Neutral Citation Number: [2022] EWHC 584 (QB)

Case No: QB-2021-002613

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2022

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

MR SARHAD RAFIQ — **Claimant**

- and -

THURROCK BOROUGH COUNCIL — **Defendant**

- -
- -

Mr Azeem Suterwalla (instructed by Gold Jennings Ltd) for the Claimant
Mr Ryan Kohli (instructed by LB Barking & Dagenham) for the Defendant

Hearing date: 14th February 2022

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 12noon 16th March 2022.

Mrs Justice Collins Rice :

Introduction

1. These two opposing applications turn on a single issue about timing.

2. Mr Rafiq asks for permission to bring a claim against Thurrock Borough Council. He says the Council unlawfully made him street homeless for a week in the summer of 2017, violating his human rights and causing him physical and mental harm. He seeks money compensation. But he did not bring this claim within the statutory time limit for doing so as of right.

3. The Council asks for his claim to be struck out, on the ground that it is out of time and the Court should not exercise its discretion to extend time.

Factual background

4. Mr Rafiq is a Kurdish Iraqi. He arrived in the UK in November 2015, aged 17, and claimed asylum. The Council accepted an obligation under the Children Act 1989 to support and house him. He turned 18 in April 2016. The Council had continuing statutory support and housing duties to a 'former relevant child'.

5. Mr Rafiq's asylum claim was refused in August 2016. He appealed unsuccessfully, and became 'appeal rights exhausted' in May 2017. The Council wrote to him on 2nd June 2017 giving 28 days' notice that, since he was no longer entitled to access public funds, it intended to cease supporting and housing him.

6. It could do that only if it would not be inconsistent with Mr Rafiq's human rights. The Council undertook a human rights assessment on 17th June 2017. It concluded that:

   i) if support were withdrawn, Mr Rafiq would not be subject to 'treatment amounting to torture or to inhuman or degrading treatment or punishment' whilst in the UK (Art.3 ECHR);

   ii) returning to Iraq would not compromise his right to respect for family life (Art.8 ECHR);

   iii) he should apply to the Home Office for support as an unsuccessful asylum seeker, having no other means of support.

   It decided he would be given a final weekly allowance, and a travel warrant to go to the Home Office and apply for residual support before returning to Iraq.

7. He says he went to the Home Office about a month later, when he was still being accommodated by the Council. He says the Home Office told him the necessary referral from the Council had not happened. He says that on 31st July 2017 he understood he had to leave his accommodation, and was street homeless from that day until 7th August 2017. The British Red Cross helped him then; they arranged for him to stay with a hosting family and gave him money. They put him in touch with an established firm of solicitors specialising in public law and human rights, Bhatia Best.

8. On 15th August, the solicitors sent the Council a pre-action judicial review letter, challenging its human rights review and apparent decision to evict Mr Rafiq. The Council reinstated accommodation and support on 21st August.

9. More than two years passed. In late October 2019 Mr Rafiq was referred to his current solicitors, Gold Jennings Ltd, for legal advice on pursuing a complaint about the state of his accommodation. During his first consultation they advised him he could have a claim for damages from the Council for making him street homeless in the summer of 2017. They corresponded with the Council, and filed a money claim at the County Court on 18th November 2019. It was issued six days later.

10. Over the course of the following year, time for service of particulars of claim was extended. The Council made the present application for the case to be struck out on grounds of time limitation on 7th October 2020. It filed its defence on 20th January 2021, pleading limitation. Mr Rafiq made the present application for an extension of time on 8th February 2021.

Legal framework

11. The Human Rights Act 1998 includes the prohibition in ECHR Art.3: '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*'. Mr Rafiq wishes to claim the Council subjected him to inhuman and degrading treatment. He relies on the decision of the House of Lords in *Limbuela v SSHD [2006] 1 AC 396* as authority that being made street homeless, even for only a few days, can amount to such treatment. Their Lordships noted that unsuccessful asylum seekers are barred from working or claiming benefits, but are entitled to protection from destitution, and from the physical discomfort, loss of self-respect, threat to health, and despair of having to sleep rough without knowing how or when that may be brought to an end.

12. Mr Rafiq also wishes to claim that the Council unjustifiably interfered with his private and home life by making him homeless (ECHR Art.8).

13. Section 7 of the Human Rights Act provides for claims against public authorities for breach of human rights. Section 7(5) provides:

> Proceedings under subsection (1)(a) must be brought before the end of—
>
> (a)the period of one year beginning with the date on which the act complained of took place; or
>
> (b)such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

14. There is guidance in the caselaw for courts exercising discretion under s.7(5)(b). The Supreme Court in *Rabone v Pennine Care NHS Trust [2012] 2 AC 72* said this (paragraph 75):

> The court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one-year period; and the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant. However … the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question of interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980.

15. So it is not wrong for a court to have regard to the s.33 factors if it considers it proper to do so in the circumstances of a particular case, but they must not be treated as a fetter on discretion. Instead, the court is to examine all the relevant factors in a case and consider whether it is equitable to allow a period of longer than one year. There is no predetermined list of relevant factors, although proportionality will generally be taken into account. The weight to be given to any particular factor is a matter for the court. (*P v Tameside MBC [2017] 1 WLR 2127* at paragraph 67).

16. *P v Tameside* (paragraphs 77-79) is also authority that a court must have regard to the policy reasons for Parliament adopting a much tighter limitation period in HRA claims than usual, and that these may be similar to those for the tight 3-month limit in judicial review proceedings.

> It is clearly the policy of the legislature that HRA claims should be dealt with both swiftly and economically. All such claims are by definition brought against public authorities, and there is no public interest in these being burdened by expensive, time consuming and tardy claims brought years after the event.

The court must look critically at the explanations given for the delay, set against these policy considerations. Delay is always a relevant consideration whether or not there is actual trial prejudice to a defendant. However the 'burden of persuasion' on a claimant is not necessarily a heavy one and there is no burden to establish lack of prejudice to the defendant.

17. The High Court in *Alseran & Ors (Iraqi Civilian Litigation) v MoD [2017] EWHC 3289 (QB)* took emphasis from the judgments of Lord Dyson and Lady Hale in *Rabone* that the merits of a claim may be the '*most important of all*' the points which may militate in favour of granting an extension, and that it is '*important that fundamental human rights are vindicated*'. It also noted that 'evidential prejudice' to a defendant,

where delay means that witnesses cannot be traced or memories have faded, may militate against the fairness of granting an extension.

18. Most recently, the High Court in *Newell v MoJ [2021] EWHC 810 (QB)* directed itself not to put any qualification to, or gloss on, '*equitable having regard to all the circumstances*'. It must mean being fair to each side.

Analysis

19. I remind myself therefore that Parliament has determined a one-year primary limitation period for HRA damages claims to be brought as of right. There are reasons for that: general public policy reasons to do with the increasing obstacles the passage of time presents to holding a fair trial; and particular public policy reasons for limiting the exposure of public authorities to unpredictable and unmanageable demands on public resources, and encouraging the swift and efficient disposal of claims against them.

20. I also remind myself that Parliament has provided a broad discretion for a court to substitute a longer period where that is equitable, or fair to both sides, in all the circumstances. That will usually involve looking back at the history of the matter and the reasons for the delay. It will also involve making the best assessment of the merits of the claim as is reasonably possible in the inevitably limited circumstances of an interlocutory application.

21. I must not artificially fetter my discretion. I can have regard to decisions in other cases if and insofar as their facts seem to be comparable. But I must retain a focus on the specific circumstances of the case before me, and on what is equitable in those circumstances. I therefore consider all the factors put forward by each side here as potentially relevant, before turning to make an overall balancing evaluation of what is equitable.

(i) Relevant factors

(a) The apparent merits of the claim

33. The essence of the claim Mr Rafiq wishes to bring is that the Council was at all times legally obliged to maintain accommodation and support for him as a 'former relevant child'. In so far as its human rights assessment concluded that withdrawing support would not breach his human rights, including because there was nothing stopping him returning to Iraq, it was defective and unlawful. The Council had in any event apparently failed to make an operative referral to the Home Office. It had therefore rendered him street homeless and thereby subjected him to inhuman and degrading treatment. He suffered degrading conditions causing sleep deprivation, hunger and poor hygiene, and the humiliation of having to beg and endure witnessing street violence and drug abuse. He claims damages and aggravated damages, valued at a minimum of £10,000 for suffering and distress, including his treatment by and lack of apology from the Council; and up to £25,000 on the basis he had been particularly vulnerable on account of his mental health, and the period of homelessness aggravated his PTSD condition from moderate to severe.

22. The Council's pleaded defence asserts the lawfulness of the human rights assessment, and relies on Mr Rafiq's ability (and obligation) to return to Iraq as a means of avoiding

homelessness, since he had indicated, and the Council had found, no 'legal or practical obstacles' to doing so. It puts him to proof of the facts of his eviction and homelessness, and denies responsibility for them in any event. It puts him to proof as to the facts and causation of any harm, including to his mental health. It also relies on its prompt reinstatement of support as being 'just satisfaction' for any breach of Mr Rafiq's human rights, having been accepted as such at the time.

23. There appears little if anything between the parties as to the relevant law. They agree about the Council's Children Act duties towards Mr Rafiq and his 'appeal rights exhausted' immigration status. They agree a human rights assessment had to be carried out and acted on by the Council.

24. The parties did debate a point of law before me about the application and effect of the decision of the Court of Appeal in *O v Barking & Dagenham LBC [2011] 1 WLR 1283*. The point involves a conundrum (paragraph 32 of the judgment) about whether it is a local authority or the Home Office that has the ultimate responsibility for preventing destitution, and whether the decision in that case (that it was the local authority) properly applied to both active and 'appeal rights exhausted' asylum seekers. But since the Council's pleaded defence appears to accept (paragraph 16) that it '*is not entitled to take into account the availability of UKBA [UK Border Agency] section 4 IIA [Immigration and Asylum Act 1999] support when considering whether a child should be provided with accommodation*', it is not clear what if anything is said to turn on the point of law.

25. As to the facts, Mr Rafiq suggests all that is really in issue is whether the Council's reliance on there being 'no obstacles' to his return to Iraq was justifiable, and the extent of the harm caused by being street homeless. I am inclined to proceed on that basis. Although the Council puts him to proof of all the facts about his street homelessness, including the circumstances of his 'eviction', there is a clear enough *prima facie* case on the materials I have seen that he was in fact on the streets for the week in question, having left his Council accommodation, and that that was involuntary.

26. The question whether there were obstacles to Mr Rafiq's return to Iraq is simply put. The parties agree there were no *legal* obstacles since he was 'appeal rights exhausted', and had made no fresh legal claims to be entitled to remain, including by not raising a further case that return would be inconsistent with his human rights. The Council also says Mr Rafiq raised no *practical* obstacles. But he says he told them he had no travel documents and no money, and these were insuperable practical obstacles.

27. The Council's human rights assessment records Mr Rafiq saying he had no documents when he arrived in the UK. But on arrival he telephoned a friend in Iraq, with whom he had left all his identity documents, and asked him to send them over. The friend could not send them, but photographed them and sent them to his phone. Mr Rafiq said 'all this paperwork is now with the Home Office'; he showed the images on his phone and said he would send them on to his 'personal advisor'. He said his financial situation was 'not good': he got £57.90 a week from the Council and £33 a week as college bursary but had no other source of support or help. The assessment notes, under the heading of 'travel needs' (that is, whether it was possible for him to return to Iraq, including whether finance, passport and travel documents were available), that Mr Rafiq said '*I do not have the means to return home as I have no finance to do so, I have no passport, I have no travel documents*'.

28. The factual dispute on this point seems to come down to whether the Council was entitled, having been told that Mr Rafiq had no money for a plane ticket and no travel documents, to conclude there were no 'practical obstacles' to his flying back to Iraq. The assessment does not reach that conclusion on its face. I cannot see the Council addresses the point anywhere else, either at the time or since. The Council explains why Mr Rafiq had no legal basis for staying in the UK and not returning to Iraq. It explains why there were no obstacles of any sort to him *being* in Iraq and living and working there. But I cannot see that it deals with the point of his having no money or documents to get there.

29. I have read the judgment of the Court of Appeal in *Clue v Birmingham City Council [2011] 1 WLR 99* which indicates (paragraphs 55-56) that a local authority does have to give its mind to this issue. Where the only potential impediment to an unsuccessful asylum seeker's return is practical in nature, such as being unable to fund their return, it is open to the authority to avoid breach of human rights by arranging transport back to country of origin. I have no evidence the Council here gave its mind to this.

30. It may be that the 'paperwork now with the Home Office', and the practicalities of the referral to the Home Office, is some part of the answer to this point. I also accept there is no evidence Mr Rafiq ever asked for travel documents and a plane ticket, no doubt because he did not want to go back to Iraq. But the Council's case for being entitled to withdraw support and accommodation relies on his not being made street homeless because he had the option to return to Iraq and there was no 'practical obstacle' to his doing so on or before 31st July 2017. I have no evidence of steps taken by either the Council or the Home Office to effect, facilitate or enable Mr Rafiq's return to Iraq, or that he was able to do so without such steps. I accept therefore for present purposes that there is a *prima facie* case that Mr Rafiq was rendered street homeless by the withdrawal of support and accommodation by the Council in circumstance in which he was unable in practice to avoid that predicament by returning to Iraq.

(b) The length of delay

31. The parties differ as to when time starts to run in the present case. Mr Rafiq says that, because of his principal reliance on Art.3, it runs either from the date he was made homeless or the date he was taken off the streets by the Red Cross, because that was when the 'treatment' complained of began and ended. The Council says it runs from the date of its human rights assessment, which is the unlawful decision complained of.

32. They also differ as to when the delay should be regarded as ending. Mr Rafiq says it is when his current solicitors put the Council on notice of his intention to bring a damages claim. The Council says it is when the claim was issued (and the time between the solicitors noting the issue and issuing the claim should count against them, not in favour).

33. It makes a few months' difference either way. The claim comes either 15 or 17 months after the expiry of the one-year deadline. So the period in issue is well over double the time for bringing a claim as of right. The Court in *P v Tameside* was clear that '*the court must take into account that the primary limitation period under the HRA is one year, not three years*'; and regarded an 18 month delay as 'considerable'.

34. Mr Rafiq seeks to pursue a claim brought between 2¼ and 2½ years after the event. I consider that delay to be a considerable one, relatively speaking, in these circumstances. I also note that the present application for an extension of time was not brought until February 2021, well over a further year later, months after limitation had been pleaded by the Council, and more than 2½ years after the expiry of the primary limitation period.

(c) Reasons for the delay

35. I am to 'look critically at the reasons for the delay', bearing in mind the public policy considerations underlying the short primary limitation period. The reason for the delay, put one way, is simple: Mr Rafiq did not realise, until he approached his current solicitors about a different matter, that he might have a damages claim. But there is further context. Mr Rafiq was represented at the relevant time by experienced human rights solicitors. They asserted a judicial review and human rights claim against the Council, but they did not seek damages. The parties say a number of things about this.

36. Mr Rafiq says he does not remember a damages claim being part of the conversation he had at the time with his former solicitors and it did not occur to him to ask about the possibility. The solicitors represented him for only a short time, and the urgent priority at that time was, and was limited to, putting a roof over his head and rescuing him from destitution. This was not a case like ***P v Tameside*** where a claimant has been 'continuously represented' throughout the primary limitation period.

37. He also says that even if the solicitors were in a position to, and should have, issued a damages claim at the time, that is not something which should be held against *him*. There is '*no rule of law to visit the faults of the lawyers upon the claimant*' (*Corbin v Penfold QBENI 1999/1257/A2* at paragraphs 22 and 26).

38. Mr Rafiq makes a third point. He says in a witness statement prepared for these proceedings he does not think he would have been able to cope with bringing a civil claim against the Council anyway because of his poor mental state at the time. I have before me a medical report, also prepared for these proceedings on Mr Rafiq's instructions and dated 1st July 2020. It says Mr Rafiq's early life history caused him to develop a post-traumatic stress disorder. His condition had been exacerbated by the failure of his asylum application, and again by being made homeless. It offers an expert opinion that his PTSD had reached a 'severe' state at the relevant time.

39. I have looked carefully at the letter Bhatia Best wrote to the Council on 15th August 2017. They mounted a detailed, line by line challenge to the Council's human rights assessment. I am satisfied the solicitors were also in possession of the primary facts of Mr Rafiq's homelessness (he had been street sleeping for a week '*at train stations and parks'*). That included having sight of a letter the Red Cross had written to the Council on 9th August 2017 accusing it of '*enforcing destitution onto our client and violating his Article 3 rights*' and asking that it '*continues to support and accommodate Mr Rafiq on a without prejudice basis while you look into the matter and conduct the necessary reviews*'. The Bhatia Best letter notes that no reply had been received to that letter. It also cites ***Limbuela*** extensively. But the only remedy sought '*at this stage*' was reinstatement of support and housing.

40. It is impossible to verify on the materials before me that that was on (informed) instruction from Mr Rafiq. His present solicitors suggest otherwise, but it is not clear

on what basis. The most Mr Rafiq says is that he cannot remember. As he is fully entitled to do, he has not waived his privilege. Solicitors have professional obligations to their clients about the advice they give, the instructions they take, and acting in their clients' best interests. Unlike *Corbin v Penfold* this is not a case in which it is agreed that the 'accepted explanation of the delay is the delay' – or, it might be said, any other fault – 'of the solicitors, and it is to be laid at their door'. There are other possible explanations for the apparent course of events here than the solicitors' negligence, or overlooking the matter of damages in the rush to send an urgent letter about accommodation (when Mr Rafiq was, at least temporarily, accommodated).

41. The Bhatia Best letter was swiftly followed by the Council providing the remedy sought – reinstatement – and the dropping of the threatened JR. The Council says it does not now have records fully to explain its decision at the time, but I have a witness statement from a Council official stating a belief that '*the matter had been resolved by mutual consent by August 2017*' and '*without any admission of liability*'. The Council points to an email exchange with Bhatia Best dated 18th August: the Council said it would 'reinstate support' for Mr Rafiq and had '*already established contact with the British Red Cross as it pertains to their requests on behalf of Mr Rafiq, these will be followed through*'; and Bhatia Best confirmed that '*in light of your agreement to reinstate support as of 21/8 proceedings will not be issued*'.

42. So the alternative explanation to negligence is that the Bhatia Best letter reflected an informed decision to limit the scope of the threatened legal action 'at this stage' to enhance the prospect of a quick result meeting Mr Rafiq's most urgent needs. What Mr Rafiq says now about not being able to face litigation at the time would be consistent with his solicitors acting on instruction to maximise the prospect of securing the principal relief sought and minimise the risk of litigation. Bhatia Best's letter is at least consistent with a tactical decision about what would be in Mr Rafiq's best interests overall, including on a considered assessment of the merits, and possible timing, of adding a threatened damages claim.

43. I have no evidence of professional fault, and if a good alternative explanation is available, it should generally be preferred. On the materials available, the more likely explanation for a damages claim not having been raised at the time is that Bhatia Best acted consistently with their professional obligations and a considered decision was taken not to.

44. It is also difficult to attach weight to what Mr Rafiq says about his mental state being itself a reason to explain the delay. It is not said he lacked capacity to instruct his solicitors. Bhatia Best was clearly able to obtain the instructions necessary to threaten JR proceedings. The damages claim would have arisen out of essentially the same set of facts. They expressly reserved the position on remedy 'at this stage'. It is not easy to understand what Mr Rafiq says as an explanation on its own for a damages claim not being raised then or within the following year.

45. The difficulty of unpicking all of this at what is now 4½ years' remove from the facts illustrates the point of a short primary limitation period. I have been given no material on which I can place real weight that Mr Rafiq's solicitors failed to act in his best interests at the time, or were unable to raise a damages claim because of Mr Rafiq's mental state. It would be wrong, and indeed inequitable, to speculate further about that. I am left therefore with no positive explanation for the delay other than that the matter

was resolved at the time to the parties' mutual satisfaction and Mr Rafiq now wishes to revisit it for a fuller vindication of his rights.

(d) Evidential prejudice and the prospects of a fair trial

46. The Council says it would suffer substantial evidential prejudice in defending this claim. Its witness statement explains that its key witnesses, who dealt with Mr Rafiq's case at the time, are either no longer in post or on long term sick leave, and cannot be expected to give evidence. I am told that, in the absence of clear and accessible documentary records, the evidence of these witnesses would be important in establishing matters such as the precise circumstances in which Mr Rafiq left his accommodation on 31st July 2017, the reasons for that, the basis on which the Council reinstated support for him afterwards, and the practicalities of his return to Iraq.

47. But Mr Rafiq objects that either it would not be unreasonable for the Council to obtain evidence (at least statements) from these potential witnesses, or that little is likely to turn on what they might be able to say anyway.

48. I take into account that simply having left the Council's employment is not a particularly weighty reason for not obtaining evidence. Limited detail is provided about the practical difficulties the Council would face in doing so, or the nature and degree of the alleged prejudice. I do at the same time take into account that there are issues potentially going to liability in this case about which there is some evidential obscurity, and on which the caseworkers might have been able to shed light; and I do take into account that the unassisted memories of busy caseworkers at this sort of remove from events are likely to have been significantly eroded. Mr Rafiq provides limited evidence about the precise circumstances of his alleged eviction and what he was told at the time. The human rights assessment form is very brief and there may be helpful context. It may also be possible to put context around the consideration given to the practicalities of Mr Rafiq's return to Iraq. It would be wrong to speculate too far, but it does appear that the Council would face the prospect of significant adverse inferences being drawn from the relatively scant documentation I have seen, and that its ability to address that with witness evidence may be compromised to at least some degree.

49. There is also an issue about the medical evidence. There is little in the way of relevant mental health evidence dating from close to the time of the events themselves. The report on which Mr Rafiq now seeks to rely dates from nearly three years subsequently. It is not agreed. It identifies a PTSD dating from Mr Rafiq's childhood and from his 'long and precarious journey to the UK' including threats to his life. It opines that this was then exacerbated by '*a number of events since his arrival in England*', principally (a) between April and June 2017, as a result of the failure of his asylum application and (b) the week of street homelessness in August 2017. It says his condition varied in its severity over time (including most recently in response to the constraints imposed by the covid pandemic). Its prognosis was that '*his post-traumatic condition will be vulnerable to periodic exacerbations especially in response to adverse life stressors. This will be particularly likely if he has to interact with government agencies such as the police or local authority*'.

50. There are a number of difficulties here. It was accepted before me on Mr Rafiq's behalf that his mental ill-health is multi-factorial, and that, assuming liability is established, there is a burden for him to discharge as to the causation of any particular consequences

by the period of street homelessness, as opposed to the number of other 'life stressors' – including entirely normal and lawful interactions with authorities, and the failure of his asylum application – operative at or around the same time. Those difficulties are apparent on the face of this report as it stands. Nevertheless, for the Council to engage fully with the report – which does state an opinion that the PTSD condition deteriorated from moderate to severe '*from being made street homeless until approximately the end of 2019*' – it would need to instruct its own medical expert. The ability of an expert at this remove to be able to make a fair and robust assessment of the effect of the week of street homelessness on an admittedly multi-factorial and fluctuating condition must be regarded as significantly compromised by the passage of time. Not only does that raise an issue of prejudice to the Council in defending this claim, it is not clear on what basis the issues of quantum and causation could now be fairly tried on their merits under these conditions.

(e) Proportionality

51. Mr Rafiq's valuation of the claim he wishes to bring relies on the guidance set out at paragraph 68 of the judgment of the High Court in *D v Commissioner of Police of the Metropolis [2015] 1 WLR 1833* for assessing damages in Art.3 violation cases (this had a particular focus on police cases, but is expressed in general terms). Damages are 'habitually' awarded for any Art.3 violation; quantum turns on quality of evidence, degree of culpability by the public authority and extent of the harm. Three broad categories are envisaged: (a) where a court wishes to make a 'low or nominal' award (up to about £8,000); (b) 'routine' violation of Art.3 with no serious long term mental health issues and no unusual aggravating factors (in the region of £8,000 to £20,000) and (c) (from £20,000 to £100,000 or more) where there are 'aggravating factors' such as medical evidence of material psychological harm, mental harm amounting to a recognised medical condition, morally reprehensible conduct by the state, long term systemic or endemic failings by the state, etc. Mr Rafiq values his claim as lying between the second and third categories.

52. That would be strongly contested by the Council. If the claim got as far as a quantum evaluation, it could contend that even at its highest the medical evidence suggests the temporary exacerbation of a fluctuating, multi-factorial condition. There must be real doubt about how far a trial court would now be able to rely on medical evidence to find significant aggravation on the facts of this case. The Council could also contend that, at its highest, what is alleged in terms of culpability is a failure to satisfy itself properly as to the absence of 'practical obstacles' to Mr Rafiq's departure to Iraq, rather than anything more systemic or reprehensible aggravating the basic fact of making him street homeless. Mr Rafiq complains of lack of apology and the Council's attitude, but the Council points to the promptness with which it responded to the request to reinstate shelter and support, and indeed continued to do so.

53. At this stage, it seems more likely than not that the claim might be valued at the lower end of the range Mr Rafiq asks for, perhaps between the first and second categories of *D v MPC*.

54. I have been directed to what the Court of Appeal said at paragraphs 79-81 of its decision in *Anufrijeva v Southwark LBC [2004] QB 1124* about proportionality and human rights damages claims generally. It is contended on Mr Rafiq's behalf that that is of limited application in Art.3 cases; these, it is said, should properly be considered as cases about

a claimant's 'treatment' by a public authority, and as distinct from 'maladministration' cases. Of course, as discussed below, the two may be closely linked, but I do hold in mind the Supreme Court guidance in *Limbuela* that *unqualified* human rights, such as the Art.3 prohibition, must be vindicated and that considerations over and above the value of the claim in damages are engaged.

55. I note, all the same, that Mr Rafiq's legal costs alone have already exceeded £30,000, and that *Anufrijeva* and *P v Tameside* suggest that proportionality is at least a factor to be taken into account at some level.

(ii) The equitable balance

56. The strongest argument in favour of extending time for Mr Rafiq to bring his claim is that, on the evidence I have seen, there is at least arguable merit in it. On the best assessment that can be made at this stage, he establishes a prima facie case that the Council rendered him street homeless without properly considering that his only alternative – return to Iraq – was not a practical possibility without travel documents or money for the flight. On the authority of *Limbuela*, that amounts to inhuman and degrading treatment and a violation of his Art.3 human rights, and he is on the face of it entitled to vindication for that. He provides evidence of his adversities in that week in the summer of 2017 and of his vulnerability on account of his poor mental health. I weigh all of this materially in his favour.

57. Against that must be weighed the reservations about the prospects for the fair conduct of a trial some five years or more after the event. I give at least some weight to the evidential prejudice likely to be faced by the Council. It is perhaps unlikely that much will prove to turn on the precise circumstances in which Mr Rafiq found himself on the street. But on the short point at the heart of the case, about whether proper consideration was given to the 'practical obstacles' of return to Iraq, it may be that the memories of staff, including Mr Rafiq's personal advisor at the Council, could have a real part to play and it is unlikely, even if the staff can be traced and are willing to testify, that they will be able to remember detail.

58. I do also give rather more weight to what is likely to be the prohibitive difficulty for the Council in obtaining robust medical evidence now on the question of the impact of the homelessness on Mr Rafiq's health. There is an equality of arms issue where a report three years after the event can only be met by a report four and a half or five years after the event, in a case where the time-sensitive and multifactorial nature of the mental condition appears from the evidence so far. I also consider this a factor which ought to be regarded as bearing down on the quantum of damages which can be regarded as properly in issue in this case.

59. Turning, however, to the key issue of the delay and the reasons for it, I have already said that I regard the delay in this case as considerable. It is well over double the primary limitation period set by Parliament. That means I need to look critically at the reasons for it. I have not accepted solicitor negligence or inability to instruct at the time as good explanations for the delay, for the reasons I have given. That leaves only one explanation to be considered in *favour* of an extension: that Mr Rafiq, as an unrepresented layperson from very shortly after the event, had not understood his rights until he happened to approach new solicitors about something else.

60. Had that reason stood alone as an explanation for the delay, I would have been able to give it little weight in any event. There are good public policy reasons – the very same reasons underlying the short primary limitation period – for discouraging routine applications for extension of time where solicitors' firms happen upon potential cases long after the event: it does not reflect the balance Parliament has struck between the vindication of individual rights and the exposure of public authorities to litigation and expense.

61. But this reason does not stand alone in the present case. Such positive explanation as does appear for why this claim was not brought within the primary limitation period must in my view be weighed heavily against extending time. That is the evidence suggesting that the mutual understanding between the parties at the time, when Mr Rafiq was represented by experienced solicitors, was that the threat to bring legal proceedings in relation to his period of homelessness was withdrawn in consideration of the prompt reinstatement of support and housing.

62. The public policy reasons for discouraging legal firms happening upon potential cases long after the event from making routine applications for extension of time, apply with especial force where the case for doing so requires a court either to impugn without positive evidence the conduct of solicitors representing a claimant at the time, or to speculate at a distance about the precise terms on which threatened legal proceedings arising out of the precise facts complained of were compromised. The general observations in ***Anufrijeva*** requiring a court to look 'critically' at attempts to recover HRA damages by any procedure other than judicial review apply with additional force where the reason for not doing so is that the JR with which such a claim would be associated has long since been withdrawn by mutual consent. Even allowing for the qualitative difference between Art.3 and Art.8 cases, and the issue of the violating 'treatment' of a victim over and above the maladministrative decision precipitating it, there are strong arguments of fairness, good administration and the proper conduct of litigation for JR and HRA damages claims arising out of the same facts to be considered in the round and dealt with together.

63. More specifically, in the present case, I am satisfied on the evidence I have seen that a legal grievance was raised against the Council at the time citing *both* violation of Mr Rafiq's Art.3 rights *and* the allegedly maladministrative decision precipitating it (itself comprising a defective human rights assessment). In return for not pursuing that grievance in litigation, the Council was asked to, and did, promptly reinstate support and accommodation and continued to do so. I accept that the Council genuinely considered the matter closed in these circumstances and that, as in ***P v Tameside***, the attempt to reopen it now came as a 'bolt out of the blue'. I accept that, without admitting liability, the Council genuinely considered it had made the swift amends asked for, which could fairly be regarded as a vindication of, and just satisfaction for, Mr Rafiq's rights. I accept it had good and reasonable objective grounds for that view. There is a strong public interest in encouraging public authorities to deal quickly, efficiently and *finally* with legal grievances, as seems best suited to eliminating the need for litigation on both sides. They are entitled to look to the courts to support them in doing so.

64. The unfairness, prejudice and administrative burden the Council faces if time for this claim is extended is real. It lies in a combination of the undoing of an arrangement it had fairly assumed was final, genuine trial disadvantage, and the sudden priority consumption of public resource at the expense of other calls upon it, from which the

public ultimately suffers. As to the first of these, I do not need to go so far as to conclude that this would be an abusive claim; but I do consider the litigation circumstances in which this application is brought to weigh heavily against the equitableness of granting it. As to the second, I consider there to be real concerns about the possibility of a trial fair to both sides, given stale, inaccessible or irretrievable evidence of different sorts. And as to the third, the substantial expense to the public purse which would be involved in establishing how much additional vindication of his rights Mr Rafiq is entitled to, beyond that which on any view he has already secured to at least some extent, is not in proportion to the likely degree of additional vindication which is realistically capable of being achieved.

65. The facts of the ***P v Tameside*** case are very different from those of this case. But I adopt the final analysis in that case, and adapt and apply it here. Set against the inequity from the standpoint of the Council in granting an extension of time in this case, I do not find countervailing equity of any strength in favour of granting Mr Rafiq's application. He will undoubtedly suffer *prejudice* in not being able to pursue his claim; he at least had nothing to lose and the hope of a 'life changing' award of money. Claimants face loss of claim in all 'limitation discretion' cases where there is no *right* to litigate. That is what limitation is; it is inherent in the whole exercise. What is more crucial is to consider the question of *justice* or *fairness as between the parties*. Here, for the reasons I have given, I do not consider Mr Rafiq will suffer *injustice* (as distinct from *prejudice*) in being denied permission to bring this claim, so long after the facts giving rise to it, after the Council responded promptly and in full to his complaint at the time, and after the primary limitation period expired. I do not consider it equitable – fair to both sides – for time to be extended in this case.

Decision

66. The Claimant's application is refused. The Defendant's application succeeds.