justified in law. She cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made."

Lord Dyson then considered the claim for UD and the evidence of breach of policy and ruled thus:

> "OVERALL CONCLUSION ON LIABILITY ON THE BASIS THAT THE POLICIES APPLIED WERE UNLAWFUL
> [89] I conclude, therefore, that since it is common ground that the unlawful policies in force between April 2006 and September 2008 were applied to Mr Lumba and Mr Mighty, they were unlawfully detained and their claims in false imprisonment must succeed. I turn to consider the assessment of damages.
> COMPENSATORY OR NOMINAL DAMAGES?

> [90] Having found that there was no liability in false imprisonment, the Court of Appeal did not need to decide whether the claimants were entitled to damages. They did, however, say ([2010] 4 All ER 489 at [96], [2010] 1 WLR 2168):
>
> 'If, on the evidence, it was clear that, even assuming a lawful consideration, there was no realistic possibility of a different decision having been reached, and no realistic possibility of earlier release, then we do not see why that should not be reflected in an award of nominal damages only.'"

Dealing with the issue of causation, Lord Dyson ruled that this was to be decided by determining what would have occurred but for the unlawful detention:

> "[93] I do not consider that this case was correctly decided on the issue of damages. I agree that the plaintiff was entitled to be put into the position in which he would have been if the tort of false imprisonment had not been committed. But I do not agree that, if the tort had not been committed, the plaintiff would not have been detained between 5.25 am and 7.45 am. On the judge's findings, if the tort had not been committed, he would have been detained during this period. It seems to me that the fallacy in the analysis in Roberts's case is that it draws no distinction between a detainee who would have remained in detention if the review had been carried out (and therefore no tort committed) and a detainee who would not have remained in detention if the review had been carried out. But the position of the two detainees is fundamentally different. The first has suffered no loss because he would have remained in detention whether the tort was committed or not. The second has suffered real loss because, if the tort had not been committed, he would not have remained in detention.
>
> …
>
> [95] The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies, and on the assumption that the *Ex p Singh* principles had been properly applied (an issue which I discuss at [129]–[148], below), it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages."

29. So, I glean from this ruling that if the breach/es of policy by the Appellant is/are sufficiently serious to make the detention unlawful, causation is not relevant to liability but is relevant to the assessment of quantum. A "but for" analysis is needed of whether

the Claimant would in any event have been detained if the Appellant had applied the policy properly. In *R (Abdollahi) v SSHD* [2013] EWCA Civ. 366, Moses LJ, at para. 35, ruled that the but for test is to be decided on the balance of probabilities.

30. Further authority for the principle that UD follows when the decision to detain was taken in breach of policy in a criminal deportation case was set out in *Fardous v SSHD* [2015] EWCA Civ. 931, in which Thomas LCJ summarised the approach thus:

> "19. The power of the Secretary of State to detain pending removal is set out in paragraph 16(2) of Schedule 2 to the Immigration Act 1971. That power must be exercised on the basis of the well-known *Hardial Singh* principles as reformulated in *R(I) v Secretary of State for the Home Department* [2003] INLR 196 at paragraph 46 and accepted as correct in the judgment of Lord Dyson JSC in *Lumba* as follows:
>
> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.
>
> ii) The deportee may only be detained for a period that is reasonable in all the circumstances.
>
> iii) If before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention.
>
> iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

In relation to the risk of criminals absconding he ruled thus:

> "*The risk of absconding*
>
> 44. It is self-evident that the risk of absconding is of critical and paramount importance in the assessment of the lawfulness of the detention. That is because if a person absconds it will defeat the primary purpose for which Parliament conferred the power to detain and for which the detention order was made in the particular case. This has been made clear in a number of cases: see for example paragraph 54 of the judgment of Keene LJ in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ. 804 and the judgment of Lord Dyson in *Lumba* at paragraph 121. 45. Although the risk of absconding will therefore always be of paramount importance, a very careful assessment of that risk must be made in each case, as the magnitude of that risk will vary according to the circumstances. It may be very great, for example, where the person has, as in this case, a clear track record of dishonesty and a knowledge of how to "work" the controls imposed to regulate immigration in the European Union. Another example where the risk may be high is where the person refuses voluntary repatriation that is immediately available to him. It is important to emphasise that the risk of

> absconding is distinct from the risk of committing further offences and not dependent on that further risk. The risk of re-offending requires its own distinct assessment."

31. I consider that these principles apply equally to a person who has committed no crimes, but the fact that the Claimant is not a criminal weighs in her favour. So, in the appeal before me, the risk of this Claimant absconding had to be analysed by the Appellant in the context of her circumstances. Refusal of voluntary removal is relevant and weighs in favour of detention but is not decisive. In an earlier case, upon which the Respondent relied, *E v Home Office* [2010] (unreported, 9CL01651) HHJ Collins, sitting at Central London County Court, ruled that when considering the reasons given by the defendant the exercise the Courts carry out is not a pure review on judicial review grounds but a re-analysis by the Court. At para. 3 he ruled as follows:

> "3. A question arises as to the role of the Court in relation to these decisions. The judgment of Mr Justice Wyn Williams in *S C & D v The Secretary of State for the Home Department*, in which judgment was handed down on the 18th July 2007, referred to a division of opinion in the High Court as to the role of the judge. A few days later, on the 30th July 2007, the Court of Appeal handed down judgment in the case of *A v The Secretary of State for the Home Department*, being aware of an earlier judgment by Mr Justice Field which had been followed by Mr Justice Wyn Williams but not being aware of the decision of Mr Justice Wyn Williams himself, in which the division of opinion appears to have been resolved in a way which is currently binding on me in favour of the proposition that, with the liberty of the subject being involved, it is not sufficient for the court simply to consider whether or not the decision-maker's decision was reasonable according to *Wednesbury* standards but that the court should act as a primary decision-maker itself. Mr Poole, on behalf of the Secretary of State, has not argued to the contrary."

That approach appears to be consonant with the later judgment of Lord Dyson in *Lumba* who said at para. 54:

> "[54] Secondly, it is for the Secretary of State to satisfy the court that it is right to infer from the refusal by a detained person of an offer of voluntary repatriation that, if released, he will abscond. There will no doubt be many cases where the court will be persuaded to draw such an inference. I am not, however, satisfied that this is such a case. It is not at all surprising that this appellant has refused voluntary repatriation. He has not yet exhausted the asylum process, which, if successful, would permit him to remain in the UK. In these circumstances, why should one infer from the refusal of voluntary repatriation that, if released, he would abscond? In my judgment, the most that can be said is that there is a risk that if he is released the

> appellant will abscond. But that can be said of most cases. I do not consider that the fact that he has refused the offer of voluntary repatriation adds materially to the evidence that such risk is present in the instance case."

32. Examples of cases where the Courts have found UD arose were put before me. So, In *Muuse v SSHD* [2010] EWCA Civ. 453, the Court of Appeal upheld an award of damages for UD involving, amongst other failures, a failure to sign the IS91 and a failure to fill in the grounds for detention. In *Maarouf v SSHD* [2020] (unreported, EOOCL2216) HHJ Lochrane assessed damages for UD, having found unlawful detention beyond the period admitted by the defendant, for breaches of policy including disregarding the claimant's past conduct which weighed in his favour and the defendant's failure to call any evidence that the detention had been properly authorised at a senior level as required by policy.

Analysis and conclusions on G1

G1: Liability

33. The Recorder extracted various clear requirements from the Appellant's policy. I have highlighted the ones which are relevant in italics above. She then made 4 core findings of fact relating to breaches by the Appellant of the policy requirements when the initial decision to detain was made. Those were: a failure to carry out the necessary consideration of alternatives to detention; a failure to carry out an adequate or explained assessment of the Claimant's risk of absconding; a failure to evidence that a senior officer had authorised the detention and a failure to keep policy compliant records. In my judgment, contrary to the Appellant's automatic detention submission, where the Appellant issues RDs to an individual the presumption in favour of liberty still applies and detention for the purposes of removal still has to be justified by the Appellant as necessary and proportionate to achieve a valid aim. The Appellant is required to consider alternatives to detention. So in this case various alternatives were put forwards in submissions: tagging, curfew, increased reporting (so, for instance, 2 days before the flight on 17.4.2018). None of these was considered. The Appellant had to assess the risk of the Claimant absconding, taking into account all of the Claimant's circumstances. The listed factors in the policy included the Claimant's previous reporting compliance and her compliance with conditions imposed (factors wholly in the Claimant's favour over many years); evidence of previous absconding (a factor wholly in the Claimant's favour); her family ties in the UK (a factor in her favour because her son had just been given refugee status and lived with her); the likelihood of removal (a factor against the Claimant, because it was imminent, but potentially modified by her 2015/2017 submissions had the Appellant read her Home Office file); any determined attempts to breach immigration laws (the Claimant had applied many times for leave to stay and had an outstanding potential submission from 2015/2017 but had made no such attempts); the Claimant's expectations (this factor should have been in her favour, she had just received her son's asylum success and had given evidence, which the Appellant did not challenge, so this factor was in her favour and she had put submissions in during 2015 and 2017 which were unanswered). The Appellant was required by the policy to keep policy compliant records and failed to do so. The IS91 and IS91R had blanks on key

factors and decisions. Finally, the IS91 and IS91R were not signed by the senior officer required to review or make the decisions.

34. The only reason for initial detention given by the Appellant on the forms and in the GCID was, as the Recorder found, the risk of absconding, presumably due to the proposed, and later the served, RDs. However, that risk was assessed at contradictory levels. Despite the fact that the Appellant knew that it would soon serve RDs it was written as "low" on 2.4.2018 and rose to "high" on 9.4.2018 with no explanation and then fell to "medium" whilst she was still in detention. The Recorder found that these figures were illogical without explanation. There was no explanation in the GCID notes or on the IS91 forms. The Appellant put forwards no evidence that "all the Claimant's circumstances" were considered and weighed when reaching these determinations. These failures were contrary to the express policy. Worse, so the Recorder found, no alternatives to detention were noted or considered by the Appellant, which was again contrary to the policy. I reject the submission by the Appellant that there were no potentially reasonable alternatives. The Recorder found that there were alternatives to consider and that there was no evidence put before her by the Appellant on the issue. The Appellant's submissions in the appeal that there were no realistic the alternatives were therefore unsupported by any evidence. It is not the Appellant's written and stated policy that detention follows automatically when the Appellant serves RDs on an individual who has never been convicted of any offence, has fully complied with immigration conditions and reporting restrictions and has family in England. Nor, in my judgment, does the individual's refusal to leave voluntarily cause automatic detention. The decision to detain is an evaluative one, the policy must be applied and factors must be weighed. It was telling that the only paragraph from the policy relied upon by the Appellant for the submission that detention was inevitable or automatic after serving RDs related to convicted criminals and even then the paragraph was qualified as follows:

> "**Application of the factors in 55.3.1 to criminal casework cases**
> **Imminence**
> 55.3.2.4 In all cases, caseworkers should consider on an individual basis whether removal is imminent. If removal is imminent, then detention or continued detention *will usually be appropriate.* As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks." (My italics).

35. In my judgment the Recorder's rulings on unlawful detention due to breaches of policy were logical, supported by the evidence and her unchallenged findings of fact. These breaches were not trivial or minor. Proper risk assessment has been described by the higher appellate Courts as very important and paramount. Likewise, consideration of alternatives to detention, the need for proper records and the need for senior sign off where the liberty of the individual is being taken away. All of these are not frivolous or

minor matters. The same reasoning applies to the decisions to continue detention on review. As I stated above, on the appeal, the Appellant never engaged with the Recorder's findings relating to continued detention after the RDs were cancelled. For these reasons I dismiss the liability parts of Ground 1 of the appeal.

G1: Causation, quantum and nominal damages

36. G1 contained a separate set of grounds relating to causation at paras. 6.3 – 6.7. The Appellant submitted that the Recorder failed to apply the law arising from *Lumba* and the causation test when assessing damages. This was dressed up as a liability point but is not. It is a quantum point. The Appellant relied on *O* [2014] EWCA Civ. 909, and judgment of Richards LJ in *OM (Nigeria)* [2012] EWCA Civ. 597. Neither of these cases was in the authorities bundles. Instead, counsel for the Appellant extracted paras. 19-24 of the judgment of Richards LJ in *OM* into her skeleton. That is an unsatisfactory way forwards but, in any event, all that was said in that ruling is that the balance of probabilities is the correct standard of proof for the but for test of causation relating to whether the Appellant would have detained the Claimant in any event had the policy been properly applied and followed. In *OM* Richards LJ was satisfied that, but for the policy breaches, the defendant would have detained the claimant in any event, inter alia because later that is exactly what happened. The result was that only nominal damages were appropriate for the unlawful detention.

37. The Appellant submitted that the Recorder failed to consider this but for test at all. Furthermore, had she done so, the inevitable result would have been a finding that, but for the breaches or policy, the Appellant would in any event had detained the Claimant. The Respondent submitted that this ground was a difficult one for the Appellant to make out taking into account that the point was not pleaded in the defence and was not raised in submissions by the Appellant at trial. Furthermore, the Appellant did not put in any evidence about what decision would have been made if policy had been properly followed, despite carrying the burden of proof to do so (see para. 23 of the judgment of Richards LJ in *OM*). In submissions in the appeal some discussion arose over what would have occurred had the Claimant been served with the RDs and allowed to go home instead of being detained. It seems likely to me, on balance, that she would have contacted her direct access barrister immediately (as she did on the facts, when she was in detention). The barrister would then have put in submissions (as he did on 11, 12 and 13 April 2018) and it is likely that the Appellant would have considered those to constitute a fresh claim (as in the event they did on 16.4.2018). That would have led to the RDs being withdrawn (as they were) and so no detention decision would ever have been made. Thus, I reject the Appellant's submissions on causation both in logic and because the Appellant failed to discharge the burden of proof at trial. The submissions in this part of G1 were based on a complete lack of evidence that the Appellant would have detained the Claimant in any event if policy had been followed and do not stand up to logical scrutiny.

G2: Basic damages

38. Ground 2 contained an acceptance that the basic award of damages for unlawful detention was correct. At trial the Appellant had submitted that the appropriate award was £17,526,60. The Recorder awarded £18,000.

G2: Aggravated damages

39. In G2 the Appellant submitted that there was no legal or evidential basis for aggravated damages so the award of £12,000 was wrong. Additional damage had to be shown by the Claimant over and above that covered by the normal compensatory award. The Appellant asserted that no such evidence was provided and the Recorder made no such findings. Reliance was placed on *Diop* [2018] EWHC 3420, in which a violent man who had been in prison for 2 years was unlawfully detained in immigration detention for 27 days. There was no "initial shock" from his first detention, he had been imprisoned for long periods before. The award was £9,000 plus interest and no aggravated damages were awarded because John Howell QC, sitting as a deputy, considered that the basic award would adequately cover his suffering. Those facts are very different to the Claimant's circumstances and her fears. Awards of aggravated damages are very fact sensitive balancing the abuse alongside the UD with the Claimant's circumstances, vulnerabilities, personality and experiences.

40. The Recorder's quantum awards were made at a second hearing and the judgment, dated 23.12.2022, and contained the following findings relating to aggravated damages.

> "**Aggravated damages**
> 10. The next item I considered was aggravated damages. The defendant conceded that there should be an award of aggravated damages based on my findings on liability and contended for a figure of £5,000."

In the light of this concession I do not consider that the Appellant can properly raise this ground of appeal. These proceedings are civil litigation. If a party makes a concession on an issue before the trial judge that party cannot later complain on appeal that the trial judge relied on that concession, unless the concession was triggered by misrepresentation or fraud. It was the responsibility of counsel and the solicitor at trial only to make concessions which were legally correct and only on instructions. If the concession was not legally correct (I pass no comment) that is a matter between the Appellant and it's lawyers. In the appeal the Appellant challenged this concession but directed me to no part of the transcript to support the challenge.

41. As to the quantum of the award for aggravated damages, in G2 the Appellant asserted that £12,000 was wrong because it was too high, being two thirds of the award for basic damages. It was submitted that the rule of thumb is no more than one half. No authority was provided in support of that submission. The Respondent submitted that the Recorder provided extensive reasons for the award and considered comparable awards and so the award was unchallengeable.

42. In *Thompson v Commissioner of Police* [1998] Q.B. 498, the Court of Appeal gave guidance on such awards. C1 having been lawfully arrested, was manhandled and assaulted by police officers and wrongly detained in a cell at the police station for a period of four hours. She claimed damages against the defendant for false imprisonment and malicious prosecution, they had fabricated a criminal case against her but she was acquitted at trial. In the civil case the jury awarded her damages, including aggravated damages, in the sum of £1,500, and exemplary damages in the sum of £50,000. C2 was unlawfully arrested, assaulted and abused by a number of police officers who subsequently wrongly detained him in a police cell for an hour and a quarter. He suffered physical and psychological injury (depression and PTSD). He claimed damages against the defendant for wrongful arrest, false imprisonment and assault. The jury awarded him damages, including aggravated damages, in the sum of £20,000 and made an award of £200,000 by way of exemplary damages. On appeal, the basic award to C1 was increased to £10,000; the award for aggravated damages was increased to £25,000 and the exemplary damages award was reduced to £25,000. For C2, the award of exemplary damages was reduced to £15,000. Lord Woolf MR gave the lead judgment. Taking into account the short periods of false imprisonment and the level of personal injury, these awards can be seen as substantial in 1996. Inflation since then, over 28 years, has increased their current day value by a factor of 252%. At P512 Lord Woolf ruled thus:

> "It is when the jury have to consider whether there should be an award of aggravated damages as additional compensation that the award in this class of case is more analogous to that in defamation proceedings. As the Law Commission point out in their admirable consultative paper *Aggravated, Exemplary and Restitutionary Damages* (1993) (Consultation Paper No. 132) para. 2.17 et seq. there can be a penal element in the award of aggravated damages. However, they are primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated. This injury which is made worse for the plaintiff because it is more difficult to excuse when the malicious motives, spite or arrogance on the part of the police: see *Rookes v. Barnard* [1964] A.C. 1129, 1221 et seq., per Lord Devlin. It is when the jury make an award of exemplary damages that the similarity of this class of action with defamation is closest. However, a factor justifying the award of exemplary damages which in defamation actions makes consistency in the proper amount to award less likely is that often the award is to prevent a newspaper profiting from the libel by increasing its circulation. This element of profiting from your tort is almost invariably absent from this class of action. In addition, as the defendant is usually a chief officer of police, the personality of the defendant will not usually be significant in determining what the appropriate level of punitive damages should be. While the conduct calling for the award of exemplary damages may differ it is to be hoped that it will be rare indeed for the most senior officers in the force to be in any way implicated. The fact that the defendant is a chief

officer of police also means that here exemplary damages should have a lesser role to play."

Then at P513A:
"There is also a greater problem of awarding exemplary as well as aggravated damages in the class of action under consideration because the very circumstances which will justify the award of aggravated damages are probably the same as those which make it possible to award exemplary damages. This accentuates the risk of a double counting. At least in defamation proceedings there is the additional factor of the defendant profiting from the libel which provides the independent justification for the award of exemplary damages."

Then at P514 F
"(1) It should be explained to the jury that if they find in the plaintiff's favour the only remedy which they have power to grant is an award of damages. Save in exceptional situations such damages are only awarded as compensation and are intended to compensate the plaintiff for any injury or damage which he has suffered. They are not intended to punish the defendant.
(2) As the law stands at present compensatory damages are of two types, (a) Ordinary damages which we would suggest should be described as basic, and (b) aggravated damages. Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award " of aggravated damages. (We would add that in the rare case where special damages are claimed in respect of some specific pecuniary loss this claim should be explained separately.)"

Further at P515D
"(5) In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale.

Further at P516 C:

> "Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted."

43. So, in *Thompson,* C1's aggravated damages award was higher than the basic award and the exemplary damages were the same as the aggravated damages. In paras. 11 to 23 the Recorder carefully considered three other comparable awards: *E v Home Office; Maarouf* and *Santos* and made an award of £12,000 for aggravated damages. I further take into account that in *R (on the application of MK (Algeria)) v Secretary of State for the Home Department* [2010] EWCA Civ. 980, a lower award for aggravated damages was made at £5,000 against the background of a basic award increased by the Court of Appeal to £12,500 for 24 days of unlawful detention. Those awards were made 14 years ago. I take into account that in *Muuse v SSHD* [2010] EWCA Civ. 453, the claimant was unlawfully imprisoned for 4 months and was awarded £20,000 for his basic damages and £7,500 for aggravated damages. In *E v SSHD* [2010] (cited above) the claimant was unlawfully detained for a month. She was awarded £22,500 made up of £12,500 for unlawful detention and £10,000 for her psychiatric injury (she has been raped in prison abroad and was traumatised by the detention here). The award for aggravated damages was £10,000, which was more than half of the award for unlawful detention (excluding the psychiatric injury). In *Maarouf v SSHD* [2020] (cited above) the claimant was awarded £25,000 damages for the basic award and £5,000 for aggravated damages. I note that some of the aggravated damages awards in these cases were less than half of the basic award but some were much higher. In my judgment these cases are acutely fact sensitive, focussing on the claimant and his or her vulnerabilities. It is of course always vital to avoid double counting and overlap. The Recorder heard the Claimant's evidence and accepted it. The Appellant called no evidence. I do not consider that the award for aggravated damages was so out of the reasonable scale or the guidelines set by the Court of Appeal that it can be declared wrong. Nor do I accept there is any substance to the asserted "rule of thumb".

G2: Exemplary damages

44. The Appellant submitted that the award of £12,000 for exemplary damages for her UD was wrong in law because such awards are only made where the facts expose an abuse of power which was outrageous, extraordinary and required censure. It was submitted that few awards are made, thus none was made in *Lumba* but the Appellant accepted that *Muuse* was an example where one was made. It was submitted that exemplary damages are not awarded for negligence or maladministration.

45. The Appellant relied in the skeleton argument on the judgment of a Lord Justice of appeal (unnamed) in *Home Office v Mohammad* [2020] EWCA Civ. 351 at paras. 15 and 24. This authority was not in the authorities bundle. I should mention here that it causes a disadvantage to the other party when the Appellant fails to put an authority relied upon in a skeleton into the authorities bundle and inconveniences the Judge, who then has to find the case. I did so. The facts were that the claimants pleaded claims under four separate heads: breach of statutory duty, negligence, breach of article 5 of the ECHR and breach of article 8. As pleaded, the damage under the last head was simply described as "reducing [the claimant's] ability to develop family and private life ties in the United Kingdom", together with unparticularised special damages for loss of earnings and benefits. Only the negligence and Art.8 claims survived a striking out application. The SSHD appealed the refusal to strike out the woke claim. The Court of Appeal held that no claim arises in negligence but permitted the Art.8 claims to continue. Paras. 15 and 24, which the Appellant relied upon, related to the allowed part of the appeal. These paragraphs do not relate to exemplary damages so were not relevant to this ground. The Appellant also relied on *AA (Afghanistan)* [2012] EWCA Civ. 1383, but the submissions arising from that judgment did not impinge on exemplary damages or support the ground either. The Appellant then made submissions in the skeleton about the Recorder's decision to award exemplary damages using words such as "lack of balance and objectivity" and describing the award as "entirely unjustified by adequate reasoning".

46. The Respondent submitted that the Recorder noted that the legal principles for deciding the threshold for an award of exemplary damages were not in dispute at trial and laid the principles out in the judgment. Thus, the only ground of appeal which could be raised would focus on whether the facts fell within the agreed legal test. The Respondent submitted that the ruling that exemplary damages were awardable arose from the factual findings and was justified and the assessment of the quantum was within a reasonable range.

47. The Recorder's decision on exemplary damages and the reasoning was set out between paras. 25 and 40. She ruled thus:

> "**Exemplary damages**
> 25. Exemplary damages are punitive in nature. The claimant claims the figure of £35,000 and the defendant denies that exemplary damages should be paid at all; in the alternative, the defendant says no more than £5,000.
> 26. Exemplary damages can be awarded "for oppressive, arbitrary or unconstitutional action by servants of the Government" (*Rookes v Barnard*). In *Muuse v SSHD* [2010] EWCA Civ 453 the Court of Appeal endorsed the guidance in earlier cases (such as *Kuddus v. Chief Constable of Leicestershire* [2001] UKHL 29) that the sort of conduct that was necessary for an award of exemplary damages was conduct that was a "gross misuse of power involving tortuous conduct by agents of the

> Government" or "outrageous conduct", such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law.
> 27. Is there oppressive or arbitrary behaviour by public officers in this case that deserves the exceptional remedy of exemplary damages? Aggravated damages have been awarded here and they have already provided some compensation for the injury caused by the defendant's oppressive and arbitrary behaviour going beyond ordinary compensatory damages. Is that award by way of compensatory and aggravated damages an inadequate deterrent or punishment for the defendant, taking into account the sum awarded would come from public funds which would have an impact on the funds available to the Home Office? If exemplary damages are to be awarded, they should be no more than sufficient to mark the appropriate disapproval of the oppressive and arbitrary behaviour.
> 28. If I am to award exemplary damages, I must also consider, and avoid any overlap between exemplary damages and damages already awarded. With reference to *Muuse,* the principle is that only if the sum as compensation is inadequate to punish the defendant for their outrageous conduct should the disapproval be marked as such conduct and the defendant deterred from repeating it and then some larger sum can be awarded. The claimant referred to *Muuse* and the comment about conduct having to be "outrageous", calling for exemplary damages to mark disapproval. There is no need for this to be qualified by looking for malice, fraud, insolence, cruelty or similar specific conduct.
> 29. In the case of *Muuse*, an award of exemplary damages was made. It was a case in which there were a number of mistakes and a failure to implement clear procedures was described as unforgiveable. It was said that this was an appalling indictment of the way that the Home Office and HMPS were operating in 2006, reflecting an indifference to doing justice on the basis of those who dealt with it.
> 30. There was reference to the high handed and oppressive way in which the claimant's imprisonment in that case was initiated and maintained for such a long time. Mr Muuse was imprisoned, kept in custody, without good cause and inadequate explanation. In that case, his nationality (Dutch) could easily have been confirmed from the outset."

The Recorder then went on to consider *Muuse* in more detail and noted the lack of any government recognition that what the SSHD had done in the case before her was wrong and the lack of any inquiry or review of internal procedures to prevent the tortious unlawful detention occurring again in future in similar circumstances. In addition, the only way the wrongdoing had been brought to light was by High Court action. The Recorder also took into account that, despite the Appellant's file note stating that the Respondent's Home Office file (of previous claims for asylum/leave to remain) should

be read, it never was and the Appellant ignored her fears of oppression in Pakistan expressed by her at initial detention. The Recorder then ruled as follows:

> "38. I concluded that there were **multiple failures in the current case**. They were not malicious **but they are, in my judgment, properly described as "outrageous**". The rights at stake were the most basic rights of liberty of the individual. The claimant feared to return to Pakistan for reasons of her religion and personal safety, which she clearly expressed to the defendant on being detained, and was, indeed, in due course granted refugee status, thus vindicating the genuineness of her fears. Until after representations were received from her legal representative, following her detention, no consideration was given to her fears and whether she may have good grounds for seeking asylum. Her detention was authorised without consideration of her Home Office file. There was no assessment of the alternatives to detention and no explanation for the decision that she was highly likely to abscond.
> 39. I accepted the claimant's submission that there was a **reckless disregard for her rights.** No witness was called by the Home Office to explain why the claimant was treated as she was. Those making decisions to detain others should act with the utmost care, following the policies and procedures that are there to protect the individual's rights and freedoms and there were multiple failures in the current case." (My emboldening).

48. The law on exemplary damages in the context of a claim for UD can be summarised as follows. Firstly, aggravated damages must be clearly distinguished as separate from and different to exemplary damages. Aggravated damages may be awarded where, in addition to and separate from the normal damages arising from and to compensate for the UD, further compensation is just and necessary to compensate for the manner in which the tort was committed by the Appellant which resulted in humiliation or injury to the Claimant's dignity, pride and self-respect, see for instance *Clerk & Lindsell on Torts,* 24th Ed at para 26-180 and *Rookes v Barnard* [1964] A.C. 1129, per Lord Devlin at pages 1221 and 1230. They are not intended to be punitive. They are compensatory. There has been commentary and discussion about whether aggravated damages are needed at all in the light of the ability of normal damages to cover not only pain, suffering and loss of amenity but also injury to feelings and self-respect, see for instance the *Law Commission Report No. 247* of 1997. However, this case does not call for that to be determined because the Appellant conceded the Claimant was entitled to an award of aggravated damages on the liability findings.

49. In contrast to aggravated damages, exemplary damages are punitive, intended to be a deterrent and are a mark of serious disapproval of the outrageous abuse of power through tortious conduct of an organ of the State with a view to preventing recurrence in future. The gateway through which a claimant must pass to receive such an award includes the need to prove that the State's tortious abuse of power was outrageous and needs to be

punished and deterred, see, *Rowlands v C.C. of Merseyside* [2006] EWCA Civ. 1773. In *Takitota v AG* [2009] UKPC 11, the claimants had been wrongfully imprisoned for 4 years. Lord Carswell, in the Privy Council, summarised the law relating to exemplary damages as follows:

> "12. The award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said *in Rookes v Barnard* [1964] AC 1229 at 1223, to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1081 emphasised the need for moderation in assessing exemplary damages."

50. It is clear to me from the Recorder's judgment that she summarised the law correctly and nothing in the Appellant's submissions disclosed any defects in her summary of the law. The next question is whether the factual findings which the Recorder made justified an award of exemplary damages. This was an evaluative decision which must be made using an objective test of what the woman on the Tooting Tube or the man on the Sheffield Tram would consider to be outrageous abuse of power by a Government department which needs punishment and deterrence, bearing in mind that the taxpayer will be paying.

51. There is a scope for this evaluative judgment and the Recorder had the advantage of seeing the key witness, the claimant, and experiencing from her live evidence what she went through and seeing how the Appellant approached their explanation of what they did. I consider that the Recorder's ruling was not wrong on exemplary damages. The right to liberty was at stake. The Appellant's failure to read the Claimant's Home Office file was a failure to follow what the Appellant itself noted it should do to self inform at least on her state of mind and expectations. The fears expressed by the Claimant on detention about any return to Pakistan were ignored. The other foundations for the finding of unlawful detention, which were all breaches of policy, included: the total failure to consider alternatives to detention; the failure properly to risk assess; the failure to explain the risk assessment results; the failure to keep records of decisions and reasons for them and the failure to obtain the necessary senior authority. This number of failures could be called "wholesale". The Recorder regarded it as "Reckless Disregard". In addition, the Appellant continued it's disdainful approach to the seriousness of the issues through its decision to call no decision maker or system function evidence before the Court and to make no effort to discharge the burden of proof on key matters relating to the liberty of the subject. Furthermore, there had been no internal disciplinary action or investigation into the case.

52. As for the quantum of the award, in *Muuse* Thomas LJ noted the following guidelines on quantum arising from *Thompson* and updated them to 2010 values (14 years ago):

> "(3) 80. **The amount of the award for exemplary damages**
> As I have set out at paragraph 51 above, the judge awarded £27,500. He did so following the guidance given by Lord Woolf in *Thompson* at p 516:
>
> > "(13) Where exemplary damages are appropriate they are unlikely to be less than £5,000. 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."
>
> 81.As the judge pointed out these figures as adjusted for inflation are £6,800, £34,000 and £68,000 respectively.
> …
> 84. I cannot accept this submission. The judge carefully approached the question of quantum. The conduct was an arbitrary abuse of executive power which can readily be characterised as outrageous. It could have merited an award at the mid-point of the range suggested in *Thompson*, but the judge made an award a little below that figure. As an amount, £27,500 is miniscule in the context of the Home Office budget, but such an award was needed to stigmatise the conduct of the officials at the Home Office as an outrageous and arbitrary exercise of executive power for the reasons I have given."

53. The Recorder's award of £12,000 is at the lower end of the awards scale, particularly taking into account the last 14 years of inflation, and I do not consider that it was outside the reasonable scope of awards which the Recorder could have made on the unchallenged facts which she found. For the above reasons I dismiss the appeal in relation to the award of exemplary damages under G2. I regard it as modest.

G3: Limitation and the Art.8 claim

54. In G3, the Appellant seeks to set aside the award of damages made under Art.8 of the *ECHR* on the basis that the claim was limitation barred by section 7(5)(a) of the *Human Rights Act 1998* which imposes a 12 month time limit. The submission was made that the limitation defence was pleaded but not dealt with in the judgment. This ground rather collapsed at the appeal hearing when I asked about the delay during the period for 12 months before the claim was issued. At that time the Appellant changed the submission from a total limitation bar to a partial one for all the delay before the 12 months before issue. The Claim Form was issued on 19.2.2021. The claimed delay period pleaded was from June 2018 to February 2021, the Recorder's finding was October 2018 to February

2021 when the Appellant informed the Respondent that her refugee status was to be granted. The Appellant relied on no case law for this ground.

55. In response, the Respondent pointed out that the Appellant never raised this in submissions at the trial. Furthermore, the Respondent submitted that this was a continuing default claim, lasting 2 years and 9 months during which time the Appellant failed to assess her claim. It was submitted that, for continuing breaches, the limitation period does not start to run until the delay ends (and the decision was made in this case). The decision was made in February 2021. The Respondent relied on paras. 23, 29 and 30 of the decision of Lord Lloyd-Jones in *O'Connor v BSB* [2017] UKSC 78 which are set out below:

> "23. The expression "the date on which the act complained of took place" is apt to address a single event. However, the provision should not be read narrowly. There will be many situations in which the conduct which gives rise to the infringement of a Convention right will not be an instantaneous act but a course of conduct. The words of section 7(5)(a) should be given a meaning which enables them to apply to a continuing act of alleged incompatibility. While it is correct that section 7(5)(b) may often empower a court to grant an extension of time to bring proceedings in respect of a course of conduct which has extended over a period of longer than a year, leaving a claimant to have recourse to such a discretionary remedy is inappropriate. It cannot justify limiting the scope of section 7(5)(a) The primary provision in 7(5)(a) must be capable of providing an effective and workable rule for situations where the infringement arises from a course of conduct."
>
> …
>
> "29. I consider that the alleged infringement of Convention rights in the present case arises from a single continuous course of conduct. Although disciplinary proceedings brought by the BSB necessarily involve a series of steps, the essence of the complaint made here is the initiation and pursuit of the proceedings to their conclusion, ie the entirety of the course of conduct as opposed to any component steps. As Lord Dyson MR observed in the Court of Appeal (at para 21) without expressing a concluded view on this issue, prosecution is a single process in which the prosecutor takes many steps. It cannot have been the intention of Parliament that each step should be an "act" to which the one year limitation period should apply. I also note in this regard that, were it otherwise, a prosecution which lasted longer than one year could not be relied on in its entirety as a basis of complaint unless proceedings were commenced before the conclusion of the disciplinary proceedings or relief were granted under section 7(5)(b). A claimant would be placed in the difficult position of having to bring a human rights claim within one year of the commencement of what might be lengthy

> proceedings, without knowing the outcome which might be very material to the claim.
> 30. On the basis that we are concerned here with a single continuing act of alleged incompatibility, I agree with Lord Hope in Somerville (at para 51) that time runs from the date when the continuing act ceased, not when it began."

56. Furthermore, Sedley LJ had long before ruled in *Home office v Mohammad* [2011] EWCA Civ. 351, at para.5 that*:*

> *"*5. … As it happens, the limitation point is answered in the pleaded reply in two ways. The principal reply is that the breach which is complained of was in each case an act which continued until the grant of ILR or the concession of the claim; the alternative reply is that it is equitable in the circumstances to enlarge time. It seems to me that the first of these propositions is correct. In measuring time from "the date on which the act complained of took place", both the language and the purpose of s.7(5) are apt to include the last day of a continuing act."

57. In my judgment the case law is clear and the limitation defence was bad in law on the facts of this case. Therefore, the Appellant's G3 is dismissed.

G4: Art.8 Threshold

58. The Recorder found the Appellant's delay and the restrictive conditions imposed for the duration of the delay constituted a disproportionate breach of the Claimant's rights under Art.8 from October 2018 to February 2021. In G4 (paras. 6.21-6.26 of the skeleton) the Appellant submitted that the Recorder was wrong to find that the restrictions imposed upon the Claimant engaged Art.8 by breaching her qualified rights. The Appellant submitted that the Recorder misdirected herself about *Hans Husson v SSHD* [2020] EWCA Civ. 329, by failing to understand how challenging the requirements are to qualify. The Appellant also submitted that there was no hint that the Recorder applied the requisite high threshold. The Appellant sought to distinguish the decision in *Husson* on the facts. Firstly, the Claimant had no right to work in England, whereas Mr *Husson* did have the right to work. Secondly, *Husson* was a strike out application and the Court did not find that delay founded breach. Thirdly, it was submitted that the Courts do not award damages for breach for mere prevention of work. Fourthly, the Claimant could have applied to work but did not. Fifthly, the Recorder ignored the balance struck in the immigration legislation which provides some financial asylum support to asylum seekers. *Husson* was an appeal from a refusal to grant permission for judicial review of a decision that he could not challenge the SSHD's delay in granting his work permit after he was granted leave to stay in England and so could not claim damages for lost income from work. Simler J. found that the Claimant had an arguable claim only under Art.8 so permission was granted. The Appellant relied on paras. 36-37 of the judgment. I set out

below those paragraphs and some others for full context, which contained the following rulings:

> "35. To establish a breach of his article 8 rights, the appellant must establish an interference with the exercise of his right to respect for his private and family life that has had such serious consequences as to engage the operation of article 8. …
> 36. Although there is no direct authority which establishes that a right to work is of itself protected by article 8, and article 8 does not give a right to choose or pursue a particular occupation, the Strasbourg authorities referred to in *Atapattu* demonstrate that where an individual is wholly or substantially deprived of the ability to work altogether, article 8(1) is at least arguably engaged. I accept that the threshold is high.
> 37. Damages for breach of a Convention right may be awarded under s. 8 of the *Human Rights Act 1998* where that is necessary to afford just satisfaction to a person who has suffered loss as a result. There are many cases where an award of damages will not be necessary to afford just satisfaction because a finding of a violation of the Convention right, and the fact that remedies are available on judicial review which will bring about an end to the violation, may constitute just satisfaction. However, as was made clear in *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 (at [59]) where the established breach has clearly caused significant pecuniary loss, this will usually be assessed and awarded.
> 38. It is now conceded as a matter of fact, that without a BRP or a stamp in his passport evidencing the right to work, the appellant was unable to take up any lawful employment in the UK because he would not be able to satisfy a UK employer of his entitlement to work lawfully. In those circumstances, the only basis on which it is now argued that there was not a total deprivation is by reference to the possibility of the appellant returning to Mauritius to work there.
> 39. It seems to me that as a matter of real world practicality, the appellant was prevented altogether from securing employment during the period of delay. It is unrealistic to expect him to have returned to Mauritius in a period when he expected to receive a BRP at any moment, had the right to remain here by reason of his family life here, and had the right to work here. Moreover, leaving the UK would have involved leaving behind his British wife and child."

59. The Respondent submitted that these points were not raised before the trial judge. In addition, the Respondent submitted that the facts of her case at trial were extraordinary because the Appellant did not ask for any further information during the 2 years and 9 months delay period and provided no explanation for any of the delay. The real issue was "when did the unlawful delay start?" The Recorder allowed the Appellant 6 months to make the decision thus determined that the breach commenced in October 2018.

60. The Recorder set out in her judgment that the Appellant asked for permission to make further submissions on this head of claim and was allowed to make them in relation to

the start date for the delay. The Recorder stated that the law was not in dispute between the parties and summarised it as follows:

> "40 In relation to Article 8, I was taken in particular to two cases: the case of *Hans Husson v SSHD* [2020] EWCA Civ. 329, and also *Atapattu v SSHD* [2011] EWHC 1388. That was for the principle in reliance on *Hans Husson* that the impact on the claimant's Article 8 rights was sufficiently serious to engage the operation of Article 8. If Article 8 was engaged, it was for the defendant to establish the interference in the claimant's right to respect for her private and family life was lawful and proportionate: *Atapattu.* The claimant relied upon the fact that there was no evidence advanced by the defendant regarding the circumstances of the delay."

61. In *Atapattu v SSHD* [2011] EWHC 1388 (Admin), the defendant withheld the claimant's passport which prevented him from working as a seaman in the merchant navy. Stephen Morris QC sitting as a deputy ruled that the threshold for a claimant to cross in an Art.8 claims was as follows:

> "136. Accordingly, this part of the claim turns wholly on whether Mr. Atapattu can establish that there has been an interference with his right to respect for his private life under Article 8(1). That in turn raises two issues: whether the consequences of the Defendant's conduct for Mr. Atapattu fell within the scope of the concept of "private life" under Article 8(1) and if so, whether, that conduct amounted to a sufficient interference with Mr. Atapattu's private life."

62. Stephen Morris QC did not consider that the claimant's right to work was wholly abolished in *Atapattu* and found that Art.8 was not engaged on the fact because he could work on land. In the process he reviewed two other cases in which Art.8 was considered to have been broken: *Smirnova v. Russia* [2004] 39 EHRR 22, and *Sidabras v. Lithuania* [2006] 42 EHRR 6. In *Smirnova* the Russian authorities retained the applicant's national identity paper, her "internal passport". The European Court of Human Rights (ECtHR) held that this infringed the applicant's right to a private life under Article 8:

> "95. The Court has a number of times ruled that private life is a broad term not susceptible to exhaustive definition..... It has nevertheless been outlined that it protects the moral and physical integrity of the individual ... , including the right to live privately, away from unwanted attention. It also secures to the individual a sphere which he or she can freely pursue the development and fulfilment of his personality ... .
> 96. ... the interference with [the applicant's] private life is peculiar in that it allegedly flows not from an instantaneous act, but from a number of everyday inconveniences taken in their entirety which lasted [for over four years]. ...

> 97. The Court finds it established that in their everyday life Russian citizens have to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets. The internal passport is also required for more crucial needs, for example, finding employment or receiving medical care. The deprivation of the passport therefore represented a continuing interference with the applicant's private life ..."

Stephen Morris QC commented on *Smirnova* as follows:

> "145. It was the cumulative effect on this wide variety of aspects of the applicant's life which was held to constitute the interference with private life. The requirement for proof of identity was "unusually" frequent in Russia. As regards impact upon ability to work, this was one only of a number of effects of the deprivation of the passport, and in any event it appeared to be the case that the internal passport was required to be able to do any work whatsoever."

63. At para 146 in *Atapattu* Stephen Morris QC went on to summarise the facts in *Sidabras* in which the *European Court of Human Rights* also considered that the claimant's rights under Art.8 were infringed by the State. He was, as a former KGB officer, dismissed from his job and debarred from working in a wide range of public and private employment when Lithuania became a republic

64. The Recorder considered the facts against the case law put before her and determined that the conditions imposed on the Claimant did constitute interference with the Claimant's Art.8 rights thus:

> "50. … Her case was set out in her in her particulars of claim, where she said that throughout the period alleged she was required to comply with restrictions placed on her residence in the UK, and she was not permitted to travel, live freely and develop her private and family life as her status in the UK was uncertain. She was unable to work or claim any public funds and had to survive on the basis of very little support provided by the asylum system and relying on assistance from friends and family, which undermined her self-esteem and caused her embarrassment. She relied on particulars, first of all, relating to her son's claim, which she said was in all material respects identical to hers (a submission I did not accept). Then that her claim was not considered within a reasonable period of time, which meant there was delay in determining her refugee status."
>
> …
>
> "54. … It seemed to me that what I am being asked to consider in the current case was a period of delay, and when a period of time can properly be characterised as a period of unreasonable delay .."

> …
> "55. Having further considered the matter, I accepted the claimant's submission that Article 8 was engaged here after the claimant's release from detention on 23 April 2018. She could not travel, she could not move freely, she could not develop her private and family life because her status was uncertain, and she could not work or claim public funds, and had to rely on the little support from the asylum system. She was wholly unable to work and her home life was affected by the anxiety she felt following her period of detention, feeling like a criminal and not a good person with her friends and family because she had been detained.
> 56. In terms of when the breach of the claimant's Article 8 right became disproportionate, I consider that was about six months after her release."
> …
> "57. … There was no evidence from the defendant in relation to the period of delay, and even if the period was taken only from October 2018, which is a six-month period, a period well in excess of two years remains unexplained. The defendant did not meet the burden of showing the interference over that period was lawful and proportionate."

65. In my judgment the Recorder was correct to rule, on the facts, that the Claimant's Art.8 rights were breached by the conditions imposed by the Appellant. She could not claim State Benefits and was restricted to the limited sums paid to asylum seekers. Her ability to work and earn was abolished. Her ability to socialise, buy food, eat out, build a social or religious life and all other aspects of her life was grossly restricted. She was also prevented from travelling. She could not build her status in society or her self-respect. The partly comparable cases considered in *Atapattu* are of some assistance in that decision. The restrictions on the Claimant were far broader than just preventing her from working or earning altogether.

66. There was a second part to the appeal under this ground, relating to liability. This was scattered through paras. 6.29 - 6.34 of the skeleton. The Appellant asserted that "mere" administrative delay does not amount to breach of Art.8 and so no claim can arise. The Appellant also asserted that it was for the Respondent to prove illegality not for the Appellant to justify legality. The Appellant relied on the submissions that the Court should not concern itself with maladministration, it should only focus on illegality and should avoid a generalised and unfocussed idea of fairness, relying (at para. 6.30 of the skeleton) on para. 46 of the judgment of an unnamed Judge in *SQH* [2009] EWCA Civ. 142. This case was not in the authorities bundle. Having found the case I see that the paragraph referred to was from the judgment of Goldring LJ. The claim concerned nationals of Afghanistan and Sierra Leone who sought indefinite leave to remain but were denied this by what they asserted was illegality or error by the authorities and breach of their legitimate expectations. Central to the claims was the assertion that the SSHD should have applied to the claimants a policy which had been withdrawn by the time of consideration. At para. 46 Goldring LJ ruled thus:

> "46. Third, I do not accept Mr. Gill's submission that it would be sufficient effectively to oblige the Secretary of State to apply the policy after it has been withdrawn where the failure to apply it during its currency was lawful; where, for example, there was historically administrative delay or (possibly very serious and widespread) administrative inefficiency which did not amount to unlawfulness in the way I have defined it. The whole basis of applications such as the present is a previous unlawful failure to apply the policy. I cannot see how a previous lawful failure to apply the policy can give rise to a subsequent intervention by the court on the basis that the policy having been withdrawn, the Secretary of State should have taken it into account and having done so, was bound to grant ILR. There can moreover be no question of intervention by the court on the basis of a generalised and unfocussed idea of fairness; or by consideration of what subsequently may have happened to the individual in question and categorised in broad terms such as prejudice, loss and detriment. In other words, I do not accept Mr. Gill's submission that Carnwath LJ was wrong in this regard."

67. I consider that the decision in *SHQ* is not directly relevant to nor determinative of the issue which the Recorder had to decide.

68. The Appellant went on to submit that because Parliament had set no timescale for the time within which the Appellant was to make a decision on the Claimant's fresh claim, the Courts should decline to impose any timescale. The Appellant relied on the judgment of Garnham J. in *R (on the application of O) v SSHD* [2019] EWHC 148, in which a challenge was made to a system operated by the SSHD. The claim failed. The claimant asserted that the making of a conclusive grounds decision for him under the National Referral Mechanism was too slow and hence unlawful. It took 34 months. The Appellant served and relied upon witness evidence showing exponential growth in applications, limited resources, prioritisation, reduced waiting times, a public body report into the delays and concerns raised by MPs and others. Garnham J ruled as follows:

> "72. The difficulty lies in identifying how the requirement to take decisions within reasonable periods is to be applied to a challenge such as this one. As Carnwath LJ said in S v SSHD in the passage immediately following that cited at paragraph 68 above, an obligation to deal with an application in a reasonable time says little in itself. Such an obligation:
>
> > "…is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But…in resolving such competing demands"

69. Garnham J. then identified two factors which he decided he had to take into account to determine the delay claims: (1) systematically unlawful delays which are unfair; (2) chronic delays. In relation to (1) he identified two categories of applicants, those with an established right awaiting official paperwork and those with no established right awaiting a decision on that right. He found himself in alignment with Collins J. in *R (FH) v SSHD [2007] EWHC 1571 (Admin)* in which he ruled that resources are relevant and so was the evidence from the Appellant about the system and why it is a reasonable one, thus:

> "86. Thus, *FH* was not a case of an established right. At paragraph 11 Collins J held:
>
> > "Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the Wednesbury test and is shown to result from actions or inactions which can be regarded as irrational … What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible.""

Garnham J then took into account the rulings of LJ Jackson in *R (Arbab) v SSHD* [2002] EWHC 1249 (Admin) which were as follows:

> "45. One aspect of the separation of powers is that the court will not generally involve itself in questions concerning the management of a government department or similar body: see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 , at 635 (per Lord Wilberforce), and at 636 and 644 (per Lord Diplock). There are at least three good reasons for this abstinence on the part of the
> courts:

> (1) How resources should be allocated between competing priorities and how government ministers should organise their administrative systems are political questions. Judges are not elected and it is not their function to decide such questions.
> (2) The courts do not have the expertise to review the performance of government departments at this level of generality.
> (3) Under our constitutional arrangements there are other more effective mechanisms for calling to account ministers and senior civil servants who mismanage their departments or mis-allocate resources. These mechanisms include Parliamentary questions and, more importantly, the scrutiny of select committees: see *de Smith, Woolf & Jowell* "Judicial Review of Administrative Action" (Fifth Edition) 1995 at"

As a result, Garnham J. constructed the following propositions:

> "89. From those cases I draw the following principles which seem to me relevant to the present case:
> i) Delay may be unlawful when the right in question arises as a matter of established status and the delay causes hardship (*Phansopkar).*
> ii) An authority acts unlawfully if it fails to have regard to the fact that what is in issue is an established right rather than the claim to a right *(Mersin).*
> iii) Delay is also unlawful if it is shown to result from actions or inactions which can be regarded as irrational. However, a failure merely to reach the best standards is not unlawful (*FH).*
> iv) The court will not generally involve itself in questions concerning the internal management of a government department *(Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd and Arbab)*
> v) The provision of inadequate resources by Government may be relevant to a charge of systematically unlawful delay, but the Courts will be wary of deciding questions that turn on the allocation of scarce resources (*Arbab).*"

70. None of these matters of law were in dispute in this appeal. The problem which the Appellant faced was much more basic. The Appellant chose not to serve or rely on any evidence to show what the system was, how much it cost, how many applications were within it, what turnover rate it had, how many staff were employed, what cost was involved, what demands were made of it's resources, or any evidence whatsoever. Stripping away all the fog on this issue it comes down, in my judgment, to a very simple question*: "Once the Claimant has established a sufficiently serious breach of her Art.8 rights and the burden shifts to the Defendant, the Court must ask: has the Defendant discharged the burden of proof to show that the interference was necessary and proportionate?"* That question can, depending on the evidence, be rephrased in this case

as: "*for this Claimant, in her circumstances, taking into account the conditions imposed upon her, how long was it reasonable for the Defendant to take to make the decision on her fresh claim?"* Had the Appellant served and relied on evidence then, applying the *Garnham J. factors*, the Appellant might have shown that 2 years and 9 month was not unlawful because it was necessary and proportionate. However, in the absence of any evidence from the Appellant, the Recorder was still required to determine the issue and did so. She decided that 6 months was a reasonable period in the circumstances on the evidence before her (or to be more precise on evidence from only the Claimant). I do not consider that approach to be illogical or wrong, nor do I consider that her assessment of the delay period was irrational or inappropriate on the evidence before her. The Appellant submits that this time limit will applied to other claims. I think not, unless of course (1) the factual matrix is the same, which seems unlikely, and (2) the Appellant fails to serve any evidence in other cases.

G5: A declaration

71. The Appellant asserted that the Recorder should have issued a declaration instead of awarding damages and asserted that the level of damages was not supported by the evidence and was excessive. The Respondent answered by relying on the findings of fact which were not challenged and the fact that the Recorder accepted the Claimant's evidence of loss. In relation to pecuniary loss, after the long delayed decision to accept her Asylum claim, within a few weeks the Claimant obtained paid work as a live-in carer and produced her pay slips to the Court. Her case was simply that this would have occurred earlier, had the Appellant made the decision earlier. No evidence was submitted on the effects of Covid during the period. The Recorder's decisions on quantum are set out at paras. 41-47. I do not consider that her approach was unsupported by evidence or excessive. She took 4.5 weeks off the sums claimed for a job search period. In relation to general damages, the Recorder awarded £5,000 for the nervousness of having to report to the Appellant monthly with fear of detention each time and for being in "limbo" for 2 years and 3 months. I do not consider that level of award to be outside the reasonable scale available on the evidence.

G6: costs

72. Under this ground the Appellant seeks to overturn the interim payment on account of costs. The Appellant accepts that the award on the indemnity basis was correctly made. The trial took 3 days. There was no costs budget from the Claimant because she was treated as a litigant in person (albeit she had a DPA barrister). The Appellant's costs budget was £35,000 plus VAT for defending the claim assuming a one day trial. I did ask the parties to put in any reference to the transcript on this or any other issue but none was put in. The relevant part of the transcript is below:

> "THE RECORDER: Then there is the question of payment on account of costs and what has been requested is £35,000 plus VAT.
> MR CROSSLEY: Your Honour, I have not any specific instructions in relation to that. I want to try to take a reasonable position, but I can only

> observe on behalf of the defence that the-- I see the reasoning behind the figure that is arrived at and I must say objectively that it does not seem that it is removed from all logic. It clearly is based on a figure that is reached.
> THE RECORDER: Yes.
> MR CROSSLEY: And that being said, I think I ought to, in the absence of any specific instructions, simply say that the costs and the value-- the budget has not been-- it does not exist and, therefore, a true appreciation of the costs is not known and I would resist any payment on account on that ground.
> THE RECORDER: Any payment on account?
> MR CROSSLEY: Well, if it is not £35,000, you will not hear from the defence an alternative figure. I can only say that I do not have specific instructions to agree that and your Honour will make your own decision.
> THE RECORDER: I think the defendant clearly should make a payment on account. I have to be cautious not to make a payment that might exceed the costs that would be payable. I am going to make an order for £30,000. it 1 seems to me it is a three-day-- you know, it has been a 2 three-day multi-track case. I cannot believe there is any risk in the costs at the end of the day 3 being less than that. So £30,000 plus VAT.
> Is there anything else we can deal with today?"

73. So, the Appellant did not put up much of a fight on the quantum of the requested payment on account. The CPR empower the Judge to make an order for a payment on account against a losing party. This is because the winning party's lawyers may have carried the claim and been paid no costs all the way through and costs assessment takes time. In the absence of any evidence that the costs of the Claimant's barrister were excessive for all the DPA work done for her, including the emergency work done whilst she was in detention, the correspondence, pleading the claim, dealing with interim hearings and the 3 day trial for this multi-track case, or any evidence that the costs were less than the costs on account ordered, I consider that the order made by the Recorder was not demonstrably wrong. In any event, the costs should have been assessed by now, furthermore a full bill of costs should have been served. None was put before me so this is or should have been water under the bridge.

The Appeal

74. For the reasons set out above I dismiss the appeal on all of the grounds put forwards and I dismiss all of the sub grounds within each ground.

END