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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY OMAR MAHMUD FOR JUDICIAL REVIEW

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Mr Frank O'Donoghue QC and Mr Robert McTernaghan (instructed by MacElhatton Solicitors) for the Applicant
Mr Aidan Sands (instructed by the Crown Solicitor's Office) for the Respondent, the Secretary of State for the Home Department

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FRIEDMAN J

Introduction

[1] This judgment concerns financial remedies pursuant to section 8 of the Human Rights Act 1998 ('HRA'). Following the outcome in *In re matter of Omar Mahmud* [2021] NIQB 6 (the 'Substantive Judgment'), it is agreed that the court should make the following declaration:

> "The failure of the Respondent to provide accommodation and ancillary support to the Applicant [pursuant to section 4 of the Asylum and Immigration Act 1999] between the 24 August 2018 and the 7 February 2019, on the facts of this case as found by this Court and as set out at paragraphs [136] and [137] amounted to and constituted inhuman and degrading treatment of the Applicant contrary to his rights pursuant to Article 3 of the European Convention on Human Rights."

[2] The issues now are whether in addition to the above declaratory relief, the court should also make an award of financial damages because it is just and appropriate to do so, and if so, how much that financial remedy should be. The procedural events that have led to this judgment are also described below. They indicate some relevant considerations to pleading and adjudicating upon HRA damages as part of the course of public law proceedings.

Substantive Proceedings

[3] The claim for Judicial Review was issued on 25 January 2019. There were two grounds. Ground 1 (which the court in due course did not allow) dealt with the claimed irrational or otherwise unlawful refusal of the Applicant's further submissions in support of a fresh claim for asylum. Ground 2 (which the court did allow) dealt with the rejection of the Applicant's renewed claim for asylum support, which was found to amount to a breach of Article 3 ECHR. As a result of leave being granted on 7 February 2019, the Respondent became obliged to renew asylum support, including to provide accommodation, by virtue of Regulation 3(2)(d)(iii) of The Immigration and Asylum (Provisions of Accommodation to Failed Asylum Seekers) Regulations 2005 (the '2005 Regulations'). By that stage, the Applicant had been homeless and without recourse to lawful livelihood or legal and financial means of accommodation for 167 days.

[4] As dealt with in the substantive judgment at paragraphs 120 to 121, the Home Office defence to Ground 2 evolved throughout the life of the proceedings. First, it was asserted that the claim was academic, because the Applicant was re-housed, although that left unanswered whether the preceding period of destitution was lawful. Second, it was said that the fault for his situation lay with the Applicant who refused to leave the country when his asylum support was stopped at the same time as the refusal of his fresh claim submission in May 2018. Due to administrative error, the Home Office subsequently realised that it had failed to compute that alongside additional further submissions, the Applicant made several efforts to renew his asylum support between June and November 2018. Third (having discovered after an adjourned hearing that two applications and various communications for renewed support were lost in the system) the Respondent doubted the Applicant was ever in fact street homeless, or at imminent risk of being so; but also blamed the Applicant for relying on the Home Office contracted agency services, principally provided for by Migrant Help, to process the applications.

[5] The court rejected the final incarnation of the defence at paragraphs 136 to 137 of its judgment, finding that the Applicant was either rough sleeping, or at imminent risk of the same during the relevant period. Through that time he suffered from documented symptoms of depression, anxiety and PTSD, which were aggravated by bereavement, but also the socially disabling uncertainty of his legal and financial situation as governed by the mandatory requirement to have no other recourse to public funds. At paragraph 134 I additionally rejected the submission (no longer maintained by the time of the relief hearing) that Migrant Help should be treated as only the Applicant's agent and/or that the Home Office could avoid constructive knowledge of what was done by Migrant Help in its capacity as a subcontracted agent of the Home Office.

[6] For reasons dealt with at paragraphs 138 to 141, I was not prepared to deny declaratory relief on the basis that a properly considered application for renewed support could have ended in a lawful refusal. That issue was not for the court to

determine, especially given the profound issue of bare human subsistence at stake, but also because the Applicant had been left in a state of limbo over several months, during which time he was denied a properly made decision as to whether to reinstate the support, as was his right.

[7] In reaching those conclusions I also made it plain that the public law wrong done to the Applicant, which amounted to inhuman and degrading treatment, was neither intentional, or arguably necessary, given that that the Respondent might well have avoided the wrong by refusing the application in a timely and clear fashion if it had operated a more efficient and adequate system. As a prelude to the extant hearing, I indicated that those matters could be relevant to whether an additional award of damages was necessary to afford just satisfaction, which by agreement during the oral submissions was to await further submissions depending on the outcome of the case.

Relief Proceedings

[8] The original Statement served pursuant to Order 53 of the Rules of the Court of Judicature (NI) 1980 (the 'RsCJ') sought declaratory relief that the Respondent had acted unlawfully in not providing the Applicant with section 4 support. Pending the final court decision on the claim it also applied for interim relief to secure the Applicant's temporary rehousing. The pleaded Statement otherwise referred to "*Such further and other relief as the Court might deem appropriate.*" At that point there was no claim for damages under the HRA, or otherwise. Order 53 rule 7 of RsCJ, requires that such a claim should be included in the pleadings:

> "7. - (1) On an application for judicial review the Court may, …. award damages to the applicant if-
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> (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and
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> (b) the Court is satisfied that, if the claim had been made in a separate action begun by the applicant at the time of making his application, he would have been entitled to such damages."

[9] Having distributed a draft judgment to the parties a discussion ensued about the appropriate procedure and forum for determining whether a financial award should be made. I was initially invited jointly by the legal representatives to make an order to convert the existing proceedings to a writ action pursuant to Order 53 rule 9(5) of the RsCJ. That proposal would have required both parties to travel the complete procedural gamut of civil proceedings for damages. It involved agreed

dates and actions extending over a further 6 months for the service of (i) Plaintiff's Statement of Claim, (ii) Defence and Defendant's Notice for Further Particulars, (iii) Plaintiff's Reply to the Reply to the Defence and Replies to the Defendant's Notice for Particulars, (iv) Plaintiff's Notice for Further Particulars, if any, from Defendant; (v) Defendant's Replies to the Plaintiff's Notice for Particulars'; (vi) mutual discovery based on an exchange of lists of documents beyond that already served; (vii) additional medical evidence relied upon by the Plaintiff, with the option for the Defendant to conduct her own examination. All of this was proposed to culminate in a two day trial.

[10] This proposal left me with questions as to what best would serve the overriding objective to do justice fairly, but proportionately. The proceedings were already two years old, there had been several rounds of disclosure, with both parties given ample opportunity to state and develop their cases, and the relevant findings had seemingly already been made. While I would not have prevented the parties from serving additional evidence, I found it difficult to see how extensive further pleadings, discovery and expert opinions (that could not have been known to the Home Office, because they were never commissioned or served at the time) would change the outcome of a damages dispute in this particular context. Further, I had already held that I did not intend to establish that the asylum support application would have been allowed had it been properly considered. Finally, there was case law from England and Northern Ireland, which indicated the circumstances when HRA damages could properly be sought and determined within the ambit of the judicial review proceedings without having to go through the otherwise necessarily formal procedural steps of High Court civil proceedings.

[11] Having shared these observations with the parties, including an invitation to refer to any reason why the shorter and more flexible structure of a JR relief hearing would frustrate a proper ventilation of the issues, they jointly altered their position. By agreement the Applicant amended his Order 53 Statement to include a claim for HRA damages. There was a quick exchange of skeleton arguments on the principles relating to such awards and their application to the facts as found. Neither party sought to rely on further evidence. There was an oral hearing that lasted for a half day. The Home Office followed up with a letter answering some queries that were raised during the hearing.

[12] Without being asked to rule on the issue it is nevertheless clear that the revised approach avoided a much longer and drawn out process, which would have had an impact on public funds well beyond the sum of an award available in cases of this nature. Before leaving the subject, I should acknowledge that there was a broader and instructive context as to why the parties initially suggested the longer and more formal route. The Order 53 Statement (as noted) did not seek damages, and the Respondent had never stopped suggesting that if the Applicant wanted to contend for an historic breach of his rights under the ECHR then the appropriate thing to do was to issue a writ of action and claim an award. I did not accept that argument as a basis to remove all aspects of the section 4 complaint from the judicial

review. Leave had been given on both grounds. Their factual matrix was evidently intertwined. That became all the more apparent as both sides made additional disclosure concerning the extent to which the asylum support application and follow up communications ought reasonably to have been known about by the Respondent, but were not.

[13] Once it was determined to rule on the substantive section 4 issue, the logic of the court also ruling on damages as part of the remedies following from the successful judicial review became more obvious. First, while it might not have been appreciated at the outset of the proceedings, the issues in relation to Article 3 ECHR ended up being relatively contained, even if serious for the individual. Second, the findings in the judgement did not herald the need for further complex deliberation of facts; or (as the case could be) the need to adjudicate upon some additional private law causes of action above and beyond the complaint under Article 3 ECHR (for instance, negligence or misfeasance in public office). Third, without disposing of the arguments as to whether or what damages award should be made, it was never likely that a final award in this case would be vast. For all those reasons it was incumbent on the parties and the court to consider whether the issue could be contained within the existing litigation structure.

[14] Twenty years after the HRA coming into force section 8 damages still lie somewhere between stranger, afterthought and makeweight in most judicial review proceedings. A judgment of the Court of Appeal in England & Wales has warned against JR pleadings that treat the issue as such (see *R (Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54 §§45-56). In referring to that view, I would not wish to undermine the dual requirements of fairness and flexibility by encouraging overly rigid or lengthy pleadings of Order 53 Statements. I would also observe that it is something in the nature of human rights litigation that Applicants, unlike ordinary civil litigants, start off in opposition to the manner in which power is being exercised, and in that respect the primary aim is to end a status quo. Damages are therefore the secondary, or not immediate, aim. However, that does not remove their importance, especially once it is established that the Applicant has suffered a human rights violation; and all the more so when it is established that a person has suffered ill-treatment contrary to Article 3 ECHR. If there is a good reason to seek damages at the outset, then Order 53 Statements should plead the issue. Equally, if there is substantial reason to amend the Statement once the result is known, this is not something that should be blocked by formality.

HRA Damages: the key principles

[15] Section 8(1) of the HRA provides that where a public authority acts unlawfully in breach of the ECHR contrary to section 6(1) of the Act, the court "*may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*"

[16] Subsection (2) expressly provides that "*damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*" Further, subsection (3) provides that:

> "No award of damages is to be made unless, taking account of all the circumstances of the case, including –
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> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
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> (b) the consequences of any decision (of that or any other court) in respect of that act,
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> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."

[17] Subsection (4) provides that:

> "In determining –
>
> (a) whether to award damages, or
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> (b) the amount of an award,
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> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

[18] Article 1 of the ECHR (so referred to in s.8(4) HRA) provides:

> "If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the high contracting party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party."

[19] An important feature of HRA damages is that they require account to be given to the supranational remedies granted under Article 41 of the ECHR, and in so far as they have native roots, those are only the roots that have grown over time by applying the international court principles to the facts of domestic human rights law violations. In *R (Greenfield) v Secretary of State for the Home Department* ([2005] UKHL 14) [2005] 1 WLR 673 Lord Bingham (at §6) identified the pre-conditions for a financial award under both Article 41 and section 8 as requiring a finding of a Convention violation, and no or only a partial entitlement to reparation under

domestic law, such as to render it necessary to afford some additional measure of just satisfaction to the injured party. He added:

> "It would seem to be clear that the domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so. In deciding to award damages, and if so how much, the court is not strictly bound by the principles applied by the European Court in awarding compensation under Article 41 of the Convention, but it must take those principles into account. It is, therefore, to Strasbourg that the British Courts must look for guidance on the award of damages."

[20] The House of Lords in *Greenfield* (at §19) offered a core overview of the damages jurisdiction, which was subsequently endorsed by the Supreme Court in *R (Faulkner and Sturnham) v Parole Board* ([2013] UKSC 23) [2013] 2 AC 254 §28, and applied by the Court of Appeal in this jurisdiction in *Jordan* [2019] NICA 61 §19:

> "First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg…. Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European Court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents... The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in

> England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all."

[21] The case law – and commentaries – have observed that the exercise of analysing the Strasbourg approach is not straightforward. Article 41 is unguided by a system of precedent, the court's awards are generally not subject to detailed reasoning, and one judgment rarely refers to the quantum of damages reached in another. It is established that awards given in relation to one article ought not to be read across as applicable to a different one; and generally an award made in relation to one of the 47 member states does not necessarily provide a good calculus for an award against a different state where the value of the same money might be notably less, or more: *Greenfield* §7, *Faulkner* §39, §105 and *Jordan* §20. See also *Anufrijeva v Southwark London BC* ([2003] EWCA Civ 1406) [2004] QB 1124 §58; *Alseran v Ministry of Defence* ([2017] EWHC 3289 (QB)) [2019] QB 1251 §§918-923; and *In Re Cox* [2020] NIQB 53 §125. As to the various observations in the domestic jurisprudence that it is not the primary aim of the Convention to secure financial awards, I have noted the recent review of the issue by Karen Reid, in 'A Practitioner's Guide to the European Convention of Human Rights' (6th Edition, Sweet & Maxwell, 2019) §89-001, which highlights a substantially discernible decrease in the occasions on which the court finds that no monetary award for non-pecuniary damage is appropriate.

[22] Overall, the "*mirror*" approach based on a domestic court taking account of Strasbourg "*principles*" for the purpose of section 8(4) HRA cannot operate in the same manner as required by section 2(1) of the HRA, which more broadly obligates when determining any "*question … in connection with a Convention right*" to "*take into account any … judgment...*" etc. On damages, there is less to mirror and what is said rarely gives rise to a clear and consistent jurisprudence equivalent to that which has increasingly arisen in the case law on the rights themselves. Lord Carnwath underscored these points in his concurring judgment in *Faulkner* (at §113) when he said that the more specific wording between section 8(4) and 2(1) "*reflects the reality that not all decisions of the Strasbourg court in relation to damages will be determinative, or even illustrative, of any principle of general application.*" For an important critique of the potential tensions between mirroring the supranational approach to awards and achieving a coherent system of domestic precedent that is predictable and not overtly dependent on the views of a single judge, see J Varuhas, 'Damages and Human Rights' (Hart, 2018 Edition), Ch. 5 pp 235-323.

[23] With those caveats, the review of the principles in *Greenfield* (at §§7-18) identified that treatment breaching the thresholds of Articles 3, 4 and 8 (for instance where a child was wrongly removed from its family) would be intrinsically harmful. Conversely, there could be structural breaches, paradigmatically of the right to a fair trial under Article 6, where it was not possible to conclude that the outcome of the

trial would have been different (as in the *Greenfield* case itself that found a violation on the basis that the prison Governor both brought the disciplinary charge and adjudicated upon it).

[24] The case law of the court has acknowledged two broad approaches to non-pecuniary loss. The first is the principle of *restitutio in integrum*: i.e. returning to an original condition. It has particularly arisen in the sphere of breaches of rights under Article 5(1) and/or 5(4), where there is a debate about whether a delayed parole hearing outcome would probably have been different and more favourable to the applicant; or (somewhat more problematically) whether the violation deprived the applicant of an opportunity to achieve a different result which was not in all the circumstances of the case a valueless opportunity. Overall, the court is concerned to only require a state to compensate for individual damage for what it has caused, such that loss, penalty or continuation of a given condition that would have occurred anyway, should not fall to be compensated in financial terms, even if it is otherwise important to declare the context giving rise to the situation as incompatible with Convention rights.

[25] The oft cited statement of principle on causation is contained in the Grand Chamber Article 41 judgment in *Kingsley v UK* (2002) EHRR 10, although I note that the case was essentially a dispute about financial loss. The Chamber had found a violation of Article 6 because the Gaming Board that presided over a hearing as to whether the applicant was fit to hold a certificate to participate in the gaming industry had already declared a view that he was not. There was therefore a structural violation of Article 6, because the appeal process under section 19 of the Gaming Act 1968 was not independent and impartial. However, the court found no basis to criticise the substance of the appeal proceedings that ensued, or the follow on judicial review that upheld their outcome. In determining that no Article 41 award should be made beyond the declaration of a breach, it was held at §40:

> "The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should, as far as possible, be put in the position he would have enjoyed had the proceedings complied with the Convention requirements…The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the state cannot be required to pay damages in respect for losses for which it is not responsible."

[26] The second approach to non-pecuniary loss has been described in different ways concerning the acknowledgement of pain and suffering, including feelings of anxiety, helplessness and humiliation. Although not quite the same, this dignitarian

principle bears some resemblance to the notion of 'injury to feelings' associated with common law aggravated damages. For a human rights damages award it is well established that impact on the 'moral' wellbeing of the individual need not be evidenced by and/or amount to psychiatric harm. An important example from this jurisdiction is the judgment of Stephens J (as he then was) in *Jordan* [2014] NIQB 71 §27 and upheld on the principle by the Court of Appeal ([2019] NICA 61 §29). Another analogous source in domestic damages has been the so-called *Vento* scales of awards made in employment discrimination cases, of which I return to below.

[27] For some common lawyers (especially those schooled outside of the human rights and humanitarian law disciplines) the language of the Strasbourg just satisfaction judgments will sound in an unfamiliar frequency. Awards for "*moral damage*" are said to arise when impingement on "*moral wellbeing*" is so significant as to warrant compensation. This is not a conventional legalistic exercise, but a commitment to broader task of equity in all the circumstances. To that end, the Grand Chamber judgment in *Varnarva v Turkey*, App. 16064/90 *et al*, 18 September 2009 §224, usefully combines both the core principles and sentiments, while also citing a number of well-known previous judgments to exemplify the points:

> "The Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity (e.g. *Elsholz v Germany* [GC], no. 25735/94, § 70, ECHR 2000 VIII; *Selmouni v France* [GC], no. 25803/94, § 123, ECHR 1999 V; and *Smith and Grady v the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 12, ECHR 2000 IX) and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right (see, for example, *Christine Goodwin v the United Kingdom* [GC], no. 28957/95, § 120, ECHR 2002 VI; *Saadi v Italy* [GC], no. 37201/06, § 188, ECHR 2008 ...; *S. and Marper v the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, 4 December 2008). In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves

> to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."

[28] Section 8(4) of the HRA requires that a court must take account of the Article 41 principles, but that does not mean that the domestic lawyer must necessarily discard local approaches to compensation. Indeed, the Strasbourg jurisprudence has made this clear as one as its own guiding principles. The Practice Direction on Just Satisfaction ('PD') issued by the President of the European Court, dated 28 March 2007 confirms that the court "*may decide to take guidance from domestic standards*", though it is "*never bound by them*" (§3). This follows *Z v UK* (2001) 34 EHRR 97 §§120 and 131, where the Grand Chamber described the rates of compensation applied in domestic cases as "*relevant*" but "*not decisive*." This qualified the earlier statement in *Osman v UK* (1998) 29 EHRR 245 §164 that the court would make awards by way of just satisfaction "*in accordance with the principles laid down in its own case-law…and not by reference to the principles or scales of assessment used by domestic courts*."

[29] There will invariably still be cases where a breach of a Convention right arguably requires a financial remedy, but the subject matter area is unchartered in the Strasbourg case law. In *Rabone v Pennine Care NHS Foundation Trust* ([2012] UKSC 2) [2012] 2 AC 72 §84 the Supreme Court confronted that situation where no decision had been cited which purported to be a guideline case in which the range of compensation was specified and the relevant considerations were articulated. Lord Dyson found it therefore "*necessary for our courts to do their best in the light of such guidance as can be gleaned from the Strasbourg decisions on the facts of individual cases*." Similarly, in the earlier House of Lords judgement in *Cullen v Chief Constable of the Royal Ulster Constabulary* ([2003] UKHL 39) [2003] 1 WLR 1763 §80, Lord Millett made an observation that still stands, suggesting that "*[in] this situation, we may have to develop our own jurisprudence while keeping an eye*" on the Strasbourg case law "*to ensure that we do not stray too far from the principles which that Court may lay down*."

[30] The task under section 8 HRA is therefore to make case specific damages awards based on equity, which must look primarily, but not definitively, to Strasbourg. There is now a significant pathway available to courts in reaching

decisions that is to be found in the approach of Leggatt J (as he then was) in the civil proceedings concerning the ill-treatment of UK held prisoners detained during the armed conflict in Iraq. His judgment in *Alseran v Ministry of Defence* ([2017] EWHC 3289 (QB)) [2019] QB 1251 §§909-916 identified eight principles, which also made specific reference to the Court's Practice Direction on Article 41. The *Alseran* principles (recently commended as "*particularly helpful*" in *In Re Cox* [2020] NIQB 53 §124) can be summarised as follows:

(i) An award of just satisfaction is not an automatic consequence of a finding that there has been a violation of a Convention right. The court may decide that, for some heads of alleged prejudice, the finding of a violation constitutes in itself just satisfaction without there being any call to afford financial compensation or that there are reasons of equity to award less than the value of the actual damage sustained, or even not to make an award at all: PD §§1-2

(ii) Before the court will award financial compensation, a clear causal link must be established between the damage claimed and a violation found by the court: PD §§7-8 and *Kingsley v UK* (2002) 35 EHRR 10 §40.

(iii) Where it has shown that the violation has caused pecuniary damage to the applicant the court will normally award the full amount of the loss as just satisfaction: PD §10.

(iv) It is also the practice of the court to award financial compensation for 'non-pecuniary damage' such as mental or physical suffering, where the existence of such damage is established: PD §§13-14. The sum of the award will be assessed "*on an equitable basis, having regard to the standards which emerge from its case law.*" Awards for mental suffering are by no means confined to cases where there is medical evidence that the applicant has suffered psychological harm and that compensation may be awarded for injury to feelings variously described as distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life or powerlessness. The case law also shows that the court will often be ready to infer from the nature of the violation that such injury to feelings has been suffered. Applicants who wish to be compensated for non-pecuniary damages are invited by the court to specify a sum which in their view would be equitable: PD §15.

(v) The purpose of an award under Article 41 is to compensate the applicant and not punish the state responsible for the violation. Hence, it is not the practice of the court to award punitive or exemplary damages: PD §9.

[See however, by way of my addition, *Greenfield* §19 where the premise that damages should invariably be awarded "*to encourage high standards of compliance*" was rejected, but it was said that the position "*may be different if there is felt to be a need to encourage compliance by individual officials or classes of official*".]

(vi) In deciding what, if any, award is necessary to afford just satisfaction, the court does not consider only the loss or damage actually sustained by the applicant but takes into account the "*overall context*" in which the breach of a Convention right occurred in deciding what is just and equitable in all the circumstances of the case. This may require account to be taken of moral injury: citing *Vanarva v Turkey* §224 (as see paragraph 27).

(vii) As part of the overall context, the court may take account of the state's conduct: citing *Anufrijeva v Southwark London BC* §68 (noting that, as well as the seriousness of the violation, the manner in which the violation took place may be taken into account). This is similar to the English law concept of aggravated damages.

(viii) The court also takes account of the applicant's conduct and may find reasons in equity to award less than the full value of the actual damage sustained or even not to make any award at all. This may be the case if, for example, the situation complained of or the amount of damage is due to the applicant's own fault: citing as an example *McCann v UK* (1995) 21 EHRR 97 §219 (where breaches of Article 2 were found in relation to the planning of the operation, but not the state of mind of the soldiers who fired upon the suspects, and where it was found that the deceased had intended to plant a bomb in Gibraltar).

[31] In terms of fixing on a quantum of damages, I agree with the approach that where the human rights harm under consideration has a near if not exact analogue in domestic law, then the relevant quantum should be taken into account, albeit not in such a way as to produce an award that is substantially out of step with the level of award for the injury that might be granted to a complainant against the United Kingdom seeking just satisfaction before the Strasbourg Court.

[32] This is not new. The Court of Appeal in England & Wales indicated in *Anufrijeva* §§77-78 (approving R *(Barnard) v Enfield LBC* ([2002] EWHC 2282 (Admin)) [2003] LGR 423) that in the search of equitable levels of quantum, consideration could be given to bands of payment made by the Local Government Omsbudman as regards instances of maladministration that gave rise to breaches of Convention rights.

[33] In the same vein Leggatt J in *Alseran* §§930-932 and 953, McAlinden J in *Cox* §§133-134 and §142 and Swift J in *R (SMX) v Secretary of State for Work & Pensions* [2019] EWHC 2774 Admin §§19-21 have all recently made reference to the guidelines set out by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police* ([2002] EWCA Civ 1871) [2003] ICR 318; and which are used in this jurisdiction (e.g. *Nesbitt v The Pallet Centre* [2019] NICA 67). It is noteworthy that the reference made to the bands in *Alseran* concerned treatment that was outside of the discrimination field, whereas the other cases concerned breaches of Article 14 ECHR,

and are therefore more akin to the wrong doing compensated for in employment proceedings. Mummery LJ in the *Vento* case at §§65-66 identified three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, which are described as follows:

> "(1) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race…Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> (2) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> (3) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case."

[34] In so far as they are regarded as relevant it should be borne in mind that the bands have now increased to £800 to £8,400, £8,400 to £25,200 and £25,200 to £42,000 for claims initiated after 11 September 2017: see *Cox* §134 citing *Durrant v Chief Constable of Avon and Somerset Constabulary* ([2017] EWCA Civ 1808) [2018] IRLR 263 §8.

[35] In the absence of a clear approach to a damages claim that is on all fours with a decided case in the Strasbourg jurisprudence involving the United Kingdom or a member state with a similar standard of living, I again respectfully summarise the approach in *Alseran* at §§937-948 as to the quantification of damages awards, which amounts to a four-stage task:

(i) consult the common law;

(ii) where the ill-treatment is akin to a tort, refer to its quantum bands;

(iii) develop a domestic body of precedent as an aid to predictability and future settlements; and

(iv) ensure that the overall award remains in sync with the wider considerations of equitable values and standards identified by the Strasbourg Court.

[36] My one final observation on the principles is that as much as they should be informed by local custom, one should never lose sight of the fact that financial remedies for human rights violations are a unique species of justice. They evolved out of the value placed upon human rights under international treaty law, which were introduced into our own law by section 8 of the HRA. Domestic law still does not recognise the concept of an administrative tort being actionable in damages. Indeed, there was a long period in this country when despite the notable protestations of common law panegyrists, the primary substantive rights enjoyed by citizens – as opposed to the procedural rights referred to as natural justice – were limited to the means to bring private law actions for financial remuneration. Such rights were "*customarily defined by correlative wrongs rather than by affirmative declarations*" which the Court of Appeal in *Secretary of State for the Home Department v GG* ([2009] EWCA Civ 786) [2010] QB 585 §12 described as "*an artefact of our constitutional history.*"

[37] It is sometimes observed that awards of this kind might be more "*modest*" than common law damages because human rights is not primarily about money. References to modesty can be found in both *Greenfield* (at §§3-4, 9 and 19) and *Faulkner* (at §68), but with respect the point is apt to be misunderstood. That is especially so when for the vast part of the history of the common law the vindication of rights was pretty much *only* about the money. Money is obviously not inconsequential to the Strasbourg Court that will almost inevitably order financial payments under Article 41 when personal harm has been caused as a result of Convention incompatible conduct. At the same time, it is important to appreciate that the HRA heralded a new means of protecting individuals and bonding society, such that the approach to damages under section 8 should retain its flexibility, accessibility and sense of proportion. The value of such payments lies in their vindicatory function. The state as wrong doer is required to restore its commitment to respect for the inherent dignity of the individual complainant in circumstances when that dignity – as the primary feature of all human rights law - has endured some serious and fundamental harm, and other damages under domestic law are not otherwise available to do justice to the wrong.

[38] 'Modesty' is therefore not quite the right word and on this support can be found in the New Zealand High Court judgment of *Taunoa v Attorney-General* ([2007] NZSC 70) [2008] 1 NZLR 429 §109. Having reviewed the English case law including *Anufrijeva* and *Greenfield*, Elias CJ held:

> "With respect to those who think that damages for vindication of [a] right must be "moderate", I do not think the adjective assists. It can be readily accepted that awards of damages should not be "extravagant." No

> award of damages should exceed what fits the case. Where a plaintiff is compensated for injury under another cause of action, damages for vindication of the right should not result in a windfall to him. Bill of Rights Act damages in such cases should be limited to what is adequate to mark any additional wrong in the breach and, where appropriate, to deter future breaches. But where a plaintiff has suffered injury through denial of a right, he is entitled to Bill of Rights Act compensation for that injury, which may include distress and injured feelings, as well as physical damage. The amount of such damages must be adequate to provide an effective remedy. Without adequate compensation, the breach of right is not vindicated... I do not understand *R (Greenfield) v Secretary of State for the Home Department* to suggest that damages, where appropriate, should provide less than an effective remedy for the breach and its consequences. The points there made were that English courts acting under the Human Rights Act 1998 (UK) are not free to depart from the remedies thought appropriate by the European Court of Human Rights and that the need for deterrence may be less important when a state is bound to comply with international obligations."

(The Chief Justice also footnote cited the judgment of the Privy Council in *Attorney-General of Trinidad and Tobago v Ramanoop* ([2005] UKPC 15) [2006] AC 328 §19 that an award may not "*necessarily*" be of substantial size, but that will depend on circumstances such as "*the importance of the constitutional right and the gravity of the breach*", as well as the need to deter further breaches).

[39] The recognition that human rights damages can play a different, but far from residual, role in relation to public law from that which it plays in exclusively private law proceedings is not confined to the Convention or the HRA. As Lord Woolf noted in *Anufrujiva* (at §54) that is also true of claims for infringement of Community Law (citing *Dillenkofer v Germany* ([1996] EUECJ C-178/94) [1997] QB 259) and, for claims for infringement of human rights, under, for example, the Indian Constitution (citing *Nilabati Behara v State of Orissa* ([1993] 2 SCC 746) [1994] 2 LRC 99). The *Nilabati Behara* case is worthy of recall. Granted the judgement of Anand J (pp. 113C-114C) speaks in terms of penalties and exemplary damages that the HRA case law avoids, as well as only mentioning "*citizens*", whereas the ECHR protects "*everyone*" under the State Party's jurisdiction. Nevertheless, the ruling that awarded damages relating to a death in police custody captures something critical in the task of establishing a new principle for the protection of human rights under a constitutional statute. In doing so, the Indian judge quoted back a decidedly common law source:

"The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the rule of law. While concluding his first Hamlyn Lecture in 1949 under the title 'Freedom under the Law' Lord Denning in his own style warned (at p 126):

> 'No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us, what is the remedy? Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence... This is not a task for Parliament…. The courts must do this. Of all the great tasks that are ahead, this is the greatest. Properly exercised the new powers of the executive lead to the Welfare State: but abused they lead to a totalitarian State. None such must ever be allowed in this country.'

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens…. The relief of monetary compensation…is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilise public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under arts 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the

> wrongdoer and fixing the liability for the public wrong on the state which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood as it is generally understood in a civil action for damages under the private law, but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty and for not protecting the fundamental rights of the citizen. The compensation is in the nature of' exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction and/or prosecute the offender under the penal law."

Application of the principles to the Applicant's Case

Necessity

[40] In this case the court has found that the failure to provide accommodation and financial support amounted to inhuman and degrading treatment within the meaning of Article 3 ECHR. That is a species of Article 3, unlike for instance assault, that is not subject to financial reparation under the ordinary operation of UK tort or public law. However, any violation of the prohibition on inhuman and degrading treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, which even if not intentional, will necessarily arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance: *Keenan v UK* (2001) 33 EHRR 338 §§109-110.

[41] The context here is specific, occasioned as it is by the overloaded bureaucracy of immigration control. But that harm done undoubtedly caused an inhuman and degrading experience that lasted for more than a temporary period. I accept the submissions of Mr O'Donoghue QC and Mr McTernaghan, for the Applicant, that the situation was only brought to an end as a result of bringing judicial proceedings. I also bear in mind that what is unique about asylum support under section 4 of the 1999 Act is that once charity is exhausted it is the only (lawful) gateway to some of the bare necessities of existence. The Applicant was entitled to a proper evaluation of his application for renewed support especially as this was his only permitted means of subsistence.

[42] The Respondent's primary submission was that above and beyond the declaration of the breach, no further financial award was necessary. The argument rested on the relevance of Applicant having lost his claim under Ground 1, and therefore the unlikelihood that the outcome of the renewed application for support would have been different, if the application was properly processed. Mr Sands pointed to the judgment of the Collins J in *R (Nigatu) v Secretary of State for the Home Department* [2004] EWHC 1806 Admin §25 and my own recognition based on it in the Substantive Judgment (at §130) that "*it <u>might</u> therefore have been open for the Secretary of State to make a clear decision that the further submissions and renewed applications had run aground on the banks of repetition and manifest unfoundedness*" (emphasis added).

[43] The Applicant submitted that the potential that the outcome of the application would be the same should make no difference to the need to make an award in principle, because the extent of the loss of chance to conclude otherwise was unknown. The history in this case was that for whatever reason the Home Office had previously renewed asylum support when fresh claim submissions were made, even though there had been many such claims in the past (Substantive Judgment §§78 and 106). In any event, Mr O'Donoghue maintained that this was a violation of rights that befell a highly vulnerable individual that endured over an extended period. The preceding damage to dignity and resilience required recognition above and beyond the cessation of the treatment and the declaration that it was unlawful.

[44] I have come to the conclusion that it is necessary to make an award, not so much because of a loss of opportunity, but because the serious consequences for the individual required proper decision making, and it would be wrong to make assumptions about outcome in such a sensitive field. Although I have acknowledged that there was wherewithal within the Respondent's policy and practice to reject the application that is not a decision that was ever made. Given the fundamental importance of Article 3, the case law on lost opportunity that has primarily arisen under Article 5(4) should not be read across to these facts. I also note that Mr Sands, for the Home Office, formally withdrew the submission advanced at the substantive hearing that the Applicant was responsible for the errors in ignoring his application by using the supplied email addresses and otherwise relying on either Bryson House and/or Migrant Help to forward the requisite forms and information to the Home Office. Further, post-hearing correspondence confirmed that the errors in the system had been unintentional, were one off and a temporary problem with the Atlas database and protocols that arose across a short space of time in 2018. This Applicant is the only person known to have suffered from the problem, although the Home Office did not apparently make checks for victims until the event of this litigation.

[45] I therefore agree with the Applicant that the treatment justifies a financial award. The wrong done very much bore an individual effect, as opposed to a plural effect arising from multiple system wide malfunction across the country. It required

letters before claim, applications for legal aid, and judicial review proceedings to be brought, all the time while the Applicant remained in an objectively inhuman and degrading situation. It also took considerable time and multiple changes in the pleaded defence of the Home Office before even the errors giving rise to the individual damage were acknowledged.

Submissions on Amount

[46] As regards the amount of an award, Mr O'Donoghue (in keeping with *Alseran* and the Practice Direction) specified a sum, which he submitted should be £10,000. The figure was advanced on the basis that there were no Strasbourg authorities on this form of enforced destitution. It was just and appropriate because of the impact of the treatment on the Applicant. He also counselled against following the recent English decision of Robin Knowles J on the delayed housing of Article 3 destitute applicants in *R (DMA & Ors) v Secretary of State for the Home Department* [2020] EWHC 3416 Admin §§34-37 and §§336-341 ('*DMA et al*'), where the court awarded each of the Applicants £1000.

[47] In *DMA et al* there were three applicants who sought section 8 awards. All of them (unlike Mr Mahmud) had received positive decisions to house them in accordance with s. 4(2) of the 1999 Act, but there was a delay in finding accommodation due to the fault of Home Office contractors. While I assume (also unlike Mr Mahmud) that those claimants at least received ancillary financial support, they remained homeless, apparently dependent on charities, or sometimes friends or churches, and all the time at imminent risk of rough sleeping. Of those claimants, DMA was in that situation for 45 days, AHK for 60 days, BK for 105 days and ELN for 75 days.

[48] Mr O'Donoghue's primary submission was that the award in *DMA et al* was too low; and especially so for the claimant who had been homeless for 105 days, as against another claimant who had been homeless for 45 days. He then advanced a farther reaching argument that because of the sometimes acknowledged more generous approach of the Northern Irish courts to quantum awards in private law tort proceedings, the same generosity (or at least caution about less generous precedents elsewhere in the United Kingdom) was required in judging what would be a just and appropriate award for the purposes of section 8 HRA.

[49] The principle of loyalty to "*the Northern Ireland experience*" relating to general damages awards in personal injury cases dates at least to *Simpson v Harland and Woolf* [1988] NI 432, 437F-438D (detailing as then Mr Kerr QC's argument against conformity with England) and 440H-441A (per Lord Lowry LCJ holding that "*Northern Ireland…constitutes a separate legal jurisdiction with its own judicial and social outlook*" and "*The Courts have their own standards…., and those are standards established and approved by the people whom the courts in this jurisdiction exist to serve*").

[50] On this basis the Applicant not only submitted against following English decisions, but suggested that the award in this jurisdiction in the recent *Cox* case of £5000 by McAlinden J was also too low for having failed to reflect the point. It was otherwise advanced that I ought to take account of other relevant domestic law guidelines, which counsel submitted should include the three broad bands in *Vento*. He submitted that the relevant band in the Applicant's case was Band 2 (i.e. £8,400 to £25,200).

[51] For the Respondent Mr Sands argued that the correct reflection of the injury to feelings in this case would be no more that £1000, as in *DMA et al*. In those cases, as here, the victims of ill-treatment were held to be vulnerable people. There was no bad faith. The delay was not deliberate, but it persisted and when the matter was drawn to the Home Office's attention there was a choice to do nothing more about it. With some understandable cross-over from his stance on necessity, Mr Sands emphasised not only that the damage was caused by system error and a one-off accident, but there were potentially lawful grounds on which the Secretary of State might have refused the application. Thereafter, the application for judicial review was never about money (reflecting the same observation by Robin Knowles J); indeed there was no claim for damages until the amendment of the pleadings was sought at a late stage.

[52] During the course of the hearing Mr Sands distinguished the function of the court under section 8 HRA with the task of awarding compensation for damages in a personal injury case. Here the governing principle was "*equity*" and the exercise required awarding a more rounded form of "*just satisfaction.*" Accordingly, it did not matter that a non-deliberate breach of Article 3 could arise for different lengths of time (as with the various claimants in *DMA et al*) and each person still receive the same award. The important thing was to make a meaningful award that recognised the breach that all of them had suffered. On this, somewhat chiming with the language in the Strasbourg case law of righting moral damage, Mr Sands made reference to the New Testament, Matthew 20.V:1-16, and the parable of the workers in the vineyard. Each labourer was paid the same sum whatever time in the day he joined in the work ("*So the last will be first, and the first will be last*.").

[53] Finally, Mr Sands submitted that I should not rely on the *Vento* guidelines. To do so would give undue account of domestic law principles over Article 41. It would also mismatch awards relating to wrongful behaviours in the employment sector with the system-failure that in this case had given rise to a strict liability responsibility for a breach of human rights law. Alternatively, if I was minded to refer to *Vento*, it was submitted that the award would lie by analogy in the bottom part of the lowest band (i.e. £800 to £1000). That was so given its one off type nature and the lack of intention to cause the harm, or any bad faith.

[54] As a result of a question raised by the court, I add here that after the hearing I was told by the Home Office in writing that had the asylum support continued over the 167 day period in this Applicant's case, then he would have received financial

subsidies to the value of £35.39 per week at a total cost of £844. Although the cost of assisted accommodation varied and was subject to a degree of commercial sensitivity, I was further informed that the average rate that would have been paid to the supplier at the time that the Applicant was homeless can reasonably be calculated as £11.71 per night. The total cost of accommodation would therefore have been in the region of £1,956. On the Home Office analysis, the total cost of section 4(2) Asylum Support for the relevant period could reasonably be estimated as £2,800.

Decision on the Award

[55] I approach the matter on the basis that quantification of damages falls to be judged as regards a known vulnerable Applicant who remained homeless and without ancillary financial support for 167 days, while his access to funds or secure accommodation was otherwise prevented through the operation of immigration law. The cause of the situation was that the applications got lost in the system. He was consequently denied the opportunity to have his application properly considered. The outcome might still have been the same, at least so much so that the court cannot assume otherwise for the purpose of making an award. Were a different outcome likely; or as in *DMA et al*, a positive decision was frustrated by improper delay, then it would be just for the award to be higher.

[56] The similarities with *DMA et al* are that all the applicants for asylum support endured prolonged periods of homelessness. The differences with *DMA et al* are that Mr Mahmud was homeless for considerably longer, had no financial support as well as no accommodation, and I have made a finding (not recorded in relation to *DMA* claimants) that he spent a substantial part of that period rough sleeping, and all of it without the benefit of otherwise exhausted charity support.

[57] The essential basis for an award therefore lies in the damage done to the dignity of the person. That harm was not intentional, but by virtue of breaching Article 3 ECHR it was serious. It arose out of a one off mismanagement of a state benefits system that acts as the safety net for the otherwise exceptionally restrictive requirements that asylum-migrant entrants to the UK must have no recourse to public funds.

[58] As regards the Applicant's submission that I should award £10,000, I was referred to no Strasbourg or indeed domestic authority that justified the figure sought. The review of 19 financial awards in Article 3 cases conducted by Green J (as then) in *DSB and MBV v Commissioner of Police for the Metropolis* ([2014] EWHC 2493 (QB)) [2015] 1 WLR 1833 §§69-108 would not support the making of an award in cases of this nature for a sum even close to £10,000. Figures in that range and above would only arise if harm was deliberately inflicted, if there was otherwise evidence of psychiatric harm, or if the authorities failed to investigate such wrongdoing in a fashion that caused the rule of law to be brought into disrepute and/or for a person to suffer some substantial secondary victimisation because of

the attitude of the authorities. By way of example, I refer to the an award of £15,000 made in *C v Police Service of Northern Ireland* [2020] NIQB 3 §§91-94, where a vulnerable child was raped and the police, due to disciplinary wrongdoing, failed to properly investigate the case leading to some discernible psychiatric damage to the victim, albeit that there was pre-existing illness. I would add that although the Applicant's pre-existing mental health symptoms worsened during his period of destitution, the evidence from both his GP and his solicitor indicate that this must also have been because he feared that he would be deported.

[59] I do not accept the submission based on *Simpson v Harland and Woolf*. That is an authority concerning the computation of personal injury compensation awards. It constitutes an important statement about fidelity to Northern Irish judicial and social outlook. However, as Lord Lowry himself analysed in the judgment, the variation is in large measure due to the fact that in Northern Ireland the assessment of damages was in the hands of juries until 1987. The point was repeated in the Lord Justice MacDermott's Introduction to the First Edition of the 'Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland' (1996) and reprinted in the Fifth Edition (2018). Neither Stephens J nor the Court of Appeal adopted the principle when assessing the HRA damages awards in *Jordan*; nor did McAlinden J in *Cox*. To have done so would have gone against the grain of section 8(4) of the 1998 Act, which as we have seen considerably grounds judicial decision-making in the legal culture of Article 41 of the international Treaty. Indeed the language of the Strasbourg case law expressly advices that it is not the Court's role "*to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties*": *Al Jedda v UK* (2011) 53 EHRR 23 §114 (citing *Varnarva v Turkey* §224 quoted at paragraph 27 above).

[60] If *Vento* is referred to, no more than as a non-binding touchstone in domestic law for how injury to feelings might be valued, then this case would fall within the lower part of Band 3; and could not properly be characterised as a Band 2 case. In making those findings I do not overlook the intensity of any experience that passes the Article 3 threshold; but this is an equity based measure of just satisfaction, not an award of conventional legal compensation. Rather than aiming for 'modesty' in the exercise of my discretion, I would prefer to characterise it an aim for vindication that reflects the important, albeit adjectival, need for an award, especially to remedy a breach of Article 3, which otherwise does not sound in tort law. The level of award should value the potential for human rights damages to take greater root in domestic human rights culture. Where similar wrongs are repeated, awards can hopefully be sought, pleaded and swiftly agreed, so as to restore the dignity of a wronged person and formalise the self-correction by a system that has caused unlawful adverse harm to that individual.

[61] As regards the Respondent's case that I should limit the award to £1000, I find with great respect that the level of award that was made in the *DMA* judicial review to be somewhat too low as regards the facts disclosed in the judgment. That judges should disagree on such matters is inescapable; and I, of course, am not privy to all

the factors that operated in litigation before another court. My reasons for determining that the award could have been slightly higher are two-fold. First, however non-legalistic these awards are meant to be I do not think that exactly the same sum need be awarded to a person who was destitute for 105 days and someone of similar characteristics and circumstances who was destitute for 45 days. On this, I take into account that the Court of Appeal in *Jordan* [2019] NICA 61 §27-30 altered the award from £7500 to £5000 once it was established that the relevant period in which the PSNI culpably frustrated compliance with the investigatory duty under Article 2 was 14 months; and not an unspecified period across more than a decade as framed in the first instance judgment. This need not be an exact science, and the consideration of the matter in the round in *Jordan* reflects that. The distinction between different periods of suffering also need not be great. That said, timescale does matter. The reasoning of Diplock LJ in *Wise v Kaye* [1962] 1 QB 638, 664 (adopted in *Alseran* at §939) explains why this should be so:

> "Looked at in isolation there is no logical reason why for one week of pain the right award should be £20 rather than £200. All that can be said is that once you accept as a premise or convention that £20 is the right award for one week of pain, the right award for two weeks of similar pain is in the region of £40 and not in the region of £400 …"

[62] Second, I find that the figure in *DMA et al* is arguably too nominal for all the claimants who endured their situations for 45 days, 60 days, 75 days and 105 days respectively. Again, I cannot be definitive, because I do not know the full facts. However, it may be that Robin Knowles J reached the figure by placing too much emphasis on the observations that awards should be modest. For reasons emphasised at paragraphs 36 to 39, I am concerned that judgments that the case is "*not about the money*" can slightly skew a proper valuation where a monetary award would be due.

[63] Using *Vento* as a touchstone, I have already accepted that awards should fall within the lower level of Band 1 other than when the Article 3 violation lasts for just a few days, in which case the right award could potentially be below those *Vento* rates. If the period extends over a period of weeks there would appear to be good argument for awards of £1000-£3000 depending on duration of the breach and the character of the victim. On this I note that the actual cost of financial support and/or accommodation would mean that an award for £1000 granted in *Vento* would be less than the Home Office would have paid had it actually housed the claimant in *DMA* who was homeless for 105 days.

[64] Finally, I have taken into account the publicly disclosed agreed award of £3000 in a related Article 3 case recently decided in England: *R (W) v Secretary of State for the Home Department (Project 17 intervening)* ([2020] EWHC 1299 (Admin)) [2020] 1 WLR 4420 §§2-3, 4(f), 73, 76 and 79. The claimant was a child whose mother was a

foreign national entrant to the UK who was consequently subjected to a principle of no recourse to public funds in such a way as to expose her and the child on several occasions across a number of years to an imminent risk of street homelessness. On one occasion mother and daughter slept rough before being housed by the local authority. The child also had to move schools. No further details are provided. Having declared a policy under the Immigration Rules to give rise to systemic abuses of Article 3 ECHR, the parties agreed an award for the child claimant, albeit without an admission of liability on the facts. As the recipient was a minor, the settlement required the approval of the court, which was given.

[65] On my own assessment that some of the claimants in the *DMA* case could have justly and appropriately received somewhat more than £1000, I bear in mind that the Applicant in this case was denied any form of asylum support including the £31.80 per week in financial support, and that his situation endured for 167 days and near enough six weeks longer than the 105 days that lasted as the longest delay endured by a vulnerable claimant in *DMA et al*. I take account that this Applicant enjoyed no certainty of outcome had his application been properly decided upon. But that did not make him the author of the circumstances he lived in for several months; nor responsible for the failure to respond to the applications that were conscientiously made on his behalf. In the round, I have therefore decided to award the Applicant £1750 to reflect his experience. I do not consider that the award would be in conflict with the principles, or practices, of the European Court of Human Rights when applying Article 41.

Conclusion

[66] Aside from the declaration set out in paragraph 1 above, I therefore make an award of £1750 to be paid by the Secretary of the State to the Applicant pursuant to section 8 of the HRA. Although the Applicant only prevailed on Ground 2 of the Judicial Review, by agreement the Respondent shall pay all of the Applicant's costs, it having been accepted that costs should follow the event, especially in a broader public interest case of this nature, and where there was no aspect of the Applicant's conduct to warrant an alternative course.