Neutral Citation Number: [2018] EWHC 3420 (Admin)

Case No: CO/5657/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: December 13th 2018

Before :

JOHN HOWELL QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

THE QUEEN

on the application of

AMETH DIOP	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Anthony Vaughan (instructed by **Leigh Day**) for the **Claimant**
Eric Metcalfe (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: November 21st 2018

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Approved Judgment

John Howell QC :

1. The Claimant, Mr Ameth Diop, was detained unlawfully by the Defendant between November 10th 2017 and December 7th 2017 and is entitled to damages in respect of his false imprisonment between those dates. So Mr David Pittaway QC, sitting as a Deputy High Court Judge, has declared: see *R (Diop) v Secretary of State for the Home Department* [2018] EWHC 1934 (Admin). The issue now is: what is the amount of compensation to which the Claimant is entitled?

WHAT THE CLAIM FOR DAMAGES IS FOR

2. Unfortunately the parties have been unable to agree the amount of any damages to which the Claimant may be entitled. Moreover, when the hearing to determine that amount began, there was no properly formulated statement of the claim for damages in the Claimant's grounds and, therefore, there was no response in the Defendant's detailed grounds for opposing the claim. That was because, in the original grounds on which his claim was made, the Claimant had merely claimed damages, reserving the right to particularise the claim, including claims for aggravated and exemplary damages, after disclosure, and because the order giving directions for this hearing (which was sealed on September 21st 2018) made no provision for any such pleadings. On October 31st 2018 the Claimant made an application to amend his grounds to deal with a different point but incidentally included a proposed amendment to state simply that the Claimant sought an award of damages including aggravated damages. However the Claimant's case in respect of "basic" and aggravated damages had been set out in a skeleton argument dated October 24th 2018 and the Defendant's response to that was contained in a skeleton argument filed on his behalf dated November 1st 2018. In those circumstances the parties were content to proceed with the hearing on the basis of those documents. Mr Eric Metcalfe, who appeared on behalf of the Defendant, did not indicate that, had an application been made before the hearing to amend the grounds to set out a properly formulated claim in respect of basic and aggravated damages as reflected in the Claimant's skeleton argument, the Defendant would have wished to adduce any further evidence than he already had or that the Defendant had been prejudiced by this procedure in any way in respect of those claims. I nonetheless directed the Claimant to file and serve a properly formulated proposed claim for damages reflecting his skeleton argument and the Defendant to file and serve his response to that document.

3. In the event, after the hearing had been completed, however, a proposed amended statement of grounds was submitted seeking not only "basic" and aggravated damages but also exemplary damages, a claim for which had been expressly disclaimed in the Claimant's skeleton argument, in the sum of £10,000. Permission was also sought to withdraw that disclaimer. I refuse permission for this belated attempt to raise a wholly new head of the claim for damages after the hearing had been completed. There is no justification provided for the delay in advancing this claim for exemplary damages and certainly none that in these circumstances would justify a further hearing, which I would have directed in order to determine the claim, in which submissions could be made on whether the criteria for an award of exemplary damages in respect of the Claimant's unlawful detention had been shown to be met and, if so, the amount of any

award. As pleaded, for example, the claim would raise the question whether, rather than merely setting out a claim for exemplary damages in respect of the Claimant's unlawful detention, what was alleged amounted in fact to a claim for exemplary damages for misconduct in public office, that is to say knowingly operating an unlawful system of bail accommodation for "high risk" detainees knowing that its unlawful operation would be likely to harm such individuals, an alleged tort which has never been raised by the Claimant or addressed by the Defendant. The proposed amendments to the grounds on which the claim for aggravated damages is made also go beyond that made in the Claimant's skeleton argument in a number of potentially significant respects. That is also not something that I am prepared to permit in the circumstances.

4. For those reasons the Claimant will have permission to amend his grounds to reflect the claims made in the skeleton argument but not otherwise. Accordingly I grant permission to the Claimant to amend his grounds to add the proposed amended paragraph 14.5 (minus the words "and exemplary damages"); the proposed paragraphs 90 to 95; the subsequent particular (i), (ii) (but only insofar as it relates to the response on March 22nd 2017), (iii), (v), (vi), (ix) (but only insofar as it relates to the Claimant's case), and (xi); proposed paragraph 97; and proposed paragraphs 101.1 and 101.2. Permission is refused to amend the grounds to include the proposed paragraph 96; particular (ii) (insofar as it relates to the response on November 13th 2017), (iv), (vii), (viii) and (x); and proposed paragraph 101.3. The Defendant has permission to amend his grounds as proposed in response accordingly.

INTRODUCTION

5. The Claimant is a foreign national offender who was lawfully detained by the Defendant under immigration act powers on the completion of the custodial part of his sentence of imprisonment on September 5th 2016. On November 10th 2017 the First Tier Tribunal ("*FTT*") granted him bail in principle, requiring the Defendant to provide him with initial accommodation within 14 days. Mr David Pittaway QC ("*the Judge*") found, however, that, had the Defendant acted lawfully, he should have secured bail accommodation for the Claimant by that date and that there was then no prospect of the Defendant deporting the Claimant within a reasonable period. He accordingly found that the Claimant's detention from November 10th 2017 until his eventual release from detention on December 7th 2017 was unlawful.

6. On behalf of the Claimant Mr Anthony Vaughan contended that the Claimant should be awarded £21,000, comprising £16,000 by way of basic damages and £5,000 by way of aggravated damages, plus interest at a rate of 8% from December 7th 2017. On behalf of the Defendant Mr Metcalfe contended that the Claimant is only entitled to basic damages of £2,800, and certainly to no more than £3,920, and that he is not entitled to any award of aggravated damages. He took no issue with the provision for interest claimed.

BACKGROUND

i. the Claimant's immigration history and his conduct in this country

7. The Claimant is a national of Senegal. He is now 29. He first arrived in the UK on December 8th 2010, with entry clearance, as the dependent of his British spouse, Ms Summerhill, whom he had met in Spain when she was on holiday. That leave eventually expired on June 1st 2012. By then Ms Summerhill had given birth to their daughter on May 20th 2010. On December 18th 2012 the claimant applied for an EEA residence card on the basis of his relationship with Ms Summerhill. That was refused on June 6th 2013. On September 3rd 2013 Ms Summerhill gave birth to their son. The Claimant's appeal against that decision was dismissed by the FTT on December 20th 2013. He was subsequently granted permission to appeal by the Upper Tribunal but his appeal was dismissed on March 10th 2016 and his appeal rights were exhausted on March 23rd 2016. By then the Claimant's relationship with his wife had broken down and he had been convicted of eight serious and violent criminal offences, all relating to domestic violence. Two of those assaults had been in the presence of children.

8. On August 30th 2013 the Claimant was convicted in Scotland of assault with a domestic abuse aggravator and admonished. On November 20th 2013 he was convicted of assault and vandalism and sentenced to two months imprisonment. His victim was Ms Summerhill's mother. On October 14th 2014 the Claimant's two children were placed on the child protection register following concerns about the Claimant's domestic physical abuse of women other than Ms Summerhill. On March 4th 2015 the Claimant was again convicted of assault with a domestic abuse aggravator and sentenced to six months imprisonment. His victim was Ms Summerhill. His children were removed from the child protection register on July 8th 2015, however, as the Claimant was then in prison. On November 10th 2015 the Claimant was convicted of hamesucken in March 2015, assaulting a person in their own house, when subject to bail and, having pleaded not guilty, he was sentenced to 22 months and 16 days imprisonment (after deducting the time he had spent in custody) from October 30th 2015. His victim was a former partner and the assault was carried out in front of her daughter.

9. His violent conduct continued while he was in prison: the Claimant was placed in segregation for extended periods because of his violence towards other inmates.

10. Before the custodial part of his sentence expired, the Claimant was served with the Defendant's decision to deport him under section 32(5) of the UK Borders Act 2007. He submitted representations against deportation on the basis of Article 8 of the European Convention on Human Rights given the relationship that he claimed that he had with his two children. These were refused, the decision was certified and a deportation order was made against him on July 28th 2016. The Claimant lodged an out-of-time appeal on August 8th 2016 which was eventually dismissed on February 8th 2017, some five months after the custodial part of his sentence expired.

11. The Defendant detained the Claimant under immigration powers, on the expiry of the custodial part of his sentence, on September 5th 2016. The Defendant considered that the Claimant presented a high risk of re-offending and a risk of causing serious harm.

The Defendant had already made an application to the Senegalese authorities for an emergency travel document on August 9th 2016, with his expired passport as supporting evidence. In his judgment the Judge found that the Defendant had been entitled to detain the Claimant for the purpose of deporting him. The Claimant had been convicted of serious offences of domestic violence and was subject to the procedure for deportation. The Claimant refused to attend the Senegalese Embassy for an interview, however, on 18 August 2016. A telephone interview was later arranged and held in November 2016. It appears to have been hoped that a travel document would be issued by the Senegalese authorities once the Claimant's appeal based on Article 8 had been dealt with.

12. As I have mentioned, the Claimant's out-of-time appeal was dismissed on February 8th 2017. On February 21st 2017, however, the Claimant applied for asylum based on his fear of persecution on his return to Senegal following, what he claimed to be, his recent conversion to Christianity. It was expected that a decision would be reached swiftly as an initial investigation suggested that his claim was without merit. The Claimant was interviewed about his asylum claim on March 13th and May 8th 2017. Meanwhile it appears that, on April 26th 2017, the Senegalese authorities refused to issue a travel document while the Claimant had an outstanding appeal. In the event the Claimant was served with his asylum refusal letter on May 15th 2017. His appeal was dismissed by the FTT in a decision promulgated on June 13th 2017. He was subsequently refused permission to appeal by the FTT and then by the Upper Tribunal. In the event the Claimant became appeal rights exhausted on September 28th 2017.

13. On November 1st 2017 the Claimant's first bail application was made by Bail for Immigration Detainees ("*BID*"), a charity, acting on his behalf. It sought the grant of bail in principle. On November 2nd 2017 BID wrote to the Senagalese Embassy seeking assistance with that application, asking whether it would be willing to issue a travel document in the circumstances they described, stating that the Claimant had two British children "and is challenging his removal". BID did not mention that his appeal rights were exhausted or that he had no current legal challenge to his deportation. On November 3rd 2017 the Senegalese Embassy conducted a telephone interview with the Claimant. It also wrote to BID stating that it was not willing to provide an emergency travel document to the Claimant "to facilitate the separation of the recipient from his children" and suggested that he should "be given the chance to explore further means that can help him regularise his situation and stay with his family". It appears that the Defendant, who had been hopeful of obtaining a travel document having spoken to the Embassy on November 1st 2017 and having been told that the Embassy were happy with the answers given by the Claimant in the telephone interview, were only informed by the Senegalese Embassy on November 9th 2017 that they were refusing to issue an emergency travel document for the same reason as they had given BID.

14. The Judge found that, following the refusal of the Senegalese embassy to grant emergency travel documentation, it was apparent that there was no prospect of the claimant being deported within a reasonable period and that, from November 10th 2017, it should have been evident to the Defendant that, unless the Senegalese embassy changed its position, the claimant could not be removed readily from the UK.

15. In the event on November 10th 2017 the Claimant was granted bail in principle by the FTT subject to suitable accommodation being obtained for him within a 14 day window which it required the Defendant to secure for him. As no such accommodation had been found, the bail application was re-listed by FTT on November 27th 2017. On December 1st 2017 the FTT extended the grant of bail in principle on the same terms as before with a new 14 day window for accommodation to be found by the Defendant for the Claimant. Once bail accommodation had been identified (as explained below), the FTT granted the Claimant bail, subject to the condition that he lived and slept at it, on December 6th 2017. The Claimant was then released from detention on December 7th 2017.

ii. the Defendant's failure to find suitable bail accommodation for the Claimant

16. The Judge's conclusion that the Claimant's detention was unlawful from November 10th 2017 to December 7th 2017 was based in part on his finding that the Secretary of State should have secured bail accommodation by the time that the FTT granted the Claimant's application for bail in principle on November 10th 2017.

17. Section 4(1)(c) of the Immigration and Asylum Act 1999 conferred a power on the Defendant to provide accommodation to persons released on bail from detention under any provision of the Immigration Acts. The system operated by the Defendant to discharge that function has been considered by Nicol J in *R (Razai) v the Secretary of State for the Home Department* [2010] EWHC 3151 (Admin) and by Edis J in *R (Sathanantham) v Secretary of State for the Home Department* [2016] EWHC 1781 (Admin), [2016] 4 WLR 128 ("*Sathanantham*").

18. Under the Defendant's policy, a person was eligible for such accommodation if he or she was detained, intended to apply for bail and would be destitute on release. Since the FTT expects a proposed place of residence, which can be made a condition of bail to be given by the applicant and that can be checked for its suitability, the Defendant's policies for bail accommodation were premised on an application for bail accommodation being determined before a bail application is made: see *Sathanantham* at [21]. The policy envisaged three types of bail accommodation that might be provided. Level 1, initial, accommodation is usually hostel type accommodation in which people stay while more suitable long term accommodation is found. Such accommodation is not suitable, however, for offenders who present a high risk. Level 2, standard dispersal, accommodation is longer term accommodation provided by third party contractors which may be shared and may be unsuitable for people who present a particular level of risk. Level 3, Complex Bail Dispersal, accommodation is for those not suited to level 1 or 2 accommodation: it is usually a single occupancy flat in a suitable location to ensure that the occupant does not present a risk to those with whom accommodation might be shared and to others.

19. The information necessary to determine which type of accommodation is required was obtained in the case of a foreign national offender by the Defendant's Section 4 Bail Team sending a blank pro-forma to the Home Office Caseworker. That caseworker was to provide a risk assessment, having contacted the applicant's offender manager (if there was one), and to recommend the type of accommodation required. If the Section 4 Bail Team decided that the applicant would be destitute if released on bail without accommodation, the appropriate accommodation was to be

arranged by that Team. This was done, in the case of Level 3 accommodation, through private sector companies who had a contractual obligation to secure accommodation, and financial incentives to do so, within given time limits. Any accommodation identified had to be checked for its acceptability with the police and (if the applicant was still subject to his sentence of imprisonment) with the National Offender Management Service ("*NOMS*"). If unacceptable, further efforts were to be made to find suitable accommodation. The Defendant's policy provided for an application for bail accommodation to be refused on the basis that the Home Office was not in a position to provide suitable accommodation within the accommodation available to it. Any such refusal attracted a right of appeal to the First Tier Tribunal: see section 103(2A) of the 1999 Act. It appears, from the evidence provided to Edis J, that such refusals did not in fact occur; that a policy was adopted after 2010 that the least worst accommodation available would be offered when the police or NOMS had repeatedly rejected proposed accommodation (which would have enabled the FTT to consider whether or not to grant bail in such circumstances); but that that had happened only in a small number of cases: see *Sathanantham* supra at [30] and [87]. Edis J held that a failure to determine an application at all in one of these two ways, by a refusal or an offer of the least worst accommodation, within a reasonable period of time was unlawful: see *Sathanantham* at [87].

20. Edis J accepted that, generally, for high risk offenders, no bail application without an address had a realistic prospect of success in practice. He observed that "the section 4 bail system does not work for high risk offenders". The timescales set by the Defendant (and included in policies and contracts) were "routinely not met, and missed by substantial margins" leading to "lengthy inactivity". The figures showed that the average time between application and offer was 91 days in 2014, 190 days in 205 and 283 days in 2016. In his view it was essential "that the system is overhauled": see *Sathanantham* at [21], [28], [78] [85] and [92].

21. The Claimant first made an application for bail accommodation on October 11th 2016, less than three months after judgment was handed down in *Sathanantham*. A blank pro-forma was sent by the Defendant's Section 4 Bail Team on October 11th 2016 and returned to them on October 13th 2016. It was considered that, although his offences did not automatically categorise the Claimant as requiring Level 3 accommodation, he was an extremely violent and unpredictable offender, with multiple convictions for serious assaults and a pre-disposition to assault his peers and cell mates when in custody (as he had 7 adjudications against him for fighting). It was considered that he posed an unacceptable risk of harm to those who might reside in close proximity to him. Accordingly, shared facilities were not considered appropriate. On October 20th 2016 the Section 4 Bail Team requested the accommodation provider to find him level 3 self-contained accommodation by November 2nd 2016, noting that he was an extremely violent and unpredictable offender whom social work assessed posed a risk of serious harm to future female partners.

22. BID sent a pre-action protocol letter to the Defendant on the Claimant's behalf on March 9th 2017 challenging the Defendant's delay in providing a bail address. In a response on March 22nd 2017 from the Litigation Operations at the Home Office it was stated that "the SSHD has been in contact with the Section 4 Bail Team and they have confirmed that your client's case has been expedited. The delay in securing your

client's accommodation is due to his special accommodation needs and this has caused some difficulty in securing suitable accommodation for him." The Judge found that there was nothing in the records to indicate that the application had been expedited, or that a request had been made for it to be expedited by the Defendant, as suggested.

23. Further applications for bail accommodation for the Claimant were made on June 29th and August 14th 2017. On September 4th 2017 the Section 4 Bail Team sent an email to the accommodation provider asking for an estimated proposal date for suitable accommodation for the Claimant and others, seeking a reply by September 7th 2017. The Judge found that this was the first email to be sent chasing the accommodation provider. No response was received. It was followed by further e-mails from the Section 4 Bail Team on September 11th 2017 (seeking a reply by September 15th 2017) and October 14th 2017 (seeking a reply by October 18th 2017). By that date the Claimant's application on October 20th 2016 had been outstanding for "248 wDays". The response on October 16th 2017 (which appears to have been the first response from the provider) was that the provider was awaiting a suitable address that met the requirements for Level 3 accommodation. After the bail application on November 1st 2017, the Section 4 Bail Team only chased the accommodation provider again on November 9th 2017.

24. On November 10th 2017, the day on which he was granted bail in principle by the FTT, the Defendant's Criminal Casework Directorate informed the Section 4 Bail team that bail in principle had been granted and that there were 14 days in which to find him a release address. They attached a further completed pro-forma, indicating that the Claimant still required Level 3 self-contained accommodation. On November 13th 2017 Litigation Operations replied to most recent pre-action protocol letter from BID (sent on November 7th 2017) stating that "the matter has been escalated" and "the relevant team are still trying to source suitable accommodation". On November 20th 2017 the Defendant's Criminal Casework Directorate asked the Section 4 Bail Team for an update on the request for an address. On November 24th 2017 the outcome of discussions within the Section 4 Bail Team (as indicated in their e-mails) was that the accommodation required would not be downgraded from Level 3; that they would "expedite the request" for such accommodation; and that they would write to the Tribunal to explain that suitable property had not been found within the period it had set. The Tribunal was informed that suitable property had not been located on November 24th 2017 in an e-mail asking for an extension of time within which to find accommodation for the Claimant. It was stated that his "case has been escalated as a matter of urgency and we are working with expedition to ensure a suitable address is sourced as soon as we possibly can."

25. On December 1st 2007 the FTT granted bail in principle again for 14 days within which the Defendant was again required to provide the Claimant with accommodation. In the event accommodation was identified on December 2nd 2017 but it was incorrectly thought to require approval by NOMS. Once that mistake had been recognised, the Claimant was informed of the address on December 5th 2017.

26. The Judge found (at [24]) that:

> "the failure to take any effective steps to expedite the application before September 2017 is relevant to this extent,

> namely that the defendant was not acting fairly and rationally in administering the section 4 bail accommodation scheme. In my view the cumulative failure to take even basic steps to expedite the application, when it was known that the claimant was a violent offender, requiring level 3 accommodation, was unlawful. .....The defendant should have secured section 4 bail accommodation by the time that the FTT granted the claimant's application for bail on 10 November 2017. The events that followed... are a further indication that little was done until the end of the 14 day window to find accommodation. It was only after that date, when the FTT relisted the application on 27 November 2017, that the search for accommodation can be said to have been earnestly promoted."

iii. the Claimant's evidence

27. The Claimant has filed a witness statement (on which he was not cross-examined) to explain how the decision to grant bail in principle on November 10th 2017 made him feel more stressed and frustrated and how the delays affected him. He states that he had been in immigration detention for 14 months which he hated, not knowing what was going to happen to him and finding it increasingly harder to cope. He states that he felt huge relief on hearing of the decision of the FTT on November 10th 2017, although he knew that he would not be released immediately as he had no bail address. Given the steps that had already been taken on his behalf to put pressure on the Defendant to find such accommodation, however, he thought that it would be found, and that he would be released, very shortly. As such accommodation was not quickly found, he says that he became more and more frustrated and scared; that he was especially worried about when he could see his children, and that he became obsessed and started to feel that he was going crazy. When told on November 24th 2017 that no accommodation had been found, he was extremely angry and felt frustrated. When the FTT granted bail in principle again on December 1st 2017, he stated that he did not know whether to believe that an address would ever be found and that he felt even worse, worrying whether he would get to the point of suicide. He was eventually told that accommodation had been found on December 5th 2017. The Claimant also says how outrageous he felt the Defendant's conduct to have been when he learnt from the judgment in this case how little had been done in the first period for which he was granted bail in principle to secure bail accommodation for him. He also feels that the failure of the Home Office to apologise and accept responsibility has only added injury to what he has suffered.

SUBMISSIONS

28. It was common ground that the assessment of damages for the denial of a person's liberty does not fall to be assessed mechanically but must be sensitive to the facts of the particular case and the degree of harm suffered by the particular claimant; that a global approach to assessment of damages should be taken and that they should not be assessed mechanically by fixing a rigid figure to be awarded for each day of incarceration; and that, while the gravity of any unlawful detention increases with its length, the amount broadly attributable to the increasing passage of time should be

tapered or placed on a reducing scale, given that the initial shock of being detained will generally attract a higher rate of compensation and so as to keep any damages payable proportionate to those payable in case of personal injury; and that the guidance in *Thompson v Commissioner of the Police* [1998] QB 498 was of assistance: see *MK (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 980 per Laws LJ at [8].

29. On behalf of the Claimant Mr Vaughan also referred me to a number of what he described as "guideline cases involving comparable periods of unlawful detention where initial detention was lawful", namely *R (Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin); *R (Johnson) v Secretary of State for the Home Department* [2004] EWHC 1550 (Admin); *E v Home Office* (2010) June 10, Claim 9CL01651; *R (Supawan) v Secretary of State for the Home Department* [2014] EWHC 3224 (Admin); *R (Lamari) v Secretary of State for the Home Department* [2013] EWHC 3130 (QB); and *KG v Secretary of State for the Home Department* [2018] EWHC 1767 (Admin) and [2018] Nov 16th, 11 WLUK 280. In considering these cases Mr Vaughan submitted that the proper level of general damages in a case such as this should be 10% higher after April 1st 2013 than before: see *Simmons v Castle* [2012] EWCA Civ 1039 at [20]. He placed particular weight in relation to the award of basic damages on *Bent*, *Lamari* and *KG*, although recognising that in each there were some distinguishing features.

30. Mr Vaughan submitted that the Claimant was unlawfully detained for 28 days (following an initial period of lawful immigration detention of 431 days); that his detention in that period was entirely the Secretary of State's fault, the result of his material public law error in failing to secure Level 3 accommodation for the Claimant; that the effect of detention on him from November 10th 2017 was greater than it had been previously, knowing that he would have been released had it not been for the Defendant's failure to provide bail accommodation, which was unlawful; that it is unsurprising that the Claimant felt increasing frustration and anxiety at his ongoing detention, having been told by a judge that his release was appropriate; and that his frustration and anxiety increased after the Secretary of State failed to secure accommodation within 14 days as required by the FTT. Accordingly, having regard to all the circumstances and to the guidelines in the cases, an award should be made of £16,000 for his "loss of liberty"/"basic damages".

31. Mr Vaughan further submitted that aggravated damages can be awarded where there are features about the defendant's conduct that justifies such an award without which a claimant would not receive sufficient compensation for the injury suffered. Such features can include any conduct which shows that those responsible for the unlawful detention behaved in a high handed, insulting, malicious or oppressive manner as well as the way in which litigation and trial are conducted: *Thompson v Commissioner of the Police* [1998] QB 498 at pp514g-h, 516b-g.

32. In this case, so he submitted, such an award is warranted as the Claimant's detention was the product of the Defendant's unlawful system for allocating bail accommodation to high risk offenders. In July 2016 Edis J had found that the system was unlawful and needed to be overhauled: see *Sathanantham* at [92]. But, so Mr Vaughan contended, the Defendant continued to operate that system, without taking any remedial steps, in circumstances that would obviously lead to unlawful delays. Further, and in any event, Mr Vaughan submitted that an award of aggravated

damages of £5,000 was justified by the following matters: (i) the Defendant's egregious inaction in dealing with the Claimant's application for bail accommodation made on October 20th 2016, not sending an e-mail chasing the accommodation provider until September 4th 2017 and failing to follow this up; (ii) the Defendant's only attempt to chase the accommodation provider after the application for bail in principle had been made on November 1st 2017 was by an e-mail on November 9th 2017, the day before the hearing of that application by the FTT; (iv) in defiance of the FTT's order on November 10th 2017, that bail accommodation had to be provided within 14 days, the Defendant made no contact with the accommodation provider within that period, which amounted to high handed conduct showing disrespect to the FTT and the Claimant; (v) the Section 4 Bail Team had taken no steps to consider how to escalate or expedite the case until the day of the FTT's deadline, November 24th 2017; (vi) the false statement in the responses to the pre-action protocol letters that the application for accommodation had been "expedited" or "escalated", which Mr Vaughan submitted, were calculated attempts to deflect a legal challenge on the basis of false and misleading information; and (vii) the failure of the Secretary of State to call any evidence from the relevant decision makers in breach of his duty of candour and co-operation.

33. On behalf of the Secretary of State, Mr Metcalfe referred to the guidance to be derived from both *MK (Algeria) v Secretary of State for the Home Department* and *Thompson v Commissioner for Police*. He also referred to what he also described as the following "guideline cases": *B v Secretary of State for the Home Department* [2008] EWHC 3189; *NAB v Secretary of State for the Home Department* [2011] EWHC 1191; *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin); *AXD v Secretary of State for the Home Department (No 2)* [2016] EWHC 1617 (QB); *Belfken v Secretary of State for the Home Department* [2017] EWHC 1834 (Admin); *Mohammed v Home Office* [2017] EWHC 2809 (QB),and *R (Sapkota) v Secretary of State for the Home Department* [2017] EWHC 2857 (Admin). Mr Metcalfe submitted that the various guideline cases cited by Mr Vaughan bore little of no resemblance to the facts of the Claimant's case with the possible exception of *Lamari*. He submitted that the "more appropriate guideline cases" were those of *NAB*, *AXD* and *Belfken*.

34. Mr Metcalfe submitted that an appropriate award of basic damages would be in the region of between £2,800 and £3,920 for 28 days detention. This was not a case in which the Claimant suffered any initial shock on being detained unlawfully: by November 10th 2017 he had already been lawfully detained continuously for 2 years from November 10th 2015, 300 days as part of his sentence and 431 days in immigration detention. Before that he had been imprisoned on more than one occasion and he must have become very much accustomed to having his liberty curtailed. These two factors should be borne in mind when considering the Claimant's evidence. Further the reason why the Claimant's detention ceased to be lawful was that BID informed the Senegalese Embassy on November 2nd 2017 that the Claimant was still challenging removal, which led the Embassy to refuse to issue an Emergency Travel Document, even though both his asylum and human rights claims and appeals had been dismissed. Further, when informed by the Defendant that that was so, the Embassy agreed to meet representatives of the Secretary of State. Thus, but for the misleading information given by BID, the Claimant's detention would have continued to have been lawful. Moreover it was not the case that the Defendant had been wholly

inactive in the relevant period before the first FTT hearing: the provider had been chased in October 2017 and before the hearing. Moreover action had been taken following that hearing. On the day on which the FTT issued its first decision to grant bail in principle, an updated pro-forma maintaining a requirement for Level 3 accommodation was issued and contact made with the social worker; on November 20th 2017 the Criminal Casework Directorate asked the Section 4 Bail Team for an up-date; and the search for accommodation was expedited and escalated on November 24th 2017. Accommodation was then identified on December 2nd 2017.

35. In relation to the claim for aggravated damages, Mr Metcalfe submitted that there was no evidence of any conduct that was high handed, insulting, malicious or oppressive. There was nothing in the manner in which detention was continued that added insult to injury.

36. Mr Metcalfe accepted that the failings in the system for bail accommodation identified by Edis J had continued and that that was reflected in the Judge's findings in paragraph [24] of his judgment. But there was no such high handed conduct directed at the Claimant himself as might warrant an award of aggravated damages: there was merely inactivity and drift. Further the difficulties in identifying and obtaining suitable bail accommodation were not exclusively the fault of the Secretary of State and were very much down to the Claimant's own conduct: they resulted in large part from the severe risk the Claimant posed to others. In any event such failings before October 2017 were only of historic interest and were irrelevant as they could have had no effect on the Claimant's release as his detention remained justified until November 10th 2017 and as no application for bail had been made before November 1st 2017. He accepted that officials could have chased the matter sooner than November 20th 2017 but he submitted that there is nothing to show that any failure to do so had made any difference to the outcome and that it did not amount to defiance of the FTT's order or high handed conduct. Mr Metcalfe further submitted that there was nothing in the Claimant's contention that the Secretary of State had failed to act in the light of the failings identified in *Sathanantham*. Remedial steps had been identified in that judgment and the provisions of Schedules 10 and 11 of the Immigration Act 2016 had been brought into force.

37. Mr Metcalfe submitted that, although the Defendant is not in a position to show that the initial application was expedited, that is in itself no basis for concluding that the claim that it had been was made falsely with the intention to deceive. The same is true of the statement that the application had been "escalated", the meaning and significance of which in this context he was not aware. Not all communications between officials are in writing. Mr Metcalfe pointed out that the Judge had not found that the Secretary of State had been in breach of his duty of candour or co-operation and the Defendant submitted that he was under no obligation to file witness evidence when it is not required.

DISCUSSION

i. general approach

38. Although Mr Vaughan sought to emphasise the unlawful operation of the Defendant's system for discharging his function of providing bail accommodation, the wrong in

respect of which the claimant is entitled to be compensated is his false imprisonment, not the unlawful operation of that system as such.

39. Apart from cases in which there may be special damages (such as loss of earnings) or an award for injury to the claimant's physical or mental health by reason of his confinement, an award of general damages for false imprisonment may reflect at least three elements: (i) compensation for the claimant's loss of liberty; (ii) compensation for any consequential injury to the claimant's feelings; and (iii) compensation for any consequential injury to his reputation.

40. In this case it is not suggested that the Claimant's detention between November 10th and December 7th 2017 resulted in any injury to his physical or mental health or to his reputation. The Claimant seeks compensation for his loss of liberty for 28 days and for injury to his feelings. In respect of the latter he also claims "aggravated damages" for the injury to his feelings.

41. In *Thompson v Commissioner of Police* supra Lord Woolf MR considered the circumstances in which such damages could be awarded in addition to what he referred to as "ordinary" or "basic damages" in cases of false imprisonment and malicious prosecution. He stated (at p516) that:

> "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.....It should be strongly emphasised….that the total figure for basic and aggravated damages should not exceed...fair compensation for the injury which the plaintiff has suffered."

42. "Aggravated damages" are thus designed to compensate the victim of a wrong for any injury to his feelings in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or by the defendant's conduct subsequent to the wrong in relation to it. It is important to note, however, that "aggravated damages" are concerned with providing compensation for the aggravated injury to a claimant's feelings as a result of the defendant's conduct. That is why they are irrecoverable by corporations or by those unaware of the wrong committed against them or of the matters relied upon as aggravating features: see Halsbury's Laws of England Vol 29 (2014) *Damages* at [322] and [323]; *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, [2014] 1 P.& CR 5 per Patten LJ at [27], [29]-[30]. They are not "exemplary damages" which go beyond compensating the claimant for any actual injury or loss that he suffers but which may be awarded to show the court's disapproval of the defendant's behaviour in certain categories of case.

43. The division between "ordinary" or "basic" damages, and "aggravated damages", for any injury to a claimant's feelings, however, may give rise to two problems in practice.

44. Drawing a sharp distinction between any injury to the claimant's feelings caused by the wrong itself (where that may be reflected in a "basic" award of damages) and any injury to the claimant's feelings caused by the manner in which it was committed (to be reflected in an award of "aggravated damages") is inevitably arbitrary: the injury to his feelings will be the product of both. This is illustrated by the decision of the Court of Appeal in *MK (Algeria) v Secretary of State for the Home Department* supra in which the particular facts surrounding the claimant's detention justifying an award of aggravated damages had already been referred to, and taken into account, when considering what should be awarded as general damages: see [10]-[15], [17] and [21]. The arbitrariness of such a division is liable to create a risk of double counting. This has led to the recommendation, contained in two decisions of the Court of Appeal which post-date *Thompson v Commission of Police* supra, that it is better to make one global award of general damages, including compensation for any injured feelings caused by the wrong and the manner in which it occurred, where appropriate: see Halsbury's Laws of England Vol 29 (2014) Damages at [322] footnote 1; *Richardson v Howie* [2004] EWCA Civ 1127, [2005] PIQR Q3 per Thomas LJ esp at [23]-[25]; *Choudhary v Martins* [2007] EWCA Civ 1379, [2008] 1 WLR 617 per Smith LJ at [20] and Sir Anthony Clarke MR at [27]-[28]; cf also *Cassell & Co. Ltd v Broome* [1972] AC 1027 per Lord Hailsham LC at p1072.

45. The second potential problem of the suggested division between "ordinary" or "basic" and "aggravated damages" for any injury to a claimant's feelings (where compensation may be awarded ordinarily for such injury) is that it may suggest that there is some threshold about the manner in which the defendant committed the wrong that must be satisfied before "aggravated damages" may be awarded. Thus in this case, for example, the Defendant submitted that there was no evidence that there was any conduct for which he was liable that was "high handed, insulting, malicious or oppressive" as the Claimant had asserted. Such conduct, as described by Lord Woolf in *Thompson v Commissioner of Police* supra, however, constituted only examples of what may be "aggravating features" about a particular case. What results from any such features is aggravated injury or damage. But distinguishing between (a) what may be the "ordinary" manner in which a wrong may be committed and the injury to feelings that may thereby be caused, and for which damages may be recoverable, and (b) an aggravated manner in which it was committed and the injury to feelings that may thereby be caused is likewise liable to be arbitrary; and, if there is some threshold that such aggravation must meet, it may leave uncompensated any injury to feelings caused by the manner in which the wrong was committed that was not part of any such "ordinary manner" and which does not meet any such threshold.

46. For these reasons in my judgment it is better in this case to focus on what injury to his feelings the Claimant has suffered in consequence of his false imprisonment, including matters which may have aggravated what might otherwise have been that injury, and to make an award of general damages in the form of a global figure that will provide compensation, so far as money can do, for that and the loss of liberty that such imprisonment caused him. That will reduce the risk of double counting or underestimating any compensation for the injury to the claimant's feelings. It will also

avoid any need to try to assess separately a "basic" award of damages and an award of "aggravated damages" on the basis of what would inevitably be an arbitrary division of what might contribute to each award. Such an approach will not necessarily exclude subsequently identifying, within the global assessment of general damages, an amount said to be for "aggravated damages" (and deducting it from the global amount of general damages) if it is desirable to identify a separate amount attributable to some particular matter to distinguish it and its effects that is worthy of particular condemnation.

ii. relevant aspects of this claim

47. The Claimant is plainly entitled to be compensated for his loss of liberty for 28 days.

48. In relation to injury to his feelings, this is not a case in which the Claimant suffered any initial shock on being detained on November 10th 2017. He had been in immigration detention and before that in prison continuously for nearly two years and he had been in prison before that. He was accustomed to being deprived of his liberty and living in immigration detention.

49. Far from suffering any shock or disappointment at not being released on November 10th 2017, the Claimant says that he knew that he would not be released immediately if he was granted bail in principle because he did not have a bail address and that his feeling was in fact one of "huge relief" as he was "so, so happy". The allegation, therefore, that the Claimant "has suffered the additional stress, anxiety and frustration of knowing that he would have been released from detention had it not been for the Defendant's failure to provide such an address, which was unlawful" and that "he was especially worried about when he could finally see his children", is not borne out by his own evidence as to his state of mind on November 10th 2017. I will deal below with what the Claimant says that he subsequently learnt about his detention on and after November 10th 2017 and its causes and its effect on him.

50. The Claimant says that at the time he felt that, given that 13 months had passed since his first application for bail accommodation, the FTT ought to have ordered the Defendant to find him accommodation in less than 14 days and that it would only be a very short amount of time before it was found, even though he says that he understood that there were "only so many addresses of the type that I needed". He knew, however, what the FTT had ordered. He also knew through his contacts with his solicitors and BID that an address had not been found, so that, in the days leading up to November 24th 2017, he says that he had been preparing himself to be told (as he then was) that no accommodation had been found. I accept that in these circumstances, in this period after November 10th 2017, the Claimant would naturally have become, and did become, increasingly frustrated and angry and concerned about when he would be released and be able to see his children, given that he knew that no accommodation had been found.

51. The Claimant says that he was pleased that there was a further grant of bail in principle on December 1st 2017 but that he felt worse as he had no idea when he would be released and that he was preparing himself for the possibility of his detention continuing for much longer. He says that he was worried that he might get

to the point of suicide. In the event he was informed that accommodation had been found on December 5th 2017.

52. Although the amount of compensation for unlawful detention broadly attributable to the increasing passage of time normally falls to be tapered or placed on a reducing scale and although the Claimant suffered no initial shock, in this case the injury to his feelings as his unlawful detention continued, his increasing frustration, anger and anxiety about his release and when he might be able to see his children, increased with the length of his unlawful detention until he was told that accommodation had been found on December 5th 2017. That must be taken into account when considering the significance of the length of his unlawful detention in the assessment of the amount of compensation to which he is entitled.

53. There were a number of other factors that Mr Vaughan and Mr Metcalfe submitted were also relevant to that assessment.

54. Mr Vaughan submitted that the award should be increased as the Claimant's detention was the product of the Defendant's continued unlawful operation of his system for the allocation of bail accommodation and that the inaction following the application for accommodation made on October 20th 2016 had been egregious. In response Mr Metcalfe submitted that any failings before October 2017 were of historic interest and had had no effect on the detention of the Claimant, as that remained justified until November 10th 2017 and as no application for bail accommodation was made before November 1st 2017. Moreover, so he submitted, the difficulties in obtaining bail accommodation were not exclusively the Defendant's fault: it was the Claimant's own conduct that generated the risk that dictated the nature of the accommodation to be found.

55. As I have mentioned, the Judge found that the Defendant's failure to take any effective steps to expedite the application for bail accommodation made in October 2016 before September 2017 was unlawful. In my judgment, however, that did not in itself result in the Claimant's continued detention or render it unlawful. Even if any accommodation had been found in that period, it would not have availed the Claimant. That detention remained justified until November 10th 2017 and any accommodation found before September 2017 would not then have been still available for him, given the evident shortage of Level 3 accommodation for a number of detainees (as the spreadsheet sent to the provider on October 14th 2017 illustrates) and that, as a matter of standard practice, any offers of bail accommodation are only open for acceptance for 14 days: see *R (Belfken) v Secretary of State for the Home Department* supra at [73]. I will return to Mr Metcalfe's point about the Claimant's contribution to the difficulty in finding him accommodation. But what is significant in respect of the failure to identify any accommodation before September 2017 is that the feelings that the Claimant describes in the period up to November 10th 2017, finding it increasing hard to cope being in detention and almost giving up hope of being released, are feelings attributable to the fact of his hitherto unsuccessful attempts to frustrate his deportation and his continued lawful detention. They were not consequences of his unlawful detention.

56. As I have mentioned the Judge found that the Defendant should have secured bail accommodation for the Claimant by November 10th 2017 when his detention became unlawful given the refusal of the Senegalese Embassy to issue an Emergency Travel

Document. The Claimant alleges that the failure to chase the accommodation provider more in October 2017 and the failure to chase the provider again after the bail application was made on November 1st 2017 until November 9th 2017 was high handed and oppressive conduct showing flagrant disregard for the Claimant's liberty. Mr Metcalfe submitted that, but, for the intervention of BID with the Senegalese Embassy, the Claimant's detention would have remained lawful (a point to which I shall return) and that the Defendant's conduct was more appropriately described as unacceptable inactivity and drift.

57. The Judge found that the failure to take even basic steps to expedite the Claimant's application was unlawful and that the Defendant should have secured bail accommodation for him by the time that the FTT granted him bail in principle on November 10th 2017. But, however the particular failings in the period before the FTT hearing may be described, the question is what relevant loss or injury they may have caused the Claimant in relation to his unlawful detention. Damages are awarded to a claimant are to compensate him, so far as money can do so, for the loss or injury he has suffered as a result of the wrong done to him, in this case his unlawful detention. The court looks to the extent of the claimant's consequential loss or injury. Plainly the Defendant's unlawful failure to secure bail accommodation in the period before hearing in the FTT meant that the Defendant ceased to be lawfully detained on November 10th 2017 given the attitude of the Senegalese authorities. The Claimant is, of course, entitled to compensation for his unlawful loss of liberty for 28 days. There is no evidence, however, either that the Claimant knew more about the Defendant's activities or lack of them in this period than that bail accommodation had not been secured in the previous 13 months since his first application for such accommodation or that it had any further effect as such on what he felt on and after November 10th 2017. I have already described above the injury to the Claimant's feelings that his continued, but unlawful, detention caused him on and after November 10th 2017 given what had previously occurred. There is no evidence that what more precisely the Defendant did or did not do in the period before November 10th 2017 has had any further, aggravating effect.

58. Mr Vaughan further submitted that, after the grant of bail in principle on November 10th 2017 the Defendant's Section 4 Bail Team did nothing to escalate or expedite the case until the first deadline set by the FTT, November 24th 2017, and made no contact with the provider in that period in defiance of the FTT's order, conduct which he characterised as high handed and disrespectful of the FTT and the Claimant. Mr Metcalfe submitted that it was not true to say that nothing had been done in that period, as I have explained above; that, although officials could have chased the matter sooner than November 20th 2017 that does not amount to defiance of the FTT order or high handed conduct; and that there is nothing to show that, had providers been contacted, that this would have made a difference to the outcome of the pro-forma submission.

59. The Judge found that little was done until the end of the 14 day window to find accommodation for the Claimant and that it was only after that date, when the FTT relisted the application on November 27th 2017, that the search for accommodation can be said to have been earnestly promoted. If it is relevant to make further more specific findings, as Mr Vaughan invited me to do, then the following appears to be the case on the basis of the material before the court. The pro-forma completed and

sent to the Section 4 Bail Team, with notice that bail had been granted in principle, on November 10th 2017 merely updated the form (which appears to have been submitted on October 13th 2017) and restated the Claimant's requirement for Level 3 accommodation. It did not apparently then lead to any further contact by the Section 4 Bail Team with any provider. The notification of the grant of bail accommodation to the social worker on the same day was appropriate but irrelevant to securing bail accommodation for the Claimant. The e-mail on November 20th 2017 from the Criminal Casework Directorate asking for an update from the Section 4 Bail team does not appear to have elicited a response from that team until November 24th 2017. Section 4 Bail Team did nothing to escalate or expedite the case until the first deadline set by the FTT, November 24th 2017, and made no contact with the provider in that period.

60. The Defendant's apparent failure to make any specific effort to comply with the requirement, to provide the Claimant with accommodation within 14 days, contained in the order made by the FTT on November 10th 2017, by contacting any provider, or by apparently doing anything else to secure bail accommodation for the Claimant, until the day by which it was required to have found it for him is not merely unjustifiable. It is an inexcusable failure to take the Tribunal's order seriously and to recognise the Defendant's own legal obligations. Such conduct by any public authority undermines the rule of law and respect for it by others. Were it necessary to do so, therefore, I would find that it met any threshold that might be required to be passed for an award of aggravated damages.

61. I have described above, however, what the Claimant knew at the time about the search for bail accommodation for him and the effect it had on his feelings in this period. There is no evidence that he then knew more than that. In fact he says that he only "now" knows "from the High Court ruling in my case, that after the 10 November bail in principle ruling, the Home Office did little until the end of the 14 day window to find me an address; and it was only after that that the Home Office did much to urgently seek accommodation for me." Although he says that he struggles to find words in reaction to this, he thinks that it was "totally outrageous" for the Section 4 Bail Team to sit on his case for almost the entire period for which bail in principle had been granted. In my judgment such anger is a result of the manner in which the Defendant dealt with the Claimant's continued unlawful detention. Such anger is relevant, and not only justified, whether or not accommodation would have been found, and the Claimant would have been released, earlier had more been done. Although that reaction is one that occurred after his unlawful detention had ended, it was a consequence of the manner in which the Defendant dealt with his continued detention. It is part of the injury to his feelings caused by his continued unlawful detention and the manner in which it was dealt with for which in my judgment he is entitled to be compensated.

62. Mr Vaughan relied on two further matters as justifying an increased award of damages.

63. The first concerned the reply in the response dated March 22nd 2017 to a letter before claim in which Litigation Operations informed BID that "the SSHD has been in contact with Section 4 Bail team and they have confirmed that your client's case has been expedited." The Judge observed that there was nothing in the records to indicate that the application had been expedited or that a request had been made for it to be

expedited. That remains the case. The Secretary of State had called no person to give evidence, and in particular none that might have explained how that statement in the letter came to be made. Mr Vaughan submitted that this was a calculated attempt to deflect a legal challenge on the basis of false and misleading information. It is not clear whether he is alleging that the author of the letter was dishonest or that any person to whom he or she spoke (possibly in the Section 4 Bail Team) was. In my judgment, however, I am not entitled to draw inferences which are not properly supported by the evidence. In particular I am not entitled to make findings of dishonesty if other explanations, such as muddle, mistake or incompetence, are equally plausible. Given both that there are means of communicating with the Section 4 team and with any provider that are not in writing and may not be recorded in writing and that mistakes can occur, I am most reluctant to conclude from the material before the court that some unidentified official acted dishonestly. In any event, however, even if the statement was untrue and was deliberately misleading, it has no material bearing on this claim for damages for unlawful detention. This is not a claim for damages for misconduct in public office or, if such a tort existed, a claim for damages for the unlawful discharge of the function of providing bail accommodation. For the reasons already given the Defendant's unlawful discharge of that function in the Claimant's case before September 2017 is immaterial for present purposes and this statement is not something (even if otherwise potentially relevant) that the Claimant says affected him.

64. Mr Vaughan also added during the course of his submissions a similar accusation about the statement made in a response dated November 13th 2017 that "the matter has been escalated". I have refused permission to advance any such contention, involving as it does an accusation in effect of dishonesty, as it had not been raised in the Claimant's skeleton argument. Quite apart from the reluctance that I have mentioned about making such findings on the basis of the material available in such circumstances, I simply note that in any event this response is not a matter that the Claimant says has affected him and I have dealt with what he says about how what happened in the period in which this response was received has in fact affected him subsequently.

65. The final matter on which Mr Vaughan relied, as he did before the Judge, was that, in breach of his duty of co-operation and candour, the Defendant has chosen not to call any evidence from the decision-makers involved in this case, notably from the Section 4 Bail Team and the Criminal Casework Directorate.

66. Mr Vaughan referred me in that connection to various general observations that Singh LJ made about disclosure in judicial review proceedings in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin). In paragraph [17] Singh LJ referred to the judgment of Lord Walker of Gestingthorpe in *Belize Alliance Conservation of Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6, [2004] Env LR 38. In that case Lord Walker stated that:

> ".....A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, [today of course an affidavit is usually not required and evidence is given in the form of a witness statement] of the relevant facts and (so far as they are not apparent from

> contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

Singh LJ then stated at [20], in the passage relied on by Mr Vaughan, that:

> "The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack". It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal put it at the hearing before us, to identify "the good, the bad and the ugly"."

67. Mr Metcalfe in response pointed out, correctly, that, despite the Claimant's submissions at the previous hearing to this effect, the Judge made no finding that the Defendant was in breach of his duty of candour or co-operation. He also maintained, again correctly, that the Secretary of State is not obliged to file witness evidence where it is not required.

68. The Judge, who was better placed to consider these complaints when determining the allegations about the Defendant's operation of the system for bail accommodation and unlawful detention, did not criticise the Defendant for any failure in candour or co-operation. The relevant facts for the purpose of assessing damages in the light of his findings as supplemented by the documentary material available principally concern what the Claimant has suffered in consequence of his unlawful detention and the manner in which it may have been handled. To the extent that matters relevant to the assessment of that depend on what the Defendant did or did not do (or rather what was done or not done in his name), those matters have been considered above. But, whether or not witness evidence should have been provided by the Defendant for this hearing, there is no evidence that its absence has had any effect on what the Claimant may have suffered in consequence of his unlawful detention or the manner in which it may have been handled.

69. On behalf of the Secretary of State Mr Metcalfe invited me to consider two matters relating to the Claimant's conduct which he contended were of relevance to the assessment of any compensation to which he may be entitled.

70. The first was that the difficulties experienced by the Defendant in identifying and obtaining suitable bail accommodation resulted in very large part from the severe risk that the Claimant posed to others and thus that the particular challenges that arose were very much due to the Claimant's own conduct. It was not exclusively the Defendant's fault. The second was that, but for the intervention with the Senegalese Embassy on behalf of the Claimant by BID stating incorrectly that the Claimant was still challenging his removal, the Claimant's detention on and after November 10th 2017 would have continued to have been lawful.

71. These contentions raise a difficult issue about the applicability of the rules relating to contributory negligence and mitigation in the context of unlawful immigration detention and the basis for any reduction in the damages to be awarded on account of a claimant's conduct.

72. Insofar as Mr Metcalfe may have been suggesting that any loss or injury that the Claimant suffered should be regarded as being partly the result of his own fault as well as that the Defendant, such a submission is in substance a contention that the damages that he should be awarded should be reduced having regard to his share in the responsibility for that damage. Such a contention would appear to invoke the power of the court conferred by section 1 of Law Reform (Contributory Negligence) Act 1945 to reduce the amount recoverable by the Claimant to such extent as the court thinks just an equitable having regard to the claimant's share in the responsibility for what he has suffered.

73. In *R (NAB) v Secretary of State for the Home Department* supra Irwin J (as he then was) expressed the view that rules relating to contributory negligence and mitigation should be treated as inapplicable in the case of unlawful detention as their application "would undermine the principal logic by which illegality has been established", but he nonetheless found that the claimant's conduct in that case, in choosing to remain in detention the United Kingdom (rather than returning to Iran) by not signing documents required by the Iranian authorities, "does mean that the appropriate level of damages must be very much lower" than in most of the reported authorities: see at [9]-[13] and [18]. That claimant's conduct appears to relate at least in part (given the reason for treating these two rules as inapplicable) to what he did before his continuing detention became unlawful. Irwin LJ (as he had by then become) added *obiter* in *R (Antonio) v Secretary of State for the Home Department* [2017] EWCA Civ 48, [2017] 1 WLR 3431, at [82], that:

> "if... the claimant failed to co-operate or set out to frustrate his deportation, then to the extent that he is nevertheless found to have been unlawfully detained, I am of the clear view that such conduct is or may be an important factor in assessing the level of damages".

The extent to which a claimant has failed to co-operate with his removal has subsequently been taken into account when assessing compensation in *R (Belfken) v Secretary of State for the Home Department* supra at [89]-[91].

74. In my judgment the authorities show that the 1945 Act is inapplicable in a case such as this. For the conduct of a claimant to constitute "fault" for the purpose of that Act, it must be act or omission that would, apart from the 1945 Act, have given rise to a defence of contributory negligence: see section 4 of the 1945 Act. "Intentional torts" did not do so. False imprisonment is such an "intentional tort" and a sub-division of trespass to the person. Accordingly the 1945 Act is not applicable when considering the amount of damages recoverable for it: see *Pritchard v Co-operative Group Limited* [2011] EWCA Civ 329, [2012] QB 320; *Hicks v Young* [2015] EWHC 1144 at [37].

75. I fail to follow, however, why a claimant should be able to recover damages in respect of the amount of any avoidable loss if the defendant can show that it was

unreasonable for the claimant not to have taken steps which, if taken, would have avoided that loss. If a claimant may only be awarded nominal damages if he would have been detained in any event, notwithstanding that the decision to detain him was flawed without undermining the finding that his detention was unlawful (as the Supreme Court decided in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245), it would equally not undermine the finding that his detention was unlawful if he receives no compensation for any loss which he ought reasonably to have avoided. Thus, for example, the Privy Council recognised that it was open to a defendant to contend that part of the compensation payable to the claimant for the loss of liberty that he suffered as a result of a malicious prosecution should be irrecoverable on the basis that he had failed to mitigate his loss by taking steps to secure his release by making a bail application: see *Calix v Attorney General of Trinidad and Tobago* [2013] UKPC 15, [2013] 1 WLR 3283, at [18]-[22].

76. A claimant need take no steps to mitigate his loss mitigation, however, until there has been an actionable infringement of his rights. In this case the Claimant's conduct on which the Defendant relies occurred before his detention became unlawful. If *R (NAB) v Secretary of State for the Home Department* supra is correctly decided, however, that is not necessarily the end of the matter. But I am unclear on the basis of what principle the amount of compensation that would otherwise be awarded by way of compensation should be reduced on account of conduct by the claimant (which does not amount to a *novus actus interveniens*) if no reduction may be made on the basis of contributory negligence or of a failure by the claimant to mitigate his loss and, if any such reduction is permissible in such circumstances, by reference to what principle the amount of the reduction is to be determined. The amount of damages to which a claimant is entitled is not a matter of discretion for the court. Subject to recognised rules such as contributory negligence and mitigation, a claimant is entitled to be put into the position he would have been in had the tort not been committed so far as money can do so. It may, of course, be the case, for example, that a claimant's conduct, which he recognises is likely to mean that he will remain in detention rather than being at liberty abroad, may cast light on the extent to which his loss of liberty, if it becomes unlawful, has in fact caused him to suffer any appreciable injury. But that is not, as I understand it, the basis on which Irwin LJ thought that the damages that would otherwise be awarded could be reduced and it is not the basis on which the Defendant in this case claims that the Claimant's damages should be affected.

77. Whatever principle may underlie the approach adopted in *R (NAB) v Secretary of State for the Home Department*, and recommended in *R (Antonio) v Secretary of State for the Home Department*, by Irwin LJ, in my judgment, however, it must at least be necessary that the claimant's conduct has some material bearing on his unlawful detention. In my judgment it is evident, but thus irrelevant, that the requirement to secure Level 3 accommodation was the result of what the Defendant considered was necessary to manage the risk that the Claimant posed given his previous conduct. It is simply impossible to contend that the Claimant's unlawful detention on and after November 10th 2017 was caused or materially affected by his previous conduct. It was caused by the fact that there was no longer a realistic prospect of deporting the Claimant within a reasonable time and by what the Judge found was the Defendant's unlawful failure to have secured bail accommodation for him by then. The latter finding must necessarily have taken into account whatever risk the Claimant posed as

a result of his own conduct and the difficulties of identifying accommodation for him in which that risk may be managed.

78. The second factor on which the Defendant relies is that, but for the intervention by BID on behalf of the Claimant with the Senegalese Embassy on November 2nd 2017 stating incorrectly that the Claimant was still challenging his removal, the Claimant's detention on and after November 10th 2017 would have continued to have been lawful. Mr Vaughan submitted that the statement was irrelevant to the decision of the Senegalese authorities who were aware that the Claimant had exhausted his appeal rights.

79. On the basis of the available documents and the Defendant's detailed grounds for opposing the claim, the facts appear to be these. The Defendant became aware that the Claimant had exhausted his appeal rights on October 4th 2017. An application was accordingly made to the Senegalese Embassy for an Emergency Travel Document on October 6th 2017. On November 1st 2017 one of the Defendant's officials had a meeting with the Senegalese authorities who then agreed to conduct a further telephone interview with the Claimant on November 3rd 2017. Before that interview BID wrote to the Embassy on November 2nd 2017 stating inter alia that the Claimant "is challenging his removal": see paragraph [13] above. At that time the Claimant had exhausted his appeal rights and he had made no application for judicial review to challenge his deportation or removal that was awaiting determination. It was accordingly incorrect, and misleading, to assert that he was in fact then challenging his removal. The Claimant has provided no explanation himself or from BID how that assertion came to be made. On November 3rd 2017 the Embassy held the interview with the Claimant and it replied to BID stating that it was not willing to issue an Emergency Travel Document: see paragraph [13] above. It appears, however, that the Defendant was only informed by the Embassy on November 9th 2017 that it had decided, after the interview with the Claimant and having discussed the matter internally, that it could not facilitate the separation of the Claimant from his children by issuing a travel document; that in its view the Claimant should be given the chance to explore further means that could help him regularise his immigration status and stay with his children; and that their mother had contacted it to express the same wish. The Defendant responded the same day explaining that the Claimant had exhausted his appeal rights; that his article 8 claim had been fully considered on a number of occasions and that he had no further avenues to explore. This had apparently no effect on the attitude of the Embassy, although a further meeting was scheduled to explain the position to it again on December 4th 2017 (a meeting which did not in the event take place).

80. In my judgment, incorrect and misleading as the BID letter was, the Defendant has not shown on the balance of probability that it was the, or a, reason why the Senegalese authorities refused to issue an Emergency Travel document. There is no evidence that the Embassy had been told that the Claimant had exhausted his appeal rights when the Defendant applied for an emergency travel document on October 6th 2017 or at the meeting on November 1st 2017, although it appears that it had been told at some point before November 2nd 2017. But in any event the Defendant subsequently made the Claimant's position clear to the Embassy on November 9th 2017 but it apparently made no difference to the Embassy's attitude. This appears to me to be consistent with the Judge's finding that, following the refusal of the

Senegalese Embassy to grant emergency travel documentation, it was apparent that there was no prospect of the Claimant's deportation within a reasonable period. If the Embassy would have issued such documentation once any misapprehension that BID had caused had been pointed out (as it had effectively been), such documentation might reasonably have been expected to have been issued and the Claimant removed shortly thereafter.

81. For these reasons in my judgment no deduction from the compensation falls to be made on the basis of the two factors identified by the Defendant.

82. To summarise, the Claimant was deprived of his liberty unlawfully for 28 days, although he did not then know that was the case. He suffered no initial shock when he was not released on November 10th 2017. He knew that he would not then be released even if bail was granted in principle by the FTT, as he knew that he had no bail accommodation. In fact he felt great relief at that point. The Claimant thereafter remained in immigration detention in conditions to which he was well accustomed: he had been in lawful detention for 14 months and 5 days and before than in prison serving a custodial sentence. The Claimant was moreover aware that the Defendant had been given 14 days in which to find bail accommodation for him. He nonetheless became increasingly frustrated and angry and concerned about when he would be released and be able to see his children in that 14 day period, given that he knew that no accommodation had been found, and, although pleased when the FTT made a further grant of bail in principle, he felt worse as, until he was told that accommodation had been found for him on December 5th 2017, he had no idea when he would be released and was preparing himself for the possibility of his detention continuing for much longer: see paragraphs [49]-[52] above. After judgment was given on this claim, however, he was also angry when he discovered that the Section 4 Bail team had themselves apparently done nothing following the first grant of bail in principle by the FTT to secure bail accommodation for him in the period in which the Defendant had been required to do so by the FTT: see paragraph [61] above.

iii. guidance on quantum in other cases

83. As I have mentioned, a very large number of cases were cited to me on the basis that they were "guideline" cases. In my judgment those cases do not set out any "guidelines" that might be applied in quantifying any award of damages for unlawful immigration detention. More accurately, each in fact shows what sum the court has decided that it is appropriate to award as damages on the facts in that particular case. Obviously those facts are never identical nor are they the same as those in this case. That is not to say that such decisions are irrelevant or considering them necessarily unhelpful. They provide some indication of a general level of the amounts that may be awarded and some such understanding of that background is necessary if some level of consistency is to be achieved when awarding compensation. But a more selective approach to the citation of such cases would have been more useful.

84. I have considered all the cases to which I have been referred. In my judgment little is to be gained by analysing each minutely. I propose only to refer to some of those decisions where there had been initially a period of lawful detention or custody for more than a very short period immediately before any period of unlawful immigration

detention. Some of those cases to which I was referred were not particularly relevant. For example in *E v Home Office* supra the Claimant, a recently arrived asylum seeker, was unlawfully detained from the outset and, in *R (KG) v Secretary of State for the Home Department* (of which no transcript is yet available) it appears that the mental vulnerability of an overstayer, who was unlawfully detained after only 24 hours in immigration detention, was exacerbated by his unlawful detention for 30 days. But in any event, as will be apparent, there are material differences from this case in each of those cases to which I refer below.

85. In *R (NAB) v Secretary of State for the Home Department* supra the claimant was detained unlawfully for 82 days when it became clear that there was no realistic prospect of his removal within a reasonable period after a period in lawful detention of 30 months. Like the Claimant in this case he suffered no initial shock and no disruption to an otherwise normal life when his unlawful detention began, something of which he was unaware. Irwin J awarded him compensation in May 2011 at a rate of £75 per day, £6,150 in all.

86. Quite apart from the shorter length of the unlawful detention in this case, however, there are also two other significant differences between that case and this. First, as I have already mentioned, Irwin J thought that the fact that the Claimant chose detention in the United Kingdom over freedom in Iran by refusing to sign documents which the Iranian authorities required, meant that the appropriate level of damages had to be "very much lower" than in most of the reported cases. In this case for the reasons I have given those features of Claimant's conduct on which Defendant relies do not justify any reduction in the compensation that might otherwise be payable. Secondly in that case there appears to have been nothing to suggest any increased adverse effect on the Claimant's feelings in the period of unlawful detention or subsequently on finding out how it had arisen.

87. In *R (Bent) v Secretary of State for the Home Department* supra the claimant, an overstayer, was lawfully detained for the purpose of his imminent removal. That detention remained lawful for 13 days until after the court had quashed the directions for his removal and recognised that his representations to remain on article 8 grounds would require a fresh decision carrying with it a right of appeal. He was then unlawfully detained for a further 23 days. Mr Robert Owen QC (sitting as a Deputy High Court Judge) recognised that the claimant's continued detention had had an adverse effect on his general well-being and awarded him £12,500 in September 2012. Adjusted for inflation and given the necessary uplift for cases before April 2013, that would be approximately £16,000 today.

88. Although this was a case in which there had been a relatively short period of lawful detention, the claimant was not (as the Claimant is) an individual who had become accustomed to being in custody in prison or in detention. From the judgment it is also not clear what view the claimant in that case had (if any) about the prospects of his release from detention, for example, whether he may also have expected his release once the directions for his removal had been cancelled given that his representations had yet to be considered, or of any reaction to his discovering his detention had been unlawful and why it had lasted for as long as it did.

89. In *R (Lamari) v Secretary of State for the Home Department* supra the claimant had been the subject of a custodial sentence of imprisonment, of which he had served 6

months in prison, before being held lawfully in immigration detention for about one year and four months. In that period he suffered from mental health problems and had made two suicide attempts. The court found that his continued detention could no longer be justified given his mental health. He was then unlawfully detained for 23 days, notwithstanding an undertaking given to the court that he would be released in that period, for breach of which the Defendant was subsequently found to be in contempt of court. HHJ Cotter found that the claimant's detention was causing his continuing mental health problems; that the claimant had been relieved and very happy to hear that he was to be released when the Defendant's undertaking was given; but that he was shocked and very distressed when it was not complied with, causing his health to deteriorate creating a serious and significant extra risk of suicide. When ultimately released in the evening, the claimant, who was in a very poor state of health and spoke no English, only arrived at the bail hostel at 4am without keys, food or water and had to sleep rough and was unable to eat or drink until after 11am. In October 2013 HHJ Cotter awarded the claimant £10,000 under the heading "compensatory damages" and £5,000 under the heading "aggravated damages", reflecting (i) the likely effect on the claimant of the Defendant's failure to comply with his undertaking; (ii) the way in which the Defendant conducted the litigation, refusing to honour her undertaking and (iii) the manner in which the detention was brought to an end, but adjusted to avoid improper double counting, particularly in relation to the effect on the claimant. The total amount awarded (disregarding the further award of exemplary damages) was thus £15,000 or approximately, allowing for inflation, £16,700 today.

90. Although in that case a foreign national offender was unlawfully detained for 23 days after a significant period in prison and lawful detention and was also shocked and distressed not to have been released when the Defendant failed to comply with her undertaking to do so, features that are echoed in this case, the impact of those matters on the claimant in that case was far more serious than the impact of them on the Claimant in this case and the manner of the claimant's release and its impact on him in that case has no relation to any similar conduct on the part of the Defendant with any such impact on the Claimant in this case.

91. In *R (AXD) v Home Office* supra, the claimant, a foreign national offender, who had been subject previously to immigration detention on more than one occasion, was detained on November 27th 2011 on completion of another custodial sentence. His detention became unlawful on April 1st 2013 by which time he had developed paranoid schizophrenia and he remained unlawfully in detention until his release on December 5th 2014, a period of 20 months and 5 days. For a considerable part of that period he was locked in a cell in HMP Woodhill for 21 hours a day with only 30 minutes of fresh air. He also experienced some unpleasant abuse because of his sexual orientation and was assaulted on one occasion. In July 2016 Jay J awarded the claimant £80,000 as a "basic award" in respect of those maters with a further award of "aggravated damages" of £25,000 to reflect the unacceptable delay in the Defendant's decision-making; the sub-optimal treatment for his schizophrenia from July 2013 to May 2014; his eventual release without a proper welfare plan and its consequences; and the Defendant's breach of her duty of candour.

92. In that case the period of unlawful detention was very much longer than in this case (which given the recommended tapering effect makes any attempt to derive a daily

rate from the basic award which would be applicable in this case, as Mr Metcalfe suggested, inappropriate). Moreover the Claimant in this case, who does not suffer from any specific disorder (unlike AXD), has not suggested that the conditions in the Immigration Removal Centres where he was detained unlawfully were similar to those that the claimant experienced in HMP Woodhill in that case or that his relations with other detainees in that period were comparable.

93. In *R (Mohammed) v Home Office* supra, the claimant, a 39 year old Somali, a prolific and violent offender, had spent much of the previous two decades in and out of custody or immigration detention. In November 2017 he was awarded damages for three periods of unlawful immigration detention each of which followed a period of lawful custody: £8,500 for the first period of 41 days; £25,000 for the second period of 139 days; and £45,000 for the third period of 265 days. The first two periods and the first 81 days of the third had been served under a more restrictive prison regime and his detention exacerbated the claimant's post-traumatic stress disorder. The awards also apparently reflected to some extent the views of the Deputy High Court judge about the Defendant's failure to engage seriously with the principles governing lawful detention; the failure to release the claimant in accordance with the Defendant's policy on receipt of independent medical evidence of torture in the third period; and the Defendant's conduct of the litigation.

94. In this case the first of these periods of unlawful detention more closely approximates to the facts of this case, although the conditions in which the claimant was detained and its effects on him were worse than those the Claimant experienced.

95. It is evident from these brief summaries that there are substantial differences between the facts in each of these cases (and the other cases to which I was referred) and the facts of this case. Of these cases *Lamari* appears to me to be of most relevance, when considering what compensation the Claimant is entitled to, involving (as that case did) a not too dissimilar period of unlawful detention of an individual who was likewise well accustomed to immigration detention and who was similarly disappointed in the expectation of release by a particular date that he had generated by an authority, in that case by an undertaking by the Defendant rather than by an order of the FTT. But, even so, in that case the period of unlawful detention and the Defendant's conduct during it plainly had very much more serious effects on Mr Lamari's mental health than the injury to the Claimant's feelings as a result of those matters in this case (which would not count as more than minor injuries in the assessment of general damages in a personal injury case) and the Claimant experienced nothing on or in connection with his release from detention which would compare with the treatment that Mr Lamari suffered. I must accordingly make a judgment as to the amount of compensation to which the Claimant is entitled for his loss of liberty for 28 days and the injury to his feelings that he suffered (which would not be disproportionate to general damages payable in cases of personal injury) doing the best I can, taking such matters of distinction into account and having had regard to the other cases to which I have been referred (which do not disclose any very consistent pattern of award).

CONCLUSION

96. In my judgment the amount of damages to which the Claimant is entitled in all the circumstances is £9,000 plus interest at a rate of 8% from December 7th 2017. I do

not consider that there is sufficient justification or need in this case to divide that amount into an amount for “basic damages” and one for “aggravated damages”.