IN THE SUPREME COURT OF ST HELENA **CLAIM NO: 522/2021**

BETWEEN:

Hearing: 22 November 2024

With supplementary submissions in December 2024

Judgment: 7 February 2025

CRUYFF GERARD BUCKLEY

Plaintiff

-and-

THE ATTORNEY GENERAL OF ST HELENA

ON BEHALF OF THE CROWN (HOME AFFAIRS DIRECTORATE)

Defendant

JUDGMENT ON REMEDY

Mr Joshua Hitchens of counsel, instructed by the Public Solicitor of St Helena, appeared for the Plaintiff.

Ms Beatrice Collier of counsel, instructed by the Attorney General of St Helena, appeared for the Defendant.

Structure of this judgment by reference to paragraph numbers:

Chief Justice Rupert Jones:

A. INTRODUCTION

1. This is my judgment on the remedy to be granted to Mr Buckley ("the Plaintiff") on his plaint, or claim, against the Defendant relating to detention in His Majesty's Prison Jamestown ("the Prison") in 2018. The Plaintiff's claim succeeded to the extent set out in my judgment on liability dated 10 October 2024 (the "liability judgment").

2. The Supreme Court ("the court") sat for the remedies hearing in London on 22 November 2024 with a video link to the courtroom in St Helena. Mr Hitchens appeared as counsel on behalf of the Plaintiff. He made oral submissions and relied on pre and post hearing written submissions dated 4, 11, 21 November and 12 December 2024 which I have taken into account. Ms Collier appeared as counsel on behalf of the Defendant. She made oral submissions and relied upon pre and post hearing written submissions dated 20 November and 6 December 2024. I am grateful to both parties for all of their submissions which I have also taken into account together with the original submissions on remedy filed before the trial on liability.

3. I also received further evidence in support of the parties' cases for the remedies hearing in the form of witness statements from: the Plaintiff dated 28 October 2024; and for the Defendant, Gareth Rhys dated 08 November 2024 and Sara McIlroy dated 08 November 2024. There was no cross examination upon any of these statements. I have read and taken them into account and refer to them only when relevant to the issues I need decide.

Issues and conclusions

4. This judgment on remedy will address four issues: a) the nature of the declarations to be made; b) the amount of damages to be awarded to the Plaintiff; c) the costs of the claim; and d) the postscript to the liability judgment.

5. I have decided: a) to make declarations as to specific and systemic breaches of the Plaintiff's rights under the Constitution; b) to award the Plaintiff £13,000 in compensatory damages and £10,000 in additional damages (a total of £23,000) to be paid by the Defendant; c) the parties have agreed that the Defendant should pay the Plaintiff's costs on the standard basis; and d) that matters addressed in the postscript to the liability judgment are largely unnecessary to decide by virtue of subsequent events.

Summary of the findings in the liability judgment

6. In the liability judgment I found that:

   (a) The Defendant had admitted a breach of the Plaintiff 's right to life under section 6 of the Constitution of St Helena St. Helena, Ascension and Tristan da Cunha, SI

2009/1751, ('the Constitution') throughout the period of his imprisonment from 20 May-19 September 2018 ('the relevant period') based on the real and immediate risk to life from fire.

(b) In respect of the period 20-24 May 2018 (5 days) the Defendant breached the Plaintiff's rights protected by sections 7, 11(1) and 11(2) of the Constitution, by reason of various negative features of the conditions in which the Plaintiff was held during this time (see [290] of the liability judgment);

(c) In respect of the period 24 May - 22 August 2018 (90 days) the Defendant breached the Plaintiff 's Constitutional rights under sections 7 and 11(1) because of the absence of outdoor work or exercise opportunities, exacerbated by the other negative features of the regime and/or conditions of detention, and were amplified during this period by the breach of section 6 arising from the fire risk (see [291] of the liability judgment);

(d) In respect of a few days during the period 24 May-22 August 2018 the Defendant breached sections 7 and 11(1) by reason of affording him inadequate personal space (see [292] of the liability judgment); and

(e) In respect of the period 22 August - 19 September 2018 (29 days) the Defendant breached the Plaintiff 's Constitutional rights under sections 7 and 11(1) because of the complete absence of outdoor work or exercise opportunities, exacerbated by other features of the regime, and amplified by the breach of section 6 arising from the fire risk (see [293] – [294] of the liability judgment).

B. THE LAW

The Constitution

7. Section 24 of the Constitution provides as follows:

Enforcement of protective provisions

24. (1) If any person alleges that any of the provisions of this Part has been, is being or is likely to be breached in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a breach in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1); […]

and may make such declarations and orders, issue such writs and give such directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Part.

…

(4) Without prejudice to the generality of subsection (2), where, in the exercise of its powers under that subsection, the Supreme Court determines that one of the provisions of this Part has been breached in relation to any person, it—

(a) may order the award to that person of such damages as the Supreme Court considers just and appropriate;

[…] (emphasis added)

8. It follows that the power to make a declaration is provided for by s.24(2) and the power to award damages as are "just and appropriate" is provided for by s.24(4)(a) of the Constitution.

Declarations on systemic unlawfulness

9. I was referred to the following authorities as to when a Court may grant a declaration on systemic unlawfulness.

10. In *R(BF (Eritrea)) v Secretary of State for the Home Department* [2019] EWCA Civ 872, [2020] 4 WLR, Underhill LJ stated that:

> "[t]he issue is whether the terms of the policy themselves create a [real] risk [of a more than minimal number of unlawful decisions] which could be avoided if they were better formulated.".

11. In *DMA v SSHD* [2020] EWHC 3416 (Admin) Robin Knowles J held at [235] that:

> "Where the Secretary of State's systems work in a way that cause her to be in breach of her legal duty it is proper for the Court to say that, because the law is not being complied with. Where there is an aspect of the process that will necessarily cause or contribute to the real risk, both of unlawful decisions and of breach of duty, the Court should be prepared to declare it."

12. In *R (Oleh Humnyntskyi and Others) v SSHD* [2020] EWHC 1912 (Admin), Johnson J considered the argument that it was necessary to consider the "full run" of cases where the test was: does the Secretary of State's policy create a real risk of unfairness in a significant number (that is in more than a minimal number) of cases? He said at [275]:

> "a finding of systemic unfairness should not be made unless there is a sufficient evidential basis for concluding that the unfairness is inherent in the system … I do not, however, agree that it is necessary to consider the application of the policy against every possible factual permutation. Once it is demonstrated that there are legally significant categories of case where there is (as a result of the terms of the policy) a real risk of a more than minimal number of procedurally unfair decisions, the policy will be shown to be systemically unfair."

Damages for breaches of the ECHR

13. As noted at [19]-[20] of the liability judgment, the purpose of Part 2 of the Constitution is to permit rights protected by the European Convention on Human Rights ("the Convention" or "ECHR") to be enforced in the St Helena domestic courts. However, the language of section 24(4)(a) of the Constitution on the award of damages perhaps provides a wider discretion than section 8(1) and 8(4) the Human Rights Act 1998 ("HRA") which applies in the UK but not in St Helena.

14. Section 8(1) & (4) HRA provides as relevant:

> **8 Judicial remedies.**
>
> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> …
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
>
> … [emphasis added]

15. Section 8(3) of the HRA reflects the provisions of Article 41 of the Convention, although that article is not one of those set out in Sch. 1 to the HRA. Article 41 provides:

> "Just satisfaction
> If the Court finds that there has been a violation of the Convention … the Court shall, if necessary, afford just satisfaction to the injured party."

16. Section 8(4)(b) HRA requires that the UK courts, when considering the amount of damages for breach of the Convention, must take into account the principles applied by the European Court of Human Rights ("EctHR") in awarding compensation under Article 41 of the Convention.

17. There is therefore a difference between: a) the potentially less restricted scope to award damages pursuant to section 24(4)(a) of the Constitution in St Helena which is governed only by the 'just and appropriate' test for all types of relief; and b) the approach in relation to section 8(1) & (4) of HRA which also requires the taking into account principles applied by the EctHR. This will include its guidance and its case law on the amount of damages to be awarded for breaches of the Convention.

EctHR principles on damages – the Practice Direction

18. The Practice Direction on Just Satisfaction Claims was issued by the President of the European Court of Human Rights on 28 March 2007, and amended on 9 June 2022, in accordance with Rule 32 of the Rules of Court. At para 5, under 'General principles', the Practice Direction states that:

> "Just satisfaction is afforded under Article 41 of the Convention so as to compensate the applicant for the actual damage established as being consequent to a violation; in that respect, it may cover pecuniary damage; non-pecuniary damage; and costs and expenses (see below). Depending on the specific circumstances of the case, the Court may consider it appropriate to make an aggregated award for pecuniary and non-pecuniary damage."

19. Under the heading 'Pecuniary damage', the Practice Direction states the following, at paras 8-9:

> "8. The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place, in other words, restitutio in integrum. This case involves compensation for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*).
>
> 9. It is for the applicant to show that pecuniary damage has resulted from the violations alleged. A direct causal link must be established between the damage and the violation found. A merely tenuous or speculative connection is not enough. The applicant should submit relevant evidence to prove, as far as possible, not only the existence but also the amount or value of the damage. …"

20. Under the heading 'Non-pecuniary damage', the Practice Statement states the following at paras 10-13:

> "10. The Court's award in respect of non-pecuniary damage serves to give recognition to the fact that non-material harm, such as mental or physical suffering, occurred as a result of a breach of a fundamental human right and reflects in the broadest terms the severity of the damage. Hence, the causal link between the alleged violation and the moral harm is often reasonable to assume, the applicants being not required to produce any additional evidence of their suffering.

11. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. The claim for non-pecuniary damage suffered needs therefore not be quantified or substantiated, the applicant can leave the amount to the Court's discretion.

12. If the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant as well as his or her own possible contribution to the situation complained of, but the overall context in which the breach occurred.

13. Exercising the discretion, the Court relies on its own relevant practice in respect of similar violations to establish internal principles as a necessary starting point in fixing an appropriate award in the circumstances of each case. Among factors considered by the Court to determine the value of such awards are the nature and gravity of the violation found, its duration and effects; whether there have been several violation of the protected rights; whether a domestic award has already been made or other measures have been taken by the Respondent State that could be regarded as constituting the most appropriate means of redress; any other context or case-specific circumstances that need to be taken into account."

Principles guiding the award of damages for constitutional breaches

21. In *Attorney General v Ramanoop [2005] 2 WLR 1324 (PC) ("Ramanoop")*, the Judicial Committee of the Privy Council set out the proper approach to awarding damages for breach of the Constitution in the context of Trinidad and Tobago. It explained the principles and distinguished between compensatory and additional damages at [18]-[19]:

> 18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.
>
> 19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its

object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

[emphasis added]

Assessment of Constitutional Damages: compensatory and additional awards

22. It flows from the above that the Supreme Court of St Helena may, in principle, consider the following by way of damages for a breach of a constitutional right:

(a) If the person wronged has suffered damage, an award of compensation; and

(b) An additional award, designed to vindicate the important constitutional rights engaged and to compensate for their breach, but which is not designed to be punitive.

23. It is these principles that the Court must follow rather than those associated with the award of damages for breaches of a Convention right.

24. In relation to the assessment of the compensatory award, the Privy Council in *Ramanoop* stated that "the comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation [under the relevant section of the Constitution] is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law".

25. As to the assessment of any additional award, this "should not be nominal or derisory", but "does not have to be large".

26. The Privy Council's approach in *Ramanoop* has been followed in other current Overseas Territories[1] as well as in other Commonwealth countries with similar constitutions to St Helena,. The Supreme Court of Bermuda summarised the law on constitutional damages in *Lambert v Minister Responsible for Telecommunications* [2019] SC (Bda) 52 Civ ('*Lambert*'):

(a) Persons carrying on their life should be free from unjustified interference, mistreatment or oppression from the State;
(b) If a person has suffered damage from such unjustified interference, mistreatment or oppression, that person is entitled to compensation;
(c) The equivalent common law level of damages is a useful guide for the compensatory element;
(d) In addition to compensation for any damages suffered, the purpose of redress is to vindicate or uphold the constitutional rights which have been infringed;

[1] See, also *Minister of Home Affairs & The Attorney General v Melveryn Williams* Bermuda Court of Appeal Civil Appeal No 15 of 2015.

(e) The purpose of vindication is to vindicate the constitutional rights which have been infringed not to punish the State or Executive;
(f) The vindicatory element of redress may be an additional award of damages, may be a declaration, or may be both, depending on the circumstances of the case;
(g) The sum will be at the discretion of the trial judge.

C. DECLARATORY RELIEF

The declarations sought

27. In his Amended Particulars of Claim the Plaintiff invited the Court to make declarations that:
(a) The Defendant breached the Plaintiff 's rights guaranteed by the Constitution;
(b) The Defendant has systemically acted unlawfully in respect of the management, operations and conditions in HMP Jamestown.

28. There is no dispute as to the Court making the first declaration in relation to the specific breaches of the Plaintiff's constitutional rights. The Defendant accepts that the findings contained in the liability judgment entitle the Plaintiff to a declaration that the Defendant breached his rights protected by sections 6, 7, 11(1) and 11(2) of the Constitution. These findings were summarised above. I will make declarations to that effect in the Order that follows this judgment.

29. The dispute between the parties is to whether to grant the declarations to the effect that the breach of the Plaintiff's rights arose from systemic unlawfulness in the operation of the prison during the relevant time of his detention.

Submissions for the Plaintiff

30. Mr Hitchens submits that the Court should declare that the breaches identified in the Court's liability judgment were caused by systemic unlawfulness in the operation of HMP Jamestown during the period of the Plaintiff's incarceration. In this case he argues:

(a) The lack of outdoor space and exercise policy for remand prisoners was universal. It is an inevitable consequence of the Court's judgment on liability that this policy created a real risk of unlawful acts and was therefore systemically unlawful.
(b) The fire risk was similarly systemic and affected more than a minimal number of breaches of Section 6.
(c) The aggravating features including the lack of ventilation, the lack of purposeful activities were also systemic and not limited to the Plaintiff.
(d) The factors which gave rise to a breach of the right to dignity were similarly systemic.

Submissions for the Defendant

31. Ms Collier submits that the second declaration sought as to systemic unlawfulness is too wide and too general. She contends that it is not reflected in the findings in the liability judgment which only identified specific failures as regards the Plaintiff and his specific circumstances.

Discussion and Analysis

32. I am satisfied that I should grant declarations that the breaches of the Plaintiff's rights were caused by systemic unlawfulness in the operation of the Prison during the relevant time.

a) Lack of outdoor space or exercise - breaches of Section 7 and 11

33. I made detailed findings on breaches of the Plaintiff's rights under 7, 11(1) & (2) of the Constitution at [147] to [295] of the liability judgment. These breaches occurred for a period of four months in relation to the Plaintiff. In particular, at [190]-[209], I found that the primary basis for the breach of each right was the lack of outdoor work, or any exercise afforded to the Plaintiff during the relevant time. The UN rules and CPT standard provide that a prisoner should be afforded a minimum of one hour outdoor exercise a day where possible.

34. I was satisfied that the complete absence of outdoor exercise during the relevant period was sufficient in isolation to constitute breaches of all three rights. The breach of s.11(2) arose where the Plaintiff was a remand or unconvicted prisoner and received inferior treatment to sentenced prisoners who were able to receive regular outdoor exercise through working on the farm. He did not receive treatment which accorded to his status.

35. The reason for the lack of opportunity for the Plaintiff to go outdoors to the Prison farm was explained at [208] & [211]-[212] of the liability judgment. It was based upon the Plaintiff being an unconvicted remand prison for whom a necessary risk assessment could not be made so as to permit him to go and work on the farm (or in the prison kitchen or workshop).

36. Ms Collier submitted that the practice or policy of not risk assessing unconvicted prisoners gave rise to no systemic unlawfulness in this case. This is because, even if there was an unwritten policy, system or practice in place, it applied to the Plaintiff alone during the relevant period and no other prisoners. While it might have also applied in principle to any other remand prisoners, there were no other remand prisoners identified in the prison during the relevant time and no evidence nor findings as to how it would have operated in respect of them.

37. She argued that the court had received insufficient evidence and hence made no findings as to how it might have applied in practice to other prisoners. For example, the court cannot be satisfied that the operation of the policy, if it existed, would inevitably have

caused a breach of the same constitutional rights if it had taken place in relation to a remand prisoner incarcerated for only short periods (eg. for less than a week). There was insufficient evidence or findings made to support the terms of any policy creating a [real] risk of a more than minimal number of breaches of the Constitution. The court had made no findings on any of these issues in the liability judgment.

38. She therefore contended that it has not been demonstrated that there was a legally significant category of cases where (as a result of the terms of the policy) there was a real risk of unlawful treatment to a more than minimal number of prisoners: the policy had not been shown to be systemically unlawful. Even if the practice or policy gave rise to a specific breach in its application to the Plaintiff – she submitted that it was not as a result of a systemic failings. Indeed, she argued that, in contrast to the way in which the fire risk was argued, the outdoor exercise breach was not pleaded in terms of systems generally.

39. Ms Collier argued that the court only heard evidence of how the operation of the system, policy or practice on risk assessments impacted upon the Plaintiff. The court only received evidence and made findings on the effect of the policy on the one individual, being the Plaintiff. Even if there were general arrangements that applied to the Prison, the court should be cautious about translating the specific impact on the Plaintiff into a systemic or general declaration. This was not a case where there was any evidence or findings of a pattern of operations applying to other plaintiffs or a system applying to other prisoners. The court did not hear evidence or make findings as to the length of stay of remand prisoners on average or in general. There was no finding that any policy created a risk of unlawfulness in a significant number of cases. There was simply no evidence or findings regarding the impact on any other prisoner.

40. However well made, I reject the arguments on behalf of the Defendant and I accept Mr Hitchens' submissions.

41. I apply the test that a systemic breach arises where, per *BF (Eritrea)* at[225]: *'*the terms of the policy themselves create a [real] risk [of a more than minimal number of unlawful decisions] which could be avoided if they were better formulated" or *Oleh Humnyntskyi* at [275]: "the unfairness is inherent in the system … … that there are legally significant categories of case where there is (as a result of the terms of the policy) a real risk of a more than minimal number of procedurally unfair decisions, the policy will be shown to be systemically unfair*."*

42. I am satisfied that the authorities do not require the State's 'policy' to be reduced to writing in a specific individual or collection of documents. Policies, such as the conducting of risk assessments on remand prisoners, can be oral or written or both. They can be gleaned from a sustained and consistent application of the same system or practice to the prison as a whole over a period of time. The same is true of management practices, operations or systems. It cannot reasonably be required that the Defendant's policies or practices need be reduced to the one written policy or document in order for them to be systemic.

43. Ms Murray did not actually state in oral evidence that there was an unwritten policy or practice of not risk assessing unconvicted prisoners for work on the farm and that it would have applied to any and all unconvicted and remand prisoners during the relevant period. However, it was the overwhelming implication of her oral evidence. She had said as much at [59] of her witness statement:

> 59. There was a prison farm, however, remand prisoners were not permitted to attend. In order to be permitted to work on the farm, the prisoner must have been convicted, categorised as Category C and undergone a risk assessment (for risk posed to both themselves and the public) to review their suitability for work on the farm. During the period of his detention, Cruyff had not yet been convicted and was also under ROSH observations for most of his time at the Prison. For these reasons, he was not suitable for work on the farm.

44. She gave oral evidence and I made findings to the effect that convicted prisoners were given access to outdoor exercise and work at the farm the Plaintiff could not be risk assessed to leave the prison because he was unconvicted [207]-[208], for example: 'because he was unconvicted he could not be risk assessed to leave the prison'. My recommendation at [208] was that if this approach is to be adopted then a work around should be adopted for an unconvicted prisoner to receive an alternative form of outdoor exercise.

45. I am satisfied that I heard sufficient evidence from Ms Murray in order to make an explicit finding, even if it was only implicit in the liability judgment, that there was such a general policy not to risk assess remand prisoners (even if it was not in writing as a policy) which meant they could not go to the farm (or otherwise receive outdoor exercise). This was a system operated by the prison throughout the relevant time.

46. The matter that has given me pause for thought is whether this policy or system would create a risk of unlawful outcomes in more than a minimal cases during the relevant time. I do no need to go as far as to find that the operation of the policy during the relevant time would always give rise to unlawfulness so reject the argument that it might not cause unlawfulness in relation to unconvicted prisoners who were in the prison only for a few days. In such cases there would still be a *risk* of unlawfulness due to the absence of them receiving outdoor exercise on the farm or in any other way.

47. I have reflected on the fact that I made no findings that there were any other unconvicted prisoners in the prison during the relevant time – indeed on one view the evidence implied that the Plaintiff was the only unconvicted prisoner during the relevant time. Therefore, it is not explicit that the operation of the policy would have given rise to a risk of unlawful treatment of any other prisoner during the relevant time.

48. I expressly found that the operation of the policy applied to just one prisoner in the relevant time, being the Plaintiff. I made no findings as to how often the prison would receive or house unconvicted or remand prisoners and how long they would stay for.

49. Nonetheless, I am satisfied that it did create such a risk and there remains a possibility that there were other prisoners in the remand or police cells housed in the prison during the relevant time. I heard evidence to the effect that these cells may have been occupied at times during the relevant period – even if the occupants were only there for a short time (the Plaintiff complained of vomit in the sink of the remand / police cell from overnight occupants). The Defendant has not disclosed any or all of the prisoner records for the individuals housed in the prison during the relevant time if they have been created or continue to exist.

50. Furthermore, I am satisfied that there would not need to be many or even any additional remand prisoners to the Plaintiff housed in the prison very often or at all during the relevant period for there to remain a risk of unlawfulness occurring to more than a handful of cases and thus creating a risk to a more than minimal number. In my liability judgment I expressly found that the prison in St Helena is small (housing under 25 prisoners at the time). I do not need to be satisfied that there had been a run of cases of unconvicted prisoners not receiving outdoor exercise during the relevant period. Therefore, unlawfulness occurring to even one or a small number of prisoners would still be significant.

51. The policy created a real risk of unlawfulness and there were sufficient findings made in the liability judgment that there was a risk it would apply to more than a minimal number of others during the relevant time.

52. The result of the policy of not risk assessing unconvicted prisoners, and thus prohibiting them from outdoor exercise or work at the farm, created an unlawful outcome where no other form of outdoor exercise was available to the Plaintiff or unconvicted prisoners generally during the relevant period. Therefore, I find that the breaches suffered by the Plaintiff arose from systemic unlawfulness by operation of the policy alone and that the Defendant's policy operated in a way that rendered the Plaintiff's treatment unlawful. I agree with Mr Hitchens that the policy of not risk assessing unconvicted prisoners gave rise to a risk (and it does not need to be any higher) of systemic breach of Articles 7 and 11(1).

53. The policy also created a real a risk of unlawful treatment for purposes of section 11(2) of the Constitution. The Plaintiff's treatment was caused by this same systemic failure. Being deprived of outdoor exercise as an unconvicted and unassessable prisoner meant that he was subject to unlawful treatment for the purposes of section 11(2): the Plaintiff was treated less favourably than convicted prisons. It was not appropriate to his remand status.

54. I have exercised my discretion to make systemic declarations in this case for good reason. Where there is an aspect of the State's systems or policies that will necessarily cause or contribute to the real risk, both of unlawful decisions and of breaches of the Constitution, the court should be prepared to declare it. Part of the court's special responsibility to all St Helenians is provide protection of their rights under the Constitution, and particularly so for those who are amongst the most vulnerable. There

is a strong public interest in making declarations so as protect prisoners' interests and encourage corrective action (all the more so in a non-self-governing territory). Although I have not found that the Plaintiff's treatment was inhuman for the purposes of section 7, I have found it to have been degrading. A systemic declaration may also be a valuable marker to encourage improvement in areas in the prison practice or systems which may need to be rectified to comply with the law (if they have not already been rectified since 2018).

55. I make a declaration that the breaches of rights suffered by the Plaintiff as a result of the lack of outdoor exercise were caused by systemic unlawfulness and were the result of the management, operations and policies in Prison at the relevant time. The Plaintiff was not risk assessed so as to be allowed to leave the prison and work or exercise on the farm or otherwise receive outdoor exercise and this gave rise to the breach of his rights under sections 7, 11(1) and 11(2) of the Constitution.

b) fire risk - breach of section 6

56. The court made detailed findings at [59] – [98] of the liability judgment in support of the Defendant's admission that the Defendant breached the Plaintiff's right under section 6 of the Constitution. The court found at [62] that:
"1) SHG knew, or ought to have known, of a real and immediate risk to the lives of prisoners by fire during the relevant time in 2018; and
2) failed to take measure within the scope of their powers which, judged reasonably might have been expected to avoid that risk".

57. I reject Ms Collier's submissions that my findings in the liability judgment on the fire risk issue were focussed only on the specific circumstances or facts of the Plaintiff's case. I am satisfied that I made wider findings that there were failures in the systems and operation of the prison general which had general effect on all prisoners during the relevant time. The failures were institutional failings that applied across the prison as a whole rather than specifically to the Plaintiff. It was the Defendant's general failure to take reasonable measures to avoid the fire risk that gave rise to a breach of the Plaintiff's section 6 right.

58. In making my findings I relied on evidence as to the operation of the prison generally during the relevant time as well as in relation to the Plaintiff specifically. In this case the Defendant's system, its consistent operation of its 'policy' on fire prevention and extinction measures, and the failings which caused the breach of the Plaintiff's rights, were identified by the court in the findings I made regarding the reports of the Overseas Territories Prison Advisor ("OTPA") and Equality and Human Rights Commission ("EHRC"). I also accepted the subsequent report Ms Murray prepared in November 2018 regarding the relevant time in which she made recommendations for corrective action to remedy the defects in fire risk measures (see [68]-[82] of the liability judgment).

59. It is apparent that the failures identified in the Prison's fire measure set out in the liability judgment arose from sustained and consistent systems in operation. These represented the policy of the Prison at the relevant time in addressing fire risk. I am satisfied that they applied to the prison generally in the way I described during the relevant period. They created a real risk of more than a minimal number of breaches in relation to prisoners housed in the prison at the relevant time. The systems and measures which caused the breach of the Plaintiff's right are summarised in my conclusion at [85]-[98] of the liability judgment.

60. There was systemic unlawfulness in relation to the fire risk during the relevant time because the Defendant's policy and systems operated in such a way that caused a real risk of more than a minimal number of constitutional breaches in relation to the prisoners who were housed in the Prison. Therefore, I am satisfied that not only did the Defendant breach the Plaintiff 's right to life guaranteed by the Constitution in respect of the fire risk but also that this was caused by the Defendant acting in a systemically unlawful manner in respect of the management, operations and fabric of the Prison during the relevant time. The system operated by the Defendant was the cause of the legal wrong he suffered. The breach of the Plaintiff's right was caused by the operation and management of the Prison at the time he was imprisoned.

61. I made no findings about the period after November 2018 and this declaration is limited to the relevant period of May to September 2018.

c) the aggravating features as systemic

62. I did not find that any of the other conditions of the Plaintiff's detention breached the provisions of the Constitution in isolation (except the Plaintiff sharing Cell 1 with three other prisoners for a few days). Instead, I made findings about the operation of the other prison conditions generally and their effect on the Plaintiff. I found that some of the conditions aggravated the breaches based on the lack of outdoor exercise but did not themselves give rise to breaches. My findings were based upon the evidence Ms Murray, Ms Turner and Mr Munns gave in relation to the prison conditions generally.

63. I have already found that the negative features of the conditions aggravated the unlawfulness but were not the cause of the unlawfulness. I do find that the negative and aggravating conditions arose as a result of the systems, policies, operation and management of the prison during the relevant time. However, the systemic nature of the negative features did not give rise to the unlawfulness – only the aggravation of other unlawfulness. Therefore, I am not prepared to exercise my discretion to make this declaration, particularly where I have not found that these features of themselves caused unlawfulness.

64. There is one exception. I did find that there was another condition which in isolation did give rise to a breach of section 7 /11(1) of the Constitution: restricted cell space. I did find that there was a breach of section 7/11(1) for a few days when the Plaintiff

shared Cell 1 with other three other occupants (receiving below the minimum 3m2 threshold for cell space).

65. However, I did not make findings or hear reliable evidence that the housing of four prisoners in this cell was a result of a general policy or system rather than oversight or mistake. Indeed, I heard evidence from Ms Murray of the reverse – that the prison would not have housed the Plaintiff with three other prisoners and I did not find that housing four prisoners in Cell 1 was a general practice or policy.

d) right to dignity

66. The analysis above has considered section 11(1) of the Constitution at the same time as section 7 so nothing additional need be said.

Overall conclusion

67. I will make declarations that the breaches of the Plaintiff's rights under sections 6, 7, 11(1) and 11(2) (in relation to fire risks and lack of outdoor exercise) were caused by systemic unlawfulness in relation to the management, operation or conditions in the Prison at the relevant time.

D. DAMAGES

Plaintiff's submissions

68. Mr Hitchens submitted that the seriousness of the court's findings should not be understated. The court had concluded that the State subjected Mr Buckley to degrading treatment, violated his right to dignity, violated his right to protection for his life and violated his specific rights as a remand prisoner.

69. There were a number and variety of breaches of the Constitution, as set out above, including of sections 6, 7, 11(1) and (2). They were not isolated.

70. These breaches subsisted over a period of months. They were prolonged.

71. He argued that the Plaintiff's evidence is clear that this treatment had a profound and lasting effect on him.

72. Mr Hitchens contended that. aside from the inherent seriousness of the breaches and the effect they had on Mr Buckley, as set out in his most recent witness statement, the following aggravating circumstances give rise to the need for a substantial award of compensatory damages and additional damages:

(a) This was a knowing breach. At the very least the St Helena Government has known since at least 2009 that there was a substantial risk that conditions in the prison breached

the protections afforded by the Constitution[2]. The first sounding of the alarm by the Southern Ocean Prison's Advisor was followed by a multitude of reports from the Equality and Human Rights Commission ("EHRC"), The Prison Visiting Committee, and the Overseas Territories Prison Advisor ("OTPA").

(b) Prisoners are in a particularly vulnerable position and the State has a particular duty to ensure respect for their fundamental rights[3]. They are also a class of people who are not well placed to bring violations of their fundamental rights to the Court's attention. This requires the Court to take a robust approach when violations are brought to its attention in order to promote high standards and respect for Constitutional Rights.

(c) Mr Buckley's treatment formed part of a series of systemic and endemic breaches. They did not arise out of isolated incidents or failings. Rather the State has systemically and consistently deprived prisoners of their Constitutional Rights over a prolonged period of time despite repeated warnings that they were doing so.

(d) The breaches in respect of Mr Buckley subsisted over several months and the systemic unlawfulness which underlies this case has subsisted for years.

(e) It is merely good fortune that no one died as a result of the breaches of s.6 of the Constitution and there is evidence that the knowledge of the acute fire risk faced by prisoners seriously aggravated Mr Buckley's already fragile mental health.

(f) The Plaintiff is entitled to vindicatory damages. Mr Buckley is entitled to have the value of his fundamental rights; and the seriousness of his mistreatment vindicated by the Court.

(g) In *Adegboyega v Secretary of State for the Home Department* [2024] EWHC 2365 (KB) ('*Adegboyega')*, a Nigerian national was awarded £200,000 in damages after he was unlawfully detained at an immigration removal centre for 88 days in 2017. The award included damages for breaches of Article 3 ECHR arising out of the poor conditions in the centre. The aspect of the award relating solely to the Article 3 breach arising out of poor detention conditions was £26,000. The conditions in *Adegboyega* were not close to being as serious as the conditions in HMP Jamestown.

(h) It is also true that the basis for assessing damages under Constitutional damages is different to assessing damages for breaches of Article 3. However, what *Adegboyega* does demonstrate is that those in Britain who suffer unlawful conditions of detention can expect to recover substantial sums in damages. The principle in *Attorney General of St Helena v AB* [2020] UKPC 1 ('*AG St Helena v AB'*) must mean that St Helenians are entitled to hold a similar expectation.

[2] See §33 of the judgment.
[3] See §52 of the judgment.

73. In light of all of these factors, Mr Hitchens argued that damages and additional damages totalling £50,000 would be a just and appropriate starting point.

Defendant's submissions

74. Ms Collier submitted that, bearing in mind the comparator cases from the EctHR, and assessing damages on an equitable basis, an award of £8,000 was appropriate by way of compensatory award for the breaches of sections 6, 7 and 11 of the Constitution.

75. She contended that an award of £5,000 would be appropriate by way of vindicatory damages as this would mark the importance of the Constitutional rights which the Court has found were breached; would take account of the factual findings made in the liability judgment regarding the Plaintiff 's mental state and the effect on him of the conditions in which he was detained, but would also properly reflect the aspects of the regime and conditions which the Court found were positive and the overall length of the breach.

Discussion and Analysis

76. I bear in mind that while both parties agree that I may take it into account, I am not bound to follow English or EctHR case law on the amount of damages to be awarded. The approaches to the award of damages from breaches of the Convention and Constitution are different and there is a difference between the governing provisions in section 24 of the Constitution and sections 8(1) and (4) HRA. The court must award what is just and appropriate and follow the guidance from the Privy Council on assessment of damages for breaches of the Constitution.

77. The main principles concerning the appropriate redress for breaches of constitutional rights were most recently summarised in the recent Privy Council case *Attorney General of Trinidad and Tobago v Charles* [2022] UKPC 49; [2023] 1 WLR 177 ('*Charles*') at [86]:

(1) When exercising its jurisdiction under section 14 the court is concerned to uphold or vindicate the constitutional right which has been contravened (*Ramanoop* para 18).

(2) If the person wronged has suffered damage the court may in its discretion award compensatory damages. The comparable common law measure of damages may be a guide (*Ramanoop* para 18).

(3) If the person wronged can establish a head of loss, the fact that it is difficult to quantify and involves speculation is not a reason for denying the assessment (*Alleyne* para 44).

(4) It will generally be for the local court to examine the circumstances to determine if and in what amount there should be compensation (*Maharaj* para 49).

(5) An award of compensatory damages may not fully vindicate the infringed constitutional right. An additional award may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. These are vindicatory damages but they are not designed to punish the defendant and are therefore distinguishable from punitive or exemplary damages (*Ramanoop* para 19).

(6) The fact that it may be very difficult to prove a financial loss may be a good reason for adding an amount to mark the importance of the constitutional right which has been violated (*Alleyne* para 40).

(7) Such damages may include an award for non-pecuniary loss, including distress and vexation caused by the denial of the constitutional right (*Alleyne* para 41).

(8) The appropriate award does not have to be large, but it should not be nominal or derisory (*Alleyne* para 41).

(9) These are matters which par excellence fall within the province of the local court which is much better placed to make a judgment about the significance of the breach (*Maharaj* para 54).

(10) If a court is to make such an award it should explain what it is doing and why (*Alleyne* para 41).

78. I make no reduction in the damages award just because the cost of living and incomes in St Helena is low compared to that in the UK. I agree with Mr Hitchens that the Privy Council judgment in *AG St Helena v AB* on general damages in personal injury cases should extend equally to compensatory and additional damages for breaches of the Constitution in St Helena. St Helenians should be entitled in principle to the same level of damages as a British citizen would be entitled for similar breaches and the amount of damages is not constrained by section 8(4) HRA to that which might be applied by the EctHR for breaches of the Convention.

79. Ultimately, I must decide what is just and appropriate to award by way of compensatory and additional damages.

Compensatory award

Article 3 ECHR compensation cases – application to sections 7 / 11(1) Constitution

80. In support of the Plaintiff's claim to damages for breaches of sections 7/11(1), Mr Hitchens relied on *Adegboyega v Secretary of State for the Home Department* (set out above) in which the High Court in England awarded the claimant £26,000 for the violation of his Article 3 ECHR rights arising from the conditions in which he was unlawfully detained for a period of 88 days from 28 April 2017 to 24 July 2017 in Brook House immigration detention centre.

81. In awarding damages, the Court relied on Green J's guidance in *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 2493 ('*DSD*') in which he set out the range of awards in Article 3 cases[4]:

    €1,000 - €8,000 where the Court wishes to make a nominal or low award.
    €8,000 - €20,000 for a routine violation of Article 3 with no serious long term mental health issues and no unusual aggravating factors.
    €20,000- €100,000+ for cases where there are aggravating factors such as: (i) medical evidence of material psychological harm; (ii) mental harm amounting to a medical condition; (iii) where the victim has also been the victim of physical harm or a crime caused in part by the State; (iv) long term systemic or endemic failings by the State; (v) morally reprehensible conduct by the State. This list is by no means exhaustive.

82. In *DSD* the first claimant recovered £20,000 (£27,850 updated) in non-pecuniary damages for breach of Article 3 ECHR and the second claimant, NBV, recovered £17,000 (£22,850) non-pecuniary damages.

83. I do not accept that the level of damages awarded in *Adegboyega* is a perfect or even good comparator for the assessment of the compensatory damages for sections 7/11(1) in this case although I do take it into account.

84. With the exception of factor (iv) — I did find systemic failings by the State in relation to lack of outdoor exercise and fire risks — none of the other aggravating factors listed by Green J in *DSD* are present in the Plaintiff 's case which would require it to be placed in the top bracket (20,000 to 100,000 euros).

85. Looking at all the facts in the round, I am not satisfied that the breaches of section 7/11(1) alone, are of equivalent seriousness to those in *Adeboyega*. Therefore, I am not satisfied that the compensatory element of damages should be equivalent. In any event, I will go on to make an award of additional damages in this case which will, like the compensatory award, also reflect in part the aggravating feature of the systemic failing by the State. As Mr Hitchens accepted in submissions, the principles for the award of Constitutional damages (such as in *Ramanoop*, *Lambert* and *Charles*) are different than for breaches of Article 3 of the Convention. Although I may take the latter into the account, I must follow the former.

86. There are a number of important factual distinctions from the Plaintiff's case on sections 7/11(1) and the Article 3 breach in *Adegboyega*. The latter case was described by the judge as "exceptional" and is not a good factual comparator. It was primarily an unlawful detention case unlike that of the Plaintiff. Being fundamentally an unlawful detention case, it was also fact sensitive – the fact of being unlawfully detained would have had an impact on the feelings of humiliation suffered by the claimant.

[4] §67 of the judgment

87. One of the most important distinctions is that the breaches of section 7/11(1) in this case were founded on the lack of outdoor exercise rather than being founded on the other negative features of the prison conditions (albeit I found these were aggravating features they were not the basis of the breach). Even though there were negative features of detention present which aggravated the breach, there are also a number of positive features in the prison conditions which I set out from paragraph 296 of the liability judgment.

88. Looking only at the negative features of the prison conditions in *Adegboyega*, the individual facts were significantly worse in that case. By comparison, there is no equivalence in relation to the much lesser restriction on toilet access that the Plaintiff experienced. I did not find that the prison conditions were unsanitary. I did not find that there was significant illicit drug use nor bad and abusive language used in the prison. I did not find that the Plaintiff was unsafe or at risk to his personal safety from assault by other detainees or that he feared such (although I found the fire risk to constitute a separate breach of section 6 of the Constitution and cause him some anxiety).

89. There is some equivalence in the prison conditions in the two cases in terms of lack of ventilation and smell. There is some equivalence on the length of time for which the breaches persisted. I do accept that in *Adegboyega* there was a shorter period of detention at 88 days compared to 120 days. I also accept that there some features which were more severe for Mr Buckley – there were multiple types of breaches.

90. I made findings as to the effect on the Plaintiff of the breaches of the Constitution and these were set out at paragraphs 280-284 of the liability judgment.

91. I did not find that the Plaintiff was caused or experienced any serious mental illness (nor any physical illness) from the conditions and regime at the time. In contrast to the Post Traumatic Stress Disorder apparent in *Adegboyega*, I found that there was some evidence of the Plaintiff suffering mild to moderate low mood / mild to moderate anxiety while incarcerated (partially supported by medical evidence) together with him experiencing feelings of degradation. That is consistent with what said by Plaintiff in his second witness statement filed for this hearing, so I accept that there was no need for Ms Collier to cross examine him upon that statement. I further place little additional weight on the statement. It was filed after the liability judgment had been given, adopted its findings, and contained evidence on the impact upon the Plaintiff which could and should reasonably have been contained in his trial statement.

92. The Plaintiff's further written evidence does not take matters further than the findings in the liability judgment. I do not accept that there has been a significant lasting effect upon the Plaintiff although I accept the detention has had some effect. I also note that no expert or other medical report has been filed as to any impact on the Plaintiff after

release from prison. Although I accept the experience was undoubtedly upsetting for him, I do not accept there has been any further medical condition caused by his imprisonment. There has been no medical evidence filed on his behalf except the evidence I addressed in the liability judgment as to the Plaintiff's mild to moderate anxiety at the time.

93. I do not wish to minimise the Plaintiff's experience of feelings of degradation caused by the breaches – I have accepted the degrading treatment passed the minimum severity threshold – even though I did not find he experienced inhuman treatment.

94. Mr Hitchens accepts that the Defendant's failures in relation to disclosure during the trial were not relevant to the Defendant's culpability for the breaches and level of compensatory or additional damages to be awarded to the Plaintiff.

EctHR comparator cases

95. Given that Part 2 of the Constitution is to permit the ECHR to be enforced in the St Helena domestic courts, both parties accept that awards made by the EctHR to compensate applicants for breach of Article 2 / Article 3 ECHR are useful comparators to assist the Court in the assessment of the compensatory award.

96. However, as I have explained above, given the difference between section 8(1)&(4) HRA and section 24(4)(a) of the Constitution, the damages awarded are not in any way binding on this court.

97. I found the following EctHR cases on the award of damages for breach of Article 3 of the Convention, as identified by Ms Collier, to be of some assistance as regards compensatory damages for breach of sections 7 and 11(1) of the Constitution:

(a) *Cenbauer v Croatia*, Application no. 73786/01, 13th September 2006: in this case the applicant was confined in inadequate space conditions for a period of 2 years and 3 months, in a facility that was in a poor state of repair and with inadequate access to outdoor exercise. He had no toilet nor running water in the cell and no access to the toilet during the night. He had to urinate in plastic containers and was confined to his cell for 12 hours at night several hours during the day and over a much more substantial period. The ECtHR awarded him EUR 3,000 by way of just satisfaction for the breach of Article 3 ECHR. This breach appears to have been longer lasting and more serious than the breach of s.7/11(1) applying to the Plaintiff.

(b) *Lonic v Croatia*, Application no. 8067/12, 4th March 2015: the applicant was held, as a remand prisoner, for 11 months in a cell with inadequate space and with only 2 hours free movement per day, and was obliged to use a bottle rather than a toilet. He had less than 3m2 personal space. For the violation of Article 3 ECHR (together with the breaches of Articles 6 and 13 ECHR) the applicant was awarded EUR 10,000. I accept that these features were in some ways worse than the section 7/11(1) breaches for the

Plaintiff - albeit that the lack of outdoor exercise and section 6 fire risk were not features.

(c) *Mursic v Croatia*, Application no. 7334/13, [GC], 20th October 2016: the applicant was held for 27 days in conditions where he had less than 3 sq.m. of personal space. The Strasbourg Court awarded him EUR 1,000 by way of non-pecuniary damages.

(d) *Ulemek v Croatia*, Application number 21613/16, 31st October 2019: the ECtHR found that the applicant was held for a period of 28 days in a cell that did not afford him adequate space. It awarded EUR 1,000 in non-pecuniary damages.

98. I am satisfied that the just and appropriate amount of compensatory damages to award the Plaintiff for the breaches of his s.7/11(1) rights (based on the lack of outdoor exercise aggravated by other negative features of the conditions) throughout the relevant period of approximately 120 days is £6,000.

99. This is for the reasons set out above and which include the aggravating factors relied on by Mr Hitchens (all of which I accept apart from of any lasting and continuing significant effect of the detention upon the Plaintiff and his health). I do not wish to minimise the seriousness of the breaches I have found. I bear in mind the real physical and mental consequences of a lack of outdoor exercise for the sustained period during which the Plaintiff was detained.

100. I also award the Plaintiff £500 for the breaches of ss. 7/11(1) for the five days (20-24 May) in which he was in the police / remand cell and £500 for the few days during which he was sharing Cell 1 with three other occupants restricting his space to less than 3m2.

101. I finally award the Plaintiff £2,000 for the breach of his right under section 11(2) of the Constitution – not being afforded the dignity and status of remand prisoner when as an unconvicted prisoner he was treated less favourably than convicted prisoners by virtue of his lack of outdoor exercise / work.

Article 2 ECHR compensation cases – equivalent of section 6 Constitution

102. I made detailed findings as to the breach of the Plaintiff's right under section 6 in the liability judgment. The main two aggravating features were the fact that the breach was systemic, and the Defendant was on notice for a substantial period of time as to the defects in the Prison's fire measures based upon the various reports it had received. To some extent this will also be reflected in the additional award. I found that the Plaintiff was aware of the risk he faced and this caused him some anxiety as it was discussed within the Prison. I found there was some mitigation in that the Prison did have some fire measures in place as I found. Further, there was no actual fire in this case, nor any physical injury caused to any person.

103. Again, I was pointed to Article 2 EctHR compensation cases by way of comparison for assessing the amount of compensatory damages. As to Article 2, the following cases are the most relevant:

(a) *Mustafayev v Azerbaijan*, Application no. 47095/09, 4th May 2017: the applicant's son died of injuries sustained following a fire in the prison in which he was detained. There was a failure to respond to the emergency and provide adequate medical assistance. The applicant complained about his son's death and also the inadequate investigation into the circumstances of his death. The ECtHR found that there had been a violation of Article 2 ECHR in both its substantive and procedural limbs. It awarded EUR 20,000 for those violations. I am satisfied that this was a far more serious breach than that relating to the Plaintiff as it involved an actual fire and death.

(b) *Daraibou v Croatia*, Application no. 84523/17, 17th January 2023: in this case the applicant, an illegal immigrant, was detained with three others at a police station pending removal. A fire was started, by the others, as a result of which they died and the applicant was seriously injured. The court found foreseeable danger and a lack of basis precaution and inadequate steps once fire started The ECtHR found that both the substantive and procedural limbs of Article 2 (and Article 3) ECHR had been violated and awarded the applicant EUR 15,000 by way of just satisfaction. It was not regarded as a systemic breach. Nonetheless, I am satisfied that this was a far more serious breach where there was an actual fire and serious injury / death.

(c) *Durdaj and others v Albania*, Application no. 63543/09, 7th November 2023: the application was made by relatives of persons killed by an explosion and fire at a weapons-commissioning facility. The ECtHR found the complaint of breach of the substantive limb of Article 2 ECHR inadmissible, but concluded that there had been a procedural breach of the Article 2 ECHR investigative duty and awarded the parents of one victim EUR 12,000 jointly, and other applicants EUR 10,000 for the breach. Again, I am satisfied that this was a more serious case than the Plaintiff's.

104. Once more, I must stand back from specific comparators and address the total damages for this breach deciding what is just and appropriate taking into account all the factors set out above. While the breach arose from the operation of the Defendant's systems, the defects in which were known about, and it caused the Plaintiff some anxiety, there was no actual fire nor physical harm caused.

105. I award £4,000 for the breach of the Plaintiff's right under section 6(1) during the relevant period of approximately 120 days.

Total compensatory award

106. The total compensatory damages to be awarded to the Plaintiff is therefore **£13,000**, made up of the following breaches of the Constitution and awards:

i) s.7/11(1) - £6,000 for the lack of outdoor exercise throughout as aggravated by other negative features of cell conditions;

ii) s.7/11(1) - £500 for the four days in police / remand cell and £500 for the few days sharing cell 1 with three other occupants and restricted space less than 3m2;
iii) s. 11(2) - £2,000 for being treated less favourably than convicted prisoners in the lack of outdoor exercise throughout; and
iv) s.6 - £4,000 for the fire risk throughout.

Additional award.

107. I am satisfied that in this case the award of compensatory damages does not fully vindicate the infringed constitutional rights. An additional award is just and appropriate to reflect the sense of public outrage, emphasise the importance of the constitutional rights and the gravity of the breaches, and deter further breaches. These are vindicatory damages, but they are not designed to punish the Defendant and are therefore distinguishable from punitive or exemplary damages.

108. I accept the submission that are no genuinely helpful comparators to assist in assessing the amount of the additional award that the Court considers just and appropriate by way of redress for the Plaintiff to vindicate the Constitutional rights engaged. I was pointed to the following cases as examples where an additional award has been made, accepting that the facts constituting the breach are markedly worse in each than in the present case:

(a) *Ngumi v Attorney General of the Bahamas* [2023] UKPC 12 where the appellant had brought proceedings for damages for false imprisonment, assault and battery and for damages for breach of his constitutional rights arising from his unlawful detention over 6 years, 4 months and 6 days. The Privy Council upheld the first instance judge's decision to make an award of $100,000 (Bahamian dollars - approximately £80,000) in additional or vindicatory damages to reflect the facts that the appellant had a very long struggle to secure his release; he had been detained in inhumane and degrading conditions for many years; his health had been severely affected and the respondents did nothing to assist him on his release.

(b) In *Charles* the claimant was charged with murder and remanded in custody whilst a pre-trial preliminary inquiry was undertaken. This inquiry proceeded for more than five years, but before it was finished the presiding magistrate was promoted and the new magistrate decided that the inquiry into the claimant's case would have to re-commence from scratch. Over two years later the claimant was released and brought proceedings for damages for the long period of detention. He was awarded vindicatory damages of $125,000 (TT dollars - approximately £15,000) for the additional two years on remand and the anxiety of facing the uncertainty of a new inquiry being as lengthy as the first, discontinued, one.

109. In both these cases the length of detention combined with the level of distress suffered and oppressive action of the State was greater than for the Plaintiff.

110. I once more take into account many of the points made by Mr Hitchens in exercising my discretion to award additional damages in this case.

111. I accept that there were a number of different breaches of different constitutional rights of the Plaintiff in a variety of ways and this is concerning.

112. The breaches occurred over a number of months. This is a moderate but not insignificant amount of time.

113. I accept that there were some systemic failures by the Defendant in the way it managed and operated the Prison in relation to the fire risk and lack of outdoor exercise for the Plaintiff as a remand prisoner. The aggravating negative features of the prison conditions also applied to prisoners generally throughout the relevant time.

114. The fire risk had been known to the Defendant over a substantial length of time. The Government had been advised repeatedly in various reports (OTPA and EHRC) about the fire risk and also the negative features of the conditions in the prison. Even the lack of outdoor exercise had been raised in at least one report albeit there was nothing about its application to remand prisoners. The Government had been on notice for a substantial period of time as to the risk of breaches to the Constitution associated with the Prison, its conditions and its regime. The court should take a robust approach to the protection of prisoners from violation of their rights and send a clear message to the Executive as to the need for corrective action.

115. As set out, I have already accepted in the liability judgment that the breaches had some harmful effect on the Plaintiff (although I also found he had exaggerated to a degree).

116. I do take into account that there were positive features of the prison regime but when assessing additional damages, there is no balancing exercise to be performed – or if there is, these features do not detract from the seriousness of the breaches. Likewise, I recognise that the Prison was operating under funding constraints, but this is true of most Government and publicly funded services. I also recognise that Ms Murray made some improvements to the prison conditions during the relevant time in relation to fans and initiating her final report in relation to the fire risk and making recommendations. She took the matters seriously – as set out in her report in November 2018.

117. In summary, I have accepted many of the aggravating factors relied upon by Mr Hitchens. I take into account the number and variety of breaches, the length of time they were experienced, their objective seriousness, that some were caused by systemic unlawfulness and that many of the risks were known to the Defendant at the time and in the years prior to 2018.

Total additional award

118. I must stand back and look at the additional award as a whole. I am satisfied that it would be just and appropriate to award £10,000 by way of additional damages. This is to reflect sense of public disquiet, the seriousness of the breaches, deter further breaches and vindicate the constitutional rights involved.

Total award of damages

119. The total award of damages to be paid by the Defendant to the Plaintiff in respect of all breaches is therefore £23,000 (£13,000 compensatory and £10,000 additional damages).

120. In reaching the total sum I have taken account of all the circumstances of the case. The *DSD* brackets do not apply to this case because the approach to the award of Article 3 ECHR damages in the UK is different from the established approach to assessing constitutional damages and s.8(4) HRA does not apply in St Helena. Nonetheless, I have had some regard by analogy to categorising the total constitutional damages award in this case according to the *DSD* brackets. Looking at the global award, and accepting the difference in approach, I would equate this case to approximately the lowest severity of the top *DSD* bracket (aggravated).

E. COSTS

121. In a departure from the normal rule in St Helena, the Defendant has agreed to pay the Plaintiff's costs of the proceedings. The parties have agreed that the Defendant should pay the Plaintiff's costs assessed on the standard basis.

F. POSTCRIPT TO THE LIABIILTY JUDGMENT

122. I made findings about the Defendant's disclosure of documents in the liability judgment, for example at paragraphs 163-165. Any failures in the Defendant's disclosure process should be taken seriously by the court and, where appropriate, remedies be awarded.

123. In the post-script to my judgment, I recited a number of concerns raised on behalf of the Plaintiff about the Defendant's conduct of the litigation. At paragraphs 312-314 of the postscript to the liability judgment, I set out the further submissions made by Mr Hitchens on behalf of the Plaintiff. Mr Hitchens alleged serious failures by the Defendant in the disclosure of relevant documents in advance of and during the

trial. I said that these allegations would be determined following the remedies hearing. I expressly did not reach any conclusion on the matters.

124. The Attorney General was understandably concerned by the nature of the allegations. He instructed independent leading counsel to investigate the concerns raised by the Plaintiff and to conduct a review of the disclosure in this case. As far as I am aware, that review is ongoing.

125. Following the hand down of the liability judgment, the Defendant also filed witness statements from Crown Counsel, Ms McIlroy and the Defendant's trial counsel, Mr Gareth Rhys. It is clear from both witness statements that Ms McIlroy and Mr Rhys conducted themselves properly and in accordance with their professional obligations.

126. It is important to distinguish the Defendant as corporate representative of Government and, the personal Defendant, the Attorney General. During the remedies hearing I asked Mr Hitchens to clarify the nature of the allegations he was making against the Defendant. He was clear that he had not intended to allege and did not allege that there had been any deliberate non-disclosure or withholding of documents by any person. He did not allege that the Attorney General had personally misconducted himself. Mr Hitchens has therefore made clear that no allegation is advanced of deliberate misconduct on the part of any individual, such as the Attorney General himself, or on the part of the Attorney General's chambers corporately. He made clear that he did not intend for his submissions to indicate that such allegations were advanced.

127. In light of that concession, at present there is no need for me to further consider the oral submissions made at the remedies hearing nor the post hearing written submissions of December 2024 or email correspondence in that month. There is no need for me to determine any of the allegations made in relation to disclosure because of these events.

128. The allegations are not presently relevant to any issues in this case.

129. The Plaintiff's costs of proceedings have been agreed to be paid by the Defendant on the standard basis (costs would normally be only payable based upon the conduct of party). Therefore, any failings by the Defendant have been reflected in the costs agreement between the parties without me needing to make any findings as to the basis and extent of any culpability. Likewise, Mr Hitchens accepted that the existence or extent of the Defendant's corporate culpability for the disclosure failings is not relevant to the assessment of the amount of damages in this case. The alleged failings during the trial process were not connected to the breaches of the Plaintiff's rights and did not cause them. They could not form a basis for awarding additional damages.

130. Based on the present circumstances, it is not necessary for me to say anything more about these issues.

Chief Justice Rupert Jones

7 February 2025

Released in draft on 26 January 2025