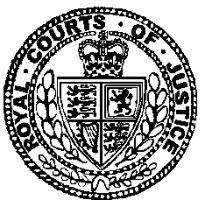

Neutral Citation Number: [2022] EWHC 1183 (Admin)

No. CO/1772/2020

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 May 2022

Before:

MRS JUSTICE FOSTER DBE

B E T W E E N:

THE QUEEN
ON THE APPLICATION OF
YOUSF SRDAR ABULBAKR

Claimant

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defendant

Mr S. Galliver-Andrew (instructed by **Duncan Lewis Solicitors**) for the **Claimant**

Mr J. Anderson (instructed by the **Government Legal Department**) for the **Defendant**

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be Tuesday, 17 May 2022 at 4:00 pm.

JUDGMENT on the ISSUE OF DAMAGES

1. This is the judgment of the Court on the issue of Quantum of Damages following written submissions by parties. It is consequent on a substantive judgment given on 31 July 2020 in which I gave the judgment for the Claimant on the issues of principle arising following which the parties were despite extended negotiation unable to agree the Quantum of Damages due. Written submissions were received as to the appropriate approach to and level of damages, and as to costs, for which the Court is very grateful.

1.0 FACTUAL BACKGROUND

2. For a fuller history reference should be made to the substantive judgment. The main features of the case were as follows.

3. A month before the licence period of the Claimant (a foreign national offender ("FNO")) began, an immigration review in November 2019 noted the Probation Service's concerns, and a previous breach of bail conditions regarding the Claimant's ex-partner and their children – to whom he posed a high risk of serious harm, and a medium risk to other members of the public. Removal at that point was expected to take place within three months. In December when the licence period began the Claimant remained in prison conditions rather than transfer to immigration detention. That transfer took place in March 2020. A release pro-forma for Schedule 10 accommodation, filled in in cases where an FNO is assessed as posing a high or very high risk and on release will lack suitable accommodation, was completed on 10 January 2020. That form was not however authorised independently, until 27 April 2020. In it was a statement that there was an exclusion zone of Dudley and a view that any placement in the West Midlands would be too close to the exclusion zone to be viable. During this time the Claimant was asking to be returned to Iran as soon as possible in the identity of a Mr Suleimani.

4. However, upon transfer to Harmondsworth IRC, the picture changed. The Claimant had apparently been in touch with the Iraqi Embassy; an enquiry telephone call regarding a Yusef Abulbakr had been received at the IRC indicating that this person wished to return to Iraq (not Iran) and held identity cards in the Abulbakr identity. The identity materials were produced, but shortly thereafter flights were suspended to Iraq because of the COVID-19 pandemic. During the forthcoming weeks the Claimant indicated a desire to return to Iraq as soon as possible.

5. Regrettably a bail application to the Secretary of State sent on 30 March 2020 elicited no substantive response from the Defendant. This included a request for a Schedule 10 address, and indicated the Claimant was keen to avoid the area in which his wife lived. When the issue of bail was considered by the Defendant prior to the bail hearing before the Tribunal, there were worrying errors including a failure properly to consider the case on detention, apparently "cutting and pasting" paragraphs from bail summaries applicable to other persons and not this Claimant. This did not in the event preclude the Tribunal from granting provisional bail until 5 May, requiring the Defendant to find accommodation to give effect to that bail grant by 6 May 2020. Inevitably, bail lapsed.

6. The liability judgement records a number of significant administrative errors. An address was identified on 23 May however its provision had not taken into account the Probation Service's express wishes concerning avoiding the West Midlands, and it had to be rejected. Likewise, it took the Defendant some time to reject Serco as a provider, since only hotel accommodation, again, expressly unsuitable, could be provided by them. Difficulties also remained with the replacement provider ClearSpring.

7. The Claimant had argued there had been a breach of the second, third and fourth principles in *Hardial Singh* and that the Secretary of State acted unlawfully in failing to provide him with accommodation pursuant to Schedule 10 of the Immigration Act 2016, so he could not take advantage of the grant of bail in principle which had been made in his favour by the FTT on 22 April 2020.

8. It was not in issue that the Claimant fulfilled the Schedule 10 criteria and that the time came when the Secretary of State indicated she could use this power to accommodate Mr Abulbakr. She accepted , as Edis J had explained in *Sathanantham v Secretary of State for the Home Department [2016] EWHC 1781 (Admin)*, [2016] 4 WLR 128, that a lack of resources and administrative convenience provided no justification for delay. In that case the Judge had said the following at para.76:

> "*Delay in processing an application whose outcome will affect the liberty of the applicant may require the intervention of the court. R v. Home Secretary ex.p Phansopkar [1976] 1 QB 606, 626B-G per Scarman LJ is authority for this, if any were needed. This is a principle of the common law. That was a case where the right to family life under Article 8 was engaged rather than the right to liberty, but the common law has always protected the right to liberty. Habeas corpus and bail are creations of domestic law in England and Wales. In R (Noorkoiv) v. SSHD and another [2002] EWCA Civ 770 the Court of Appeal held that the obligation to avoid delay in determining a person's right to be released is a more intense obligation than the duty to try criminal cases within a reasonable time. Lack of resources and administrative necessity do not justify such delays. This was a decision framed in terms of Article 5. It is authority for the need for public authorities to have effective systems for taking steps which are designed to effect the release from detention of any person.*"

9. The Claimant here relied on the recognition in that case that a lack of vigour in pursuing accommodation and a deference to criminal agencies' objections to bail, were capable of amounting to maladministration in connection with the accommodation.

10. In the present case the Defendant was also contending with considerable further burdens imposed by the COVID-19 pandemic and restrictions on international flights. These restrictions necessarily impacted her ability to remove FNO's within a reasonable time and upon the availability of accommodation from which evictions had been paused.

11. The central concluding paragraphs on the issue of unlawful detention in the liability decision in the present case were as follows:

"*82. ... There is no precedent for the circumstances of the COVID pandemic and, in my judgement, the time did come, in early June, when it was clear in this case that there was no reasonable prospect of removal to Iraq. Indeed, in terms, the position was deteriorating in the memo of 6 June.*

"*83. ... I cannot find a reasonable basis for a belief that this applicant could be deported in what was for him a reasonable time. As stated, he had already been detained, even on a discounted basis, for three or four months.*

"*84. ... In my judgement, it was sufficiently clear after 6 June that no realistic prospect did arise allowing her to remove him within a reasonable time. Allowing for the transfer of information administratively and its consideration, I date the time at which it became unlawful from 8 June.*

"*85. I have come to the conclusion that what happened in this case does not amount to the egregious failure that characterises unlawfulness under Hardial Singh (iv) in respect of the approaches of the Secretary of State to removal in this case. Both the timetable of the attempts made in respect of documentation in respect of removal given the pandemic and in consideration of the issues raised, did not, although in certain cases there were delays, reach the level at which it is possible for this court to interfere and say that it was more than an administrative failure or a series of administrative failures.*

"*86. The position with regard to accommodation is, however, different. The system had been recognised elsewhere as not working as it should. In this case it did not. It did not in large part through what must be categorised by avoidable error and through dilatoriness. The Secretary of State, frankly and properly, admits that there were cumulative failures but does not accept that they reached the appropriate level for a characterisation of unlawfulness. I disagree. When stimulated by reminders and when imposed upon by express urgency from the end of May 2020, accommodation providers appear to have taken about one month (that is to say, about thirty-five days, perhaps more than a month) until 23 June to find what they mistakenly thought was suitable housing. That is so even in COVID conditions. Had the application been promptly dealt with, even from the date of the bail grant on 22 April, that suggests that the system operating under COVID pressure could have produced accommodation by the end of May or the beginning of June.*

"*87. The failure to appreciate Probation would object to housing in West Midlands was a serious one. That, compounded with the sudden and extraordinary pressure of the COVID crisis, resulted in a series of extreme delays to the provision of accommodation. Allowance may come, as I have indicated, for some of those delays*

due to unavoidable crisis, but there remains, as I have described, a kernel of failing, given the timescales that appear to have been possible once appropriate speed was realised.

"*88. Once again, the court has great sympathy with hard-pressed services. … . But it is plain to me that the system is not working even when it is working to the best of its capacity.*

"*89. On the facts of this case, even during the crisis, a period of four to five weeks should have seen provision of accommodation for this particular Claimant, given the requirements that he had. That would have taken his release somewhere to early to mid-June, allowing for a period of grace in the Secretary of State. This chimes with my other findings as to the lawfulness of the length of his detention in any event in all the circumstances and it chimes with my findings as to when the reasonable prospect stopped being available.*

"*90. Accordingly, I will make the declarations in respect of a period of unlawful detention between 8 June and 17 July 2020. That is the most favourable to the Claimant under each of the heads.*"

12. I did not make an Order to the effect that the Claimant was, at the date of the judgment, unlawfully detained since the Defendant produced up to date evidence that flights had just been resumed to Baghdad and removal was now possible within a reasonable time. No Order for the release of the Claimant was therefore made.

13. As a result of the judgment the Claimant falls to be compensated for a period when he was unlawfully detained between 8 June and 17 July 2020, which is a period of 40 days.

14. In calculating that period, as indicated, the Court took into account the demands of the COVID-19 pandemic and a recognition of the difficulties in accommodation provision. The case nonetheless revealed serious error particularly in the failure properly to give effect to the presumption against detention.

15. This was not a case of unlawfulness under *Hardial Singh* (iv) as the judgement stated. The Court characterised the failure as "avoidable error" and "dilatoriness". Mistakes as to the suitability of the housing, (through overlooking the requirement for a proper address, which could not be a hotel), and overlooking the proscription of the West Midlands area.

16. Following a continuing failure of the parties to agree an appropriate sum for damages the Court was furnished with helpful written submissions.

2.0 THE PRINCIPLES

17. There was no dispute as to the general principles to be applied to assessing damages as set out by Laws LJ in *MK (Algeria) v. SSHD* [2010] EWCA Civ 980. In paragraph [8] he summarised:

"*1) The assessment of damages should be sensitive to the facts and the particular case and the degree of harm suffered by the particular*

> *Claimant: see the leading case of Thompson v Commissioner of Police [1998] QB 498 at 515A and also the discussion at page 1060 in R v Governor of Brockhill Prison Ex Parte Evans [1999] QB 1043.*
>
> "*2) Damages should not be assessed mechanistically as by fixing a rigid figure to be awarded for each day of incarceration: see Thompson at 516A. A global approach should be taken: see Evans 1060 E.*
>
> "*3) While obviously the gravity of a false imprisonment is worsened by its length the amount broadly attributable to the increasing passage of time should be tapered or placed on a reducing scale. This is for two reasons: (i) to keep this class of damages in proportion with those payable in personal injury and perhaps other cases; and (ii) because the initial shock of being detained will generally attract a higher rate of compensation than the detention's continuance: Thompson 515 E-F.*"

18. It should be noted that the Claimant has, as the Defendant observes, not particularised his aggravated and exemplary damages' claims, as the rules require, in his amended pleadings. Those particulars do appear in the written submissions made so the Court may see the basis on which it is said the entitlement arises, however, that ought to have been more clearly set out. For reasons which will become apparent, I propose in any event to deal with the claim as it is presented now, noting the Defendant resists any entitlement in the Claimant to damages beyond a basic award.

19. The Claimant puts its primary case on the basis that this case is analogous to that of *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453; alternatively, "if the court is not satisfied that full exemplary damages in line with *Muuse* are appropriate attention is drawn to *R (Diop) v Secretary of State Stayed for the Home Department [2018] EWHC 3420 (Admin)*".

20. In *Muuse* a Somali-born Dutch national was arrested with a view to his deportation to Somalia when there was no power so to deport him. There was a series of striking failures including inadequate investigation into his nationality, no proper notice of his detention, no opportunity to give reasons against deportation and, thereafter a failure to answer correspondence and a maintenance of detention even after the Defendant had conceded his Dutch nationality. The Court of Appeal recorded the following finding of the first instance Judge as follows:

> "*73. One mistake would be bad enough but at least one could be forgiven. But this number of mistakes and the failure to implement clear procedures is unforgiveable. This is an appalling indictment of the way the Home Office and HMPS were operating in 2006 when detaining [Mr Muuse]. Such conduct reflects an indifference to doing justice on the part of those who dealt with [Mr Muuse]'s case on the [Home Secretary]'s behalf.*"

21. When considering the issue of misfeasance in public office the Court of Appeal was constrained, having rehearsed some of the salient facts, to say the following at paragraph 60 (iii):

> "*In these circumstances, the actions of the officials can only have been explicable on the basis (1) that the officials were recklessly indifferent to the legality of their actions or (2) that they were either too incompetent to exercise the powers entrusted to them or grossly negligent in the discharge of their duties. The second alternative is a defence expressed in other contexts as "I did not act in bad faith or dishonestly, but I was very foolish.*"

22. The Court of Appeal was excoriating elsewhere in its judgment about the conduct of the Defendant and, summarising the law on exemplary damages, held them to be appropriately awarded in that case.

23. I pause to note it is not in issue that exemplary damages are non-compensatory, rather they operate as a punishment and deterrence to the Defendant. The two categories of action attracting such awards are, where there is oppressive, arbitrary or unconstitutional action by servants of the Government, or where conduct is calculated to make a profit for the Defendant which exceeds such compensation as may be payable to a Plaintiff (per Lord Devlin in *Rooks v Barnyard* [1964] AC 1129).

24. Thomas LJ in *Muuse* said the following about the first category of conduct, emphasising that the punishment of outrageous conduct underlies aggravated damages:

> "***(iii) The requirement of oppressive, arbitrary or unconstitutional conduct***
>
> "*69. A number of authorities were cited as being helpful in determining how Lord Devlin's summary of the legal position should be refined including Holden v Chief Constable of Lancashire [1987] QB 380 and AB v South West Water [1993] QB 507. In the first case, Puchas LJ considered that, although Lord Devlin used the words "oppressive, arbitrary or unconstitutional" disjunctively, it was not enough that the action be simply unconstitutional; there had to be an improper use of "constitutional or executive power". In the second, Sir Thomas Bingham MR (at page 529) after pointing out that Lord Devlin's phrase ought not to be subject to minute textual analysis as it was a judgment, not a statute, considered that there was no doubt what Lord Devlin was talking about:*
>
> *"It was gross misuse of power, involving tortious conduct by agents of the government."*
>
> "*70. Lord Devlin's phrase "oppressive, arbitrary or unconstitutional" must be read, as was made clear by Lord Hutton in Kuddus v Chief Constable of Leicestershire [2001]UKHL 29, [2002] AC 122 at paragraph 89, in the light of Lord Devlin's further view at page 1128:*

> "*In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.*"
>
> "*As Lord Hutton observed, the conduct had to be "outrageous" and to be such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law.*
>
> "*71. In my view, the guidance given by Sir Thomas Bingham MR and Lord Hutton is sufficient. There is no need for this to be qualified by further looking for malice, fraud, insolence cruelty or similar specific conduct. There is no authority that supports Dr McGregor's view to this effect.*"
> [Emphasis added.]

25. It is also not in issue that aggravated damages could be awarded in addition to basic damages in cases of false imprisonment as set out by Lord Woolf in *Thompson v Commissioner of Police* [1998] QB 498 and in order to mark humiliation or oppression, where at page 516 he said the following:

> "*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 this 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.*"

26. The Claimant's alternative case is based on *Diop.* In that case basic, aggravated and exemplary damages were pleaded (following directions properly to set out and plead the damages claimed in the skeleton). In the event the court disallowed reliance upon a previously disavowed, new claim for exemplary damages. *Diop* was therefore not a case in which exemplary damages were an issue. In that case the Secretary of State proffered £2800 by way of entitlement to damages, on a basic basis. The Claimant was asking for £16,000 by way of basic damages and £5000 on top as aggravated damages. The Court awarded £9,000 for 28 days loss of liberty.

27. *Diop* was also a case concerning a failure to secure accommodation following a grant of bail in principle. In that case the Claimant asserted his right to aggravated damages on the grounds that the Claimant's detention was the product of the Defendant's unlawful

system for allocating bail accommodation to high risk offenders, which had been exposed by Edis J in July 2016 in the case of *Sathanantham* (above). In any event, *Diop* submitted also that aggravated damages were appropriate because of the failures to follow up, the inadequate attempts to chase accommodation and failure to expedite in a timely manner. The Defendant in that case defended the claim for aggravated damages saying there was no evidence of conduct that was high-handed, insulting, malicious or oppressive, and nothing that "added insult to injury". The Court identified particular features of the cases as including there was no initial shock, but from a particular date, increasing further with the absence of accommodation, the Court found anger and anxiety. He had a desire to see his children, was worried he might become suicidal. There was in that case no additional psychiatric overlay. The Court did there find that failures to take any steps to secure accommodation reached the threshold of an "*inexcusable failure to take the Tribunal's Order seriously and to recognise the Defendant's own legal obligations*". Which "*undermines the rule of law and respect for it by others*", accordingly the aggravated damages threshold was there met.

28. In *Diop* the court considered the risks of double counting where injury to feelings might be reflected both in a basic award or an aggravated award. The Court concluded, following authority that it is better to make one global award of general damages which includes an element referable to any injured feelings caused "*by the wrong in the manner in which it occurred*". The Court further indicated there was no particular limit to the categories of what might be "aggravating features" in any particular case. It approached the issues by focusing on such injury as was suffered in consequence of the false imprisonment, including matters which may have aggravated that injury, making an award of general damages in the form of a global figure for feelings and for the loss of liberty. The figure awarded was therefore a global 'basic' and 'aggravated' award.

29. The Claimant in this case suggests *Diop* was a case less serious than the present, but does not dissuade me, if the figure be right, from making such an overall award as was made in that case.

3.0 SUBMISSIONS

30. The Claimant argues a number of particular features should contribute to a larger rather than a smaller award, these are:

    a. Whilst accepting there is no "initial shock" where a person passes seamlessly from detention under a criminal sentence to immigration detention, nonetheless whereas here a person remains on the prison estate for some months rather than transferring into immigration detention facilities, that aggravates the detention due to the absence, for example, of access to the Internet, and the inherent increased restriction.
    b. The existence of COVID 19 restrictions exacerbated the Claimant's stress and anxiety.
    c. The failures of administration including:
        i. the non-progress of the release pro forma between January and April 2020;
        ii. the delay in taking Schedule 10 steps;
        iii. the failure to determine Secretary of State's bail end March/early April;
        iv. following the lapse of bail on 6th May 2020, delays in making referrals with respect to accommodation;

v. failure to take further meaningful steps until the public law proceedings were initiated (resulting in a flurry of activity towards the time of the interim relief hearing), including as to correspondence with the Iraqi authorities;
vi. suggesting, for the interim relief proceedings, unsuitable accommodation in the Midlands; and
vii. suggesting thereafter unsuitable accommodation in a hotel – which had the suggestion been known at the hearing, could have been addressed and the Defendant informed as to its impossibility given probation requirements.

31. The Claimant argues therefore that this is properly regarded a suitable case for both aggravated and exemplary damages although more serious than *Diop* and analogous to *Musse*.

32. The Claimant suggests that in *Diop* £9,000, pro-rata, was awarded for 28 days detention and adjusted for inflation would result here in an award of £13,248 for 40 days. It is asserted the distress here is greater.

33. By reference to the case of *R (Johnson) v Secretary of State for the Home Department* [2004] EWHC 1550 (Admin) the Claimant notes that £15,000 for immigration detention of 53 days was awarded which, adjusted for inflation on a 40 day pro rata basis produces damages of £17,835. It could not be said in that case, as it was in *Diop*, however, that there was any relief in the delay of providing accommodation; furthermore the case did not have the aggravating features said to be present here. Accordingly an award of £25,000 is argued by the Claimant to be appropriate: that would comprise £17,800 odd as a basic award, and the rest as aggravated and/or exemplary damages.

34. *Johnson* was the case of a 64-year-old Jamaican who was effectively illiterate, and a case in which the Judge held:

> "*The outcome is that Mr Johnson was detained from 12 June to 19 July, that is 5 weeks and 3 days, so a process could be carried out which was designed to take 7 days. The administrative convenience of the process was the only justification for the detention: see Saadi. His detention should have been subject to review at various stages during the intended 7 days and if it was considered that his claim could not be processed in that period, or approximately that period, he should have been released. As I have said no explanation or justification for what occurred has been provided.*"

35. *Johnson* was a case, as was *Muuse*, where the Secretary of State declined to put in any evidence at all. The Judge also said this in respect of Mr Johnson's case:

> " *... the application for judicial review was issued on 12 August. On 13 August Mr Johnson was taken to Heathrow through a failure of communication. He had an unpleasant time and was not returned to Oakington until between 2 and 3 the next morning. He then continued to be detained. On 15 August Mr Johnson was granted bail by an adjudicator. The grant of bail was opposed by the Department on the ground in part that 'On 12 June 2003 he was arrested for motoring offences by the police. Subsequent enquiries*

> *revealed his immigration status and he was served with papers as a section 10 overstayer.' As is now accepted there was no justification for this at all. I have a note of the hearing made by counsel for Mr Johnson. It was not submitted that there were other reasons why Mr Johnson was likely to abscond or that he would not cooperate with his removal if, in due course, that came about.*"

36. It appears (although the matter was not in contention between the parties here) that the sum awarded in *Johnson* was the result of a negotiated settlement. That appears from the passage in another authority per Mr Kenneth MacDonald QC sitting as a Deputy Judge of the High Court (as he then was) in the case of *R (on the application of B) v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin) where this is said of *Johnson*:

> "*10. The Immigration, Nationality and Refugee Law Handbook (2006 edition) states at page 1208 that damages of £15,000 — about £17,000 in today's money — were agreed between the parties. The statement is likely to be reliable because the editor of the handbook was counsel for the claimant in Johnson . I accept that the figure of £15,000 — £17,000 in today's money — resulted from a negotiated settlement and that it is not possible to gauge exactly the factors that underlay the settlement. However, it was a figure agreed against a similar background by the same body that is the defendant in this case and by an experienced practitioner in the relevant field.*"

37. I therefore approach the *Johnson* figure as a useful comparator, for the reasons the judge in that case gave, subject to the caveat that it was the subject of negotiation, rather than award and subject also to the observation its facts are in my view stronger than those of the present case.

38. By contrast the Secretary of State urges the court to award only basic damages, both in light of the pleading failure alleged, but also that there was no evidence to support the additional claims: the matters relied on are inadequate to support a claim for exemplary damages nor was there any evidence in respect of matters to give rise to aggravated damages.

39. The Defendant relies upon the case of *Mohammed v Home Office* [2017] EWHC 2809, and *R (Majewski) v Secretary of State for the Home Department* [2019] EWHC 473 (Admin).

40. In the first of those cases, Mr Mohammed was described by the Judge as having "*Repeatedly put his own liberty at risk by his offending. To some extent custody had become an occupational hazard of his criminal lifestyle.*" His long criminal record and frequent periods of incarceration were in play in that case, and mentioned as relevant by the judge, unlike the present.

41. In *Majewski*, in which *Mohammed* was referred to, the Claimant was a rough sleeper, and an EEA national. He was awarded a total of £14,900 in compensatory damages of which the first £6,500 were for the initial shock of incarceration: he was not an offender. Elements of claimed aggravation or exacerbation meriting different damages awards

were all rejected by the Court. This authority is of some value but is again, different insofar as the total award was split with a large portion attributable to the initial shock of a rough sleeper being incarcerated. Given the requirement to test overall the size of the compensatory award for the totality of the final sum, I approach with caution the act of "slicing off" the second portion namely £8,500 only as attributable to 38 days incarceration, as the Defendant encouraged the Court to do.

42. I take due regard of the admonition (*passim* the cases) that each case must be decided both according to principle, but also on its own facts, I turn now to the conclusions I have reached on the appropriate sum for damages.

4.0 CONCLUSION

43. In my judgement it is clear the Secretary of State is correct in her contention that this is not a case in which awards for aggravated damages or exemplary damages should be made. I intend in the figure I award to comprehend an element described by this Claimant as pertaining to the fear and uncertainty of incarceration during COVID times, and to reflect the fact that part of the detention he spent on the prison estate, not in immigration detention.

44. I do not agree with the Claimant that this case is analogous to *Muuse*: it is a far less egregious example of executive failing, it consisted of a series of careless mistakes, a failure to check – on more than one occasion – the detail of this particular Claimant's circumstances, and an unsatisfactory approach to the presumption of liberty. I commented upon the failings in the substantive judgement, a little of which is indicated above. However, nothing in the present case equates to what was described in the Court of Appeal as follows in *Muuse* (where an issue was whether the Judge had in fact made a finding of reckless indifference):

> "*59. In my view plainly there was evidence on which the judge could have reached the conclusion that the officials in both the Immigration Directorate and the Prison Service had acted with reckless indifference to the illegality of Mr Muuse's detention. It is, in my view, astonishing that no witnesses were called from the Immigration Directorate. The reason given in the Further Information provided by the Home Secretary was:*
> "*It is not the [Home Secretary]'s policy to call junior staff workers as witnesses in a trial.*
>
> "*This is not acceptable in a case such as this. As was submitted on behalf of Mr Muuse, the inevitable inference that a court would draw is that no one in the Immigration Directorate was prepared to give evidence to explain the decisions made. The failure to call anyone to provide an explanation (particularly as to the assertion of confusion and the failure to release immediately on 16 November 2006), the lack of documentation which should have existed and the evidence held by the Immigration Directorate and the Prison Service that plainly showed Mr Muuse was Dutch, it would not have been the least surprising if the judge had found that there had been reckless indifference to the illegality of Mr Muuse's detention.*"

45. Whilst the detention here was clearly upsetting to the Claimant, there is nothing to put this case into the *Muuse* class. I agree, there are similarities with the *Johnson* case, and as emphasised, the failures were careless and unnecessary, even given the pressures acknowledged to be on the system. Again, it is not in my judgement as serious as the facts in *Johnson*.

46. The Claimant says:

    a. Whilst accepting there is no "initial shock", here the Claimant remained on the prison estate up for some months rather than transferring into immigration detention facilities which aggravates the detention due to the absence of access to the Internet and the increased restriction.

    The Court makes some allowance for this feature.

    b. The existence of COVID 19 restrictions exacerbated the Claimant's stress and anxiety.

    The Court accepts this is an exacerbating feature to an extent.

    c. The Claimant says the failures of administration included:
        i. the non-progress of the release pro forma between January and April 2020;
        ii. the delay in taking Schedule 10 steps;
        iii. the failure to determine Secretary of State's bail end March/early April;
        iv. following the lapse of bail on 6th May 2020, delays in making referrals with respect to accommodation;
        v. failure to take further meaningful steps until the public law proceedings were initiated (resulting in a flurry of activity towards the time of the interim relief hearing), including as to correspondence with the Iraqi authorities;
        vi. suggesting, for the interim relief proceedings, unsuitable accommodation in the Midlands; and
        vii. suggesting thereafter unsuitable accommodation in a hotel – which had the suggestion been known at the hearing, could have been addressed and the Defendant informed as to its impossibility.

    All of these features are aspects of the claim itself: in my judgement they do not enhance the requirement to compensation such as, an element of lack of *bona fides*, or egregious misuse of the process might do. This was not a case where, as in *Diop*, the rule of law was held to have been undermined.

47. In conclusion, there are some aspects which affect the detriment suffered by this particular Claimant, in these particular circumstances: those relate to the extra restrictions of the prison regime whilst being held in administrative detention, and to the extra restriction of the COVID conditions pertaining at the time at which, necessarily, exacerbated any detention.

48. Taking these matters into account, and in light of the helpful updated figures by reference to earlier authorities in my judgement, as at today's date, allowing for an element of current inflation, **the appropriate award is £17,500** to represent all of the effects of the detention. This is a "global" basic award. I have notionally added to a foundation figure

of £15,500, an uplift of £2,000 to reflect both the extra time in prison, rather than administrative detention, and COVID circumstances, with more emphasis upon the latter. I have found the cases of *Diop* and *Johnson* helpful in terms of quantum and approach but the award reflects the particular effects upon this Claimant of his incarceration which, whilst significant for him, do not reflect the severe psychological overlay of other cases.

5.0 COSTS

49. The parties have made a detailed submissions on the appropriate award as to costs. I intend no disservice to those submissions by not setting out the particular references upon which they rely nor the detail of their argument. In essence, the Claimant submits that it has fulfilled the general rule insofar as it is set out at CP (a)R 44 2(2)(a), namely, the Defendant is the unsuccessful party and:

> "*The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party*."

50. The Defendant points to the absence of an order for the Claimants release which it describes as the primary purpose in bringing the proceedings. It is the case that neither at the interim hearing nor before me was such an order made. Further, says the Defendant, accurately, the pleaded claim has not been made out in totality in spite of some amendment shortly before. Accordingly, submits the Defendant, "real-world success" must have regard to the fact that the Claimant failed to secure his release and it is neither here nor there that a change of circumstances caused the later detention of the Claimant to be lawful. The Defendant here refers to the fact that by the date of the hearing flights to the Middle East had resumed following COVID-19 restrictions. Removal was possible within a reasonable time, and the detention with a view to removal was, once more, lawful. It is suggested also that the Defendant should get her costs down to the date of amendment and thereafter the Claimant should get only one third of their costs and the Defendant two thirds of hers. In order, practically, to reflect the equities it is suggested by the Defendant that no Order as to costs is the appropriate Order.

51. I accept the Defendant submissions only to this extent: it is appropriate given the requirement for amendment that an element of this default is reflected in the costs recovered. However, I am clear that essentially, this Claimant has won. The Defendant did not accept that any period of incarceration was unlawful, the Claimant required to come to court to achieve the declaration of unlawfulness. It is also clear that steps were taken under the shadow of litigation which might otherwise have been taken more slowly or perhaps, not at all. See the case of *R (Parveen) v LB Redbridge* [2020] 4 WLR 53 applying *RL v Croydon LBC* [2019] 1 WLR 224.

52. In my judgement the Claimant has achieved what it set out to achieve: namely the declaration as to the unlawfulness of his detention, albeit not for the whole period. It is inappropriate in the present case to divide up the period of detention so as to suggest in some way the Claimant "lost" that part of the detention which was held to be lawful, given that the whole period and the whole course of conduct on the part of the Defendant, was vigorously defended. The circumstances of the refusal of this Court to grant release were unusual, they related in part to the COVID situation, and other factors concerning documentation which were otherwise extraneous to the decision-making of the

Defendant, they do not materially affect my conclusion that the Claimant won: that is the "result in real life".

53. In those circumstances the Claimant has in the terms understood in *M v London Borough of Croydon* [2012] EWCA Civ 595 been more than "successful only in part".

54. It has been said on many occasions that procedural vigour is important in judicial review. Paragraph 2.1.2 of the Administrative Court Guide records that the appellate Courts have identified an increasing concern in this area (see the cases there footnoted). The Guide expressly warns at 2.2.1.2 that adverse costs consequences may result. In respect of the late amendment, I order that the Claimant should forego 5% of their costs. I do not award that 5% to the Defendant.