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FINAL

Claim Nos: G00BS 413&669&614&343

IN THE COUNTY COURT AT BRISTOL

B E T W E E N :

ISATU BAH & OTHERS

Claimants

-and-

THE HOME OFFICE

Defendant

JUDGMENT

Representation:

Claimant	Mr Goodman and Mr Amunwa instructed by:
	Deighton Pearce Glynn
Defendant	Mr Tabori instructed by::
	Government Legal Department

INTRODUCTION

1. The essential question in this case is whether the Home Office can be liable in damages under section 8 of the Human Rights Act 1998 for applying an unlawful scheme to the Claimants which *could* have resulted in a breach of their Article 3 right not to be subjected to degrading or inhuman treatment in the form of extreme destitution.
2. This judgment proceeds on the basis of such admitted or assumed facts as were necessary for the trial of a preliminary issue which was heard on 29th and 30th September 2021; by agreement between the parties no oral evidence was given and thus no findings are made on any disputed facts.
3. The Claimants are mothers who are not British citizens; they are sole carers of minor British children. The Defendant gave the Claimants limited leave to remain, "LLTR", in the United Kingdom on a 10 year route to settlement in the United Kingdom on condition that they had no recourse to public funds, "NRPF", further to the Immigration Rules.
4. The Defendant operated a regime of applying a NRPF condition unless persuaded by an applicant that the applicant was **in** (as opposed to approaching) a state of destitution. I shall refer to this as the "Old Regime"; it has since been amended.
5. The Old Regime was successfully challenged as unlawful within the meaning of section 6 of the Human Rights Act 1998 in the Divisional Court in R (W, a Child by his Litigation Friend J) v Secretary of State for the Home Department & Anor [2020] EWHC 1299 (Admin); a case to which I shall refer henceforth as "W".
6. In these proceedings, in reliance upon the decision of the Divisional Court in W, the Claimants claim damages under section 8 of the Human Rights Act 1998 for (amongst other things) breach of their Article 3 procedural rights (prohibition of inhuman or degrading treatment) given to them by the European Convention for the Protection of Human Rights and Fundamental Freedoms and they also bring claims under the Equality Act 2010.
7. On 30th June 2021 HHJ Cotter QC (as he then was) made a direction for trial of the following preliminary issue:

*"Whether or not the Claimants have a right to damages for breach of their **procedural rights** under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in W to breach the procedural right under Article 3 of the ECHR."* [emphasis added].

8. At trial of this issue the parties were represented by counsel as follows:
   (a) Mr Goodman and Mr Amunwa for the Claimants;
   (b) Mr Tabori for the Defendant

   and I am most grateful for their written and oral submissions.

9. It is common ground that the preliminary issue is novel in the context of immigration, the NRPF condition and Article 3; I was given a plethora of domestic and Strasbourg jurisprudence and I shall refer to those cases which assisted me.
10. Within this judgment I shall consider:
    (1) The relevant parts of the Old Regime;
    (2) Article 3 ECHR and destitution;
    (3) How the Old Regime was applied to the Claimants;
    (4) The decision in Limbuela;
    (5) The decision W;
    (6) A summary of the Claimants' submissions;
    (7) A summary of the Defendants' submissions;
    (8) Discussion;
    (9) Remedy;
    (10) Conclusion and consequential matters.
11. Little to no time was spent at trial on the *quantum* of general damages should the court chose to award any for just satisfaction. Mr Goodman had prepared closing submissions on quantum of damages; Mr Tabori had not and it is right to observe that the directions made to date did not envisage anything other than trial of the preliminary issue. Given that awards of general damages in these types of cases are modest and in the region of £3,000 I had hoped that there would be agreement that I could deal with the same fairly summarily in order to

save cost but Mr Tabori was not prepared to agree to this course of action. Accordingly I shall not quantify damages within this judgment.

THE OLD REGIME

12. The Claimants were subject to the same scheme that applied in W.
13. There is no dispute about the legal and policy framework (which is set out by Bean LJ and Chamberlain J in W at paragraphs 10 to 27) so I shall summarise only the key elements of the framework.
14. The relevant parts of section 3 of the Immigration Act 1971 read as follows:

"General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen—

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under this Act;

…

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—

…

(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;"

15. Most state benefits comprise public funds for the purpose of section 3(1)(c)(ii); those benefits typically provide or top up an applicant's income so that the applicant can meet their costs of living[1]. The main costs of living concern accommodation, food and utilities. The relevant types of benefit include tax credits, universal credit, income support, child benefit and council tax benefit.

[1] Including their minor children's costs of living.

16. Part 5A of the Nationality Immigration and Asylum Act 2002 was inserted further to the Immigration Act 2014. The relevant parts of sections 117A and B of the 2002 Act read as follows:

    "117A Application of this Part

    (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

    (a) breaches a person's right to respect for private and family life under Article 8, and

    (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

    (2) In considering the public interest question, the court or tribunal must (in particular) have regard—

    (a) in all cases, to the considerations listed in section 117B, and

    …

    117B Article 8: public interest considerations applicable in all cases

    (1) The maintenance of effective immigration controls is in the public interest.

    …

    (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

    (a) are not a burden on taxpayers, and

    (b) are better able to integrate into society."

17. The Defendant has published Immigration Rules which have been revised from time to time. Appendix FM thereof addresses family members; the relevant part of GEN.1.11A (which applied at the time in question) reads as follows:

    "Where entry clearance or leave to remain as a partner, child or parent is granted,… it will **normally** be granted subject to a condition of no recourse to public funds, **unless** the applicant has provided the decision-maker with:

(a) satisfactory evidence that the applicant **<u>is</u>** destitute as defined in section 95 of the Immigration and Asylum Act 1999; or [emphasis added]

(b) satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income."

[emphasis added].

18. I refer to the two grounds as:

(a) The 'actual destitution' ground and

(b) The 'child welfare' ground.

19. The statutory definition of 'destitute' in section 95(3) of the Immigration and Asylum Act 1999 is as follows:

"For the purposes of this section, a person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

20. Once a NRPF condition has been imposed it is open to an applicant to ask that the decision to impose the condition be revisited by making a Change of Conditions 'CoC' application. If the applicant is successful in having the condition lifted on the ground of actual destitution there is no backdating of benefits even though it is axiomatic that the Defendant has decided that the applicant was destitute at the date of making the application at the very latest.

<u>ARTICLE 3 AND DESTITUTION</u>

21. Article 3 of the Convention Rights reads as follows:

    "Prohibition of torture

    No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

    For the avoidance of doubt this case does not concern torture or punishment.

22. The right is absolute and unqualified. Plainly the state must not inflict inhuman or degrading treatment and there will be occasions when the state needs to step in to protect a person from inhuman or degrading treatment.

23. There are degrees of destitution. Destitution is not, in itself, inhuman or degrading treatment but someone who is destitute at the hands of the state cannot be that distant from a state of inhuman or degrading treatment.

24. In Pretty v UK [2002] 35 EHRR 1; [2002] ECHR 427 the ECJ considered Article 3 and at paragraph 52 of their judgment they say:

    "As regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering …Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 … The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible ...

25. In R (Limbuela) v Secretary of State for the Home Department [2005] 3 WLR 1014 Lord Bingham said at paragraph 7

    "…As in all Article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state,

denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage Article 3, should merit the description used, in an immigration context, by Shakespeare and others in Sir Thomas More when they referred to "your mountainish inhumanity".

Baroness Hale said at paragraph 78:

"The only question, therefore, is whether the degree of suffering endured or imminently to be endured by these people reaches the degree of severity prohibited by Article 3. It is well known that a high threshold is set but it will vary with the context and the particular facts of the case. There are many factors to be taken into account. Sleeping rough in some circumstances might not qualify. As my noble and learned friend, Lord Scott of Foscote says, no doubt sometimes it can be fun. But this is not a country in which it is generally possible to live off the land, in an indefinite state of rooflessness and cashlessness. It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam's age had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity required under Article 3? I think not."

APPLICATION OF THE OLD REGIME TO THE CLAIMANTS

26. A detailed factual summary for the lead Claimants was submitted by Mr Goodman. This is not an agreed document and I repeat that I am not making any factual findings but I hope the following observations are not contentious.

27. All of the Claimants were very low earning single parents with minor dependent children. In each case they were granted LLTR with a NRPF condition.

28. The Claimants' financial circumstances deteriorated; they were unable to meet their basic costs of living and fell into arrears of rent/ utility bills and suchlike.

They all sought assistance from The Unity Project which is a charity that exists to assist migrants with LLTR in the UK to make CoC applications on the ground that they face destitution without having recourse to public funds.

29. In the case of Ms Yeboah she was dissuaded from making a CoC application because of the Old Regime in late 2018. She made a CoC application in June 2019 which was unsuccessful. On 11th September 2019, with childbirth imminent, she made a fresh application which was granted on the actual destitution ground; see the Defendant's case record. It seems that the decision was made on 1st October 2019 but not implemented until 21st October 2019.

30. In the case of Ms Botchway, she made a CoC application in July 2019 when she was facing imminent eviction; it was granted on the child welfare ground and not the actual destitution ground; see the Defendant's case record. However, the factual basis accepted by the Defendant was inadequate accommodation and inability to meet essential living needs from earnings so the facts accepted by the Defendant would also support actual destitution.

31. In the case of Ms Darko, she made a CoC application in July 2019 when she was in substantial arrears of rent and utility bills; it was granted on 25th September 2019. I do not have the Defendant's case record but the available paperwork and the decision letter suggests that the NRPF condition was lifted on the actual destitution ground.

32. In the case of Ms Bah she challenged the NRPF condition but was unsuccessful in 2018. Ms Bah made a fresh application in August 2019 which was successful on 25th September 2019 and was implemented on 1st October 2019. There is no witness statement from Ms Bah and the Defendant's case record seems to suggest that the condition was lifted on the actual destitution ground but it is not clear.

33. Therefore, so far as each of the Claimants are concerned save, perhaps for Ms Botchway, it seems that the Defendant accepted when the CoC application was made that they were actually destitute. The circumstances of the individual Claimants show that they and the dependents for whom they cared were at real

risk of losing the rooves over their heads and being homeless. There was no evidence of financial support being available from any of the fathers of the children. Mr Tabori tells me that some local authority funded financial assistance may have been available under section 17 of the Children Act 1989 but I am left with the clear impression (as was the Defendant) that without access to public funds the Claimants were at risk of being left so destitute that their Article 3 rights could have been breached. To adopt the words of Baroness Hale, the Claimants (who are female) and their children were at sufficient risk of 'rooflessness' and 'cashlessness' by being deprived of state benefits until the state deemed them to be actually destitute (as opposed to imminently destitute which is the new test after W).

34. The witness statements of the Claimants all speak of their states of anguish, worry and desperation which would be consistent with the financial straits the Claimants were in.

ARTICLE 3 OF THE CONVENTION RIGHTS AND THE DECISION IN LIMBUELA

35. In R (Limbuela) v Secretary of State for the Home Department [2005] 3 WLR 1014 the claimant asylum seekers who claimed to be destitute were refused support under section 95 of the Immigration and Asylum Act 1999 on the ground that they had not claimed asylum as soon as reasonably practicable after their arrival in the United Kingdom within section 55(1) of the Nationality, Immigration and Asylum Act 2002 and the provision of support was not necessary to prevent a breach of their Convention rights under section 55(5). They applied for judicial review of the Secretary of State's decision to refuse support on the ground that their suffering was so severe that a breach of their Article 3 right was imminent.

36. Therefore the essential issues before the court was to identify when:

(a) Denial of support with consequential destitution became inhuman or degrading treatment;

(b) The Secretary of State's duty to provide support under section 55(5) arose - was it on actual breach or on imminent risk of breach?

37. At paragraphs 8 and 9 Lord Bingham said as follows:

"8. When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

9. It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed…."

38. Lord Hope likewise considered the issue of when the Secretary of State's duty to provide support was triggered. At paragraph 61 he identified the question as follows:

"As for the final question, the wording of section 55(5)(a) shows that its purpose is to prevent a breach from taking place, not to wait until there is a breach and then address its consequences. A difference of view has been expressed as to whether the responsibility of the state is simply to wait and see what will happen until the threshold is crossed or whether it must take preventative action before that stage is reached."

And answered in at paragraph 62:

"The best guide to the test that is to be applied is, as I have said, to be found in the use of the word "avoiding" in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of Article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage

before the power in section 55(5)(a) is capable of being exercised. It is not just a question of "wait and see". The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the Article will occur because the conditions which he or she is having to endure are on the verge of reaching the -25- necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it."

THE DECISION IN W

39. In this case the claimant was a child who brought judicial review proceedings by his carer, mother and litigation friend J. J was granted leave to remain but was subject to the NRPF condition which caused her to suffer periods of destitution. J made a further application for leave to remain and she submitted evidence that she would become destitute if the NRPF condition was imposed but the condition was imposed nonetheless.

40. Further to Limbuela the Secretary of State conceded that the regime would be unlawful if it required applicants to become destitute before applying for the NRPF condition to be lifted. In argument she appears to have relied heavily on the use of the word "normally" in GEN.1.11A and the exception in (b) in an attempt to argue that the Old Regime should not be understood by the decision maker as always requiring applicants to become destitute before making an application for the NRPF condition to be lifted. This argument did not find favour with the Divisional Court. At paragraph 64 of their judgment Bean LJ and Chamberlain J say:

"In any event, even if paragraph GEN 1.11A were understood as imposing a duty not to impose, or to lift, the NRPF condition in cases where exception (a) or (b) applies, that does not address the case where the applicant is not yet suffering, but will imminently suffer, inhuman or degrading treatment. Paragraph GEN 1.11A says nothing about that case".

41. Their conclusion is at paragraph 73:

"For these reasons, the Claimant succeeds on ground 6. The NRPF regime, comprising GEN1.11A and the Instruction read together, do not adequately recognise, reflect or give effect to the Secretary of State's obligation not to impose, or to lift, the condition of NRPF in cases where the applicant is not yet, but will imminently suffer inhuman or degrading treatment without recourse to public funds. ***In its current form the NRPF regime is apt to mislead caseworkers in this critical respect and gives rise to a real risk of unlawful decisions in a significant number of cases. To that extent it is unlawful****."* [emphasis added].

42. There is nothing in the judgment which I consider can be taken as authority for the propositions that:

(a) There were relevant procedural rights;

(b) Which had been breached;

(c) Which gave the victims a right to damages.

I do not consider that I can place any weight at all on the subsequent agreement reached on damages in that case which were made expressly with no admission of liability on the part of the Defendant.

SUMMARY OF THE CLAIMANTS' SUBMISSIONS

43. The Claimants' case is attractively simple.

44. Mr Goodman says that, further to W, the Defendant's Old Regime is unlawful. He argues that by applying the unlawful Old Regime to the Claimants, who would in their circumstances thus be at risk of being subjected to unlawful decisions that could result in breach of their Article 3 rights, the Defendant is liable in general damages under section 8 of the Human Rights Act for just satisfaction.

45. Mr Goodman emphasises that the Claimants do not have to prove that the Defendant acted or failed to act in such a way as to cause a breach of their

Article 3 rights. He observes that if the Claimants could prove that the Defendant breached their Article 3 rights there would be no point in pursuing a claim that relied on breach of procedural rights which claim would be entirely redundant.

SUMMARY OF THE DEFENDANTS' SUBMISSIONS

46. Mr Tabori argues that a person to whom the Old Regime was applied does not, without more, have a claim simply because the Old Regime was unlawful. I agree otherwise anyone to whom the NRPF condition under the Old Regime was applied could claim damages even if there was no harm whatsoever in denying the applicant recourse to public funds. It would be akin to strict liability. However, I do not think that Mr Tabori's argument is contentious because that is not the Claimants' case.
47. Mr Tabori argues that to make good their claim for breach of their procedural rights the Claimants must do more than show they were placed at risk of their Article 3 rights being breached, rather they must show substantive breach. In short he argues that there must be damage and causation thereof as required in a typical claim in tort. It is worthwhile observing that Mr Tabori was unable to present any case law in which this was the ratio decidendi.
48. Mr Tabori also argues that in any event, even if the Claimants make headway in their case against his primary point above, they cannot claim non compensatory damages for just satisfaction.

DISCUSSION

49. Accordingly it is necessary to consider the case law, both domestic and from the ECJ, to attempt to identify the requirements for a successful claim for damages for breach of procedural rights.

50. It seems to me that reference to Mr Tabori's authorities in which claims for breach of Article 3 rights were refused on the basis that the suffering and or destitution was insufficient to amount to inhuman or degrading torture is unnecessary because that is not the issue the court is being asked to consider. If I understand the Claimants' cases correctly, the issue is whether the Defendant is liable for failing to act prospectively to these Claimants to avoid potential breaches of their Article 3 rights. Accordingly cases such as AO v Home Office [2021] EWHC 1043 (QB) do not assist. As observed earlier in this judgment the Claimants presented sufficient evidence to show that there was a real risk of breach; it was not a fanciful risk.

51. In Beganovic v Croatia [2009] ECHR 992 the applicant complained that the domestic authorities had not afforded him adequate protection against a serious act of violence and he relied on Article 3. Croatia argued that the applicant's injuries did not engage Article 3. The court said at paragraph 68:

"In addition, the injuries sustained by the applicant cannot be said to have been of a merely trivial nature. In conclusion, having regard to the circumstances of the present case, the Court considers that the applicant's allegations of ill-treatment were "arguable" and capable of "raising a reasonable suspicion" so as to attract the applicability of Article 3 of the Convention" …

The point being that the court did not require the applicant to prove breach of Article 3 in order for the state's obligation to protect to be engaged.

52. Mr Tabori relied on R (Gentle and Another) v Prime Minister & Others [2008] 2 WLR 879 (House of Lords). The claimants were mothers of British servicemen killed in the Iraq War. The claimants argued that the Government had failed to take reasonable steps to satisfy itself that the invasion of Iraq was lawful. Accordingly they argued that the Government had not taken reasonable steps to protect the servicemen's lives. The claimants argued that the Government

had a procedural obligation under Article 2 ECHR (right to life) to initiate a public investigation which would visit the issue of the Government's investigation into the lawfulness of the invasion. The claimants accepted that Article 2 did not give rise to a duty to investigate the question whether the invasion itself was lawful. The argument failed. Lord Bingham said at paragraphs 6 and 7:

"It is the procedural obligation under Article 2 that the appellants seek to invoke in this case. But it is clear (see para 3 of Middleton, quoted above, Jordan v United Kingdom (2001) 37 EHRR 52, para 105; Edwards v United Kingdom (2002) 35 EHRR 487, para 69; In re McKerr [2004] UKHL 12, [2004] 1 WLR 807, paras 18-22) that the procedural obligation under Article 2 is parasitic upon the existence of the substantive right, and cannot exist independently. ***Thus to make good their procedural right to the enquiry they seek the appellants must show, as they accept, at least an arguable case that the substantive right arises on the facts of these cases.*** *Unless they can do that, their claim must fail. Despite the careful and detailed submissions of Mr Rabinder Singh QC on their behalf, I am driven to conclude that they cannot establish such a right.*

7. *As the summary in para 2 of Middleton makes clear, Article 2 not only prohibits the unjustified taking of life by the state and its agents, but also requires a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. In either case the question whether the state unjustifiably took life or failed to protect it will arise in respect of a particular deceased person, as it did at the inquests pertaining to Fusilier Gentle and Trooper Clarke. There is in my opinion no warrant for reading Article 2 as a generalised provision protective of life, irrespective of any specific death or threat. In the present case the appellants, tragically, lost their sons. But the right and the duty they seek to assert do not depend on their sons' deaths. If they exist at all they would have arisen before either young man was killed and would exist had both young men survived the conflict."*

[emphasis added]

It seems to me from reading the case that the claimants' case was doomed to fail once it was conceded that Article 2 did not give rise to a duty to investigate the lawfulness of the invasion. It is common ground between Mr Goodman and Mr Tabori that an investigative duty is parasitic on the duty to protect but it cannot be said that the investigative duty arose only once the substantive duty has been breached; there needed to be an arguable case that the substantive right arose on the facts of their cases. I do not take Gentle as authority for the proposition that a claim for breach of procedural rights cannot succeed absent a breach of the relevant substantive right.

53. In O v Commissioner of Police for the Metropolis [2011] EWHC 1246 the claimants had been held in servitude and their rights under Articles 3 and 4 (prohibition of slavery) had been breached. It was accepted that their rights under Article 3 and 4 had been infringed. They claimed that notwithstanding that the police were put on notice of their predicament the police failed to carry out an effective investigation such as to protect the claimants from breaches of Articles 3 and 4. The police denied breach of duty. The claimants succeeded and obtained damages for just satisfaction. It was held that the police were under a duty to investigate once a credible account of an alleged infringement had been brought to their attention. However, I see nothing in this authority to support the proposition that no duty would have arisen notwithstanding a credible account of a risk that their rights had been infringed.

54. I cannot see that D v Commissioner of Police of the Metropolis (Liberty and Others intervening) [2018] 2 WLR 895 (Supreme Court) (the victims of the rapist Worboys case) helps the court.

55. In the recent case of R (DMA and others) v Secretary of State for the Home Department [2021] 1 WLR 2374 the Secretary of State had accepted a duty to provide accommodation to 5 destitute failed asylum seekers in order to avoid a breach of their Article 3 rights. Her guidance required the decision to accommodate to be implemented within days; in this case there was much delay. The claimants did not claim that the delay caused actual breach of their Article 3 rights. Knowles J noted that by accepting the duty to accommodate the Secretary of State accepted that the claimants appeared to be destitute and that on a fair and objective assessment the claimants faced an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life; see paragraph 97 of the judgment. The claimants succeeded in persuading Knowles J that the Secretary of State (inter alia):

(1) Breached her duty to provide accommodation within a reasonable time

(2) Was in breach of duty for failing to monitor the provision of accommodation.

56. In this case the court did consider damages for just satisfaction and decided to award the same. I shall return to this case to consider whether damages should be awarded to the Claimants.

57. In R(ST) v SSHD [2021] EWHC 1085 the Divisional Court held that the unlawful NRPF policy had not given rise to an investigatory duty i.e. that the Secretary of State should have inquired into how the NRPF scheme was working. However, I do not read the judgment as any authority for the proposition that the Secretary of State cannot be liable for an unlawful regime which, on the evidence, could push a claimant into such destitution as to breach their Article 3 rights.

58. I conclude from the authorities that the Claimants, on the evidence in their cases, have a right to claim damages for breach of their procedural rights under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in W to breach the procedural right under Article 3 of the ECHR. In particular, I reject the contention that the Claimants must prove actual breach of Article 3.

59. There remains the matter of whether the court, in its discretion, should award damages and I turn to that issue now.

REMEDY

60. Section 8(3) of the Human Rights Act 1998 reads as follows:

    No award of damages is to be made unless, taking account of all the circumstances of the case, including—

    (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

61. As, I hope, I have made clear in this judgment I agree with Mr Tabori that there is no 'strict liability' as he put it; in turn I accept there must be a causal link between violation and damage which may be non-pecuniary such as for physical or mental suffering per Rule 32 of the ECtHR's rules of court.

62. The main argument in favour of the Defendant is that the unlawfulness of the Old Regime has been corrected and if the Claimants' substantive Article 3 rights had been breached they would have had a plain claim for damages thus they have no claim for general damages under section 8 for just satisfaction.

63. In R (Greenfield) v S of S for the Home Department [2005] 1 WLR 673 (which was cited in DMA) the House of Lords considered damages for breach of Article 6 (fair trial). Within paragraph 6 Lord Bingham observed:

"… It is evident that under Article 41 there are three pre-conditions to an award of just satisfaction: (1) that the Court should have found a violation; (2) that the domestic law of the member state should allow only partial reparation to be made; and (3) that it should be necessary to afford just satisfaction to the injured party. There are also pre-conditions to an award of damages by a domestic court under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. It would seem to be clear that a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is 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 whether 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 British courts must look for guidance on the award of damages."

64. In Lord Bingham's analysis of the authorities, seen through an Article 6 lens, it is apparent that the law (domestic and in Strasbourg) has recognised that modest damages may be appropriate for anxiety and frustration

notwithstanding that the primary remedy – declaration and re-trial - amounts to just satisfaction in most Article 6 cases.

65. R (DMA and others) v Secretary of State for the Home Department [2021] 1 WLR 2374 (in which Greenfield was cited) damages were awarded for breaches of procedural rights; Knowles J's reasoning was as follows at paragraphs 337 ff:

"Section 8(3) goes on to provide that: "No award of damages is to be made unless, taking account of all the circumstances of the case … the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made." In Greenfield v the Secretary of State for the Home Department [2005] UK HL 14, the House of Lords emphasised that a domestic court could not award damages under s.8 of the 1998 Act unless satisfied that it was "necessary" to do so.

338. In DSD v Commissioner of Police for the Metropolis [2015] 1 WLR 1833 the Court (Green J) [the Worboys case damages hearing] *said the starting point is to ask whether a non-financial remedy is sufficient 'just satisfaction'. To determine this the Court will ask firstly, whether there is a causal link between the breach and the harm which should be appropriately reflected in an award of compensation in addition to other remedies; and secondly, whether the violation is of a type which should be reflected in a monetary award.*

339. Green J identified the range of factors that the Court would need to consider:

> *"118… the nature of the harm suffered and treatment costs; the duration of the breach by the defendant; the nature of the failings and whether they were operational and/or systemic; the overall context to the violations; whether there was bad faith on the part of the defendant or whether there is any other reason why an enhanced award should be made; where the award sits on the range of awards made by Strasbourg and in similar domestic cases; other payments; totality and 'modesty'."*

Green J also noted that damages are not likely to be substantial and will generally be modest. In Lee Hirons v Secretary of State for Justice [2016] UKSC 46, the Supreme Court held that the victim must establish that the effects of the breach were sufficiently grave to merit compensation.

340. It was argued on behalf of the Secretary of State that even taking each claimant's individual circumstances at its absolute highest, when considered against the factors set out by Green J in DSD no award of damages is necessary to afford "just satisfaction". It was argued that "the nature of the harm suffered by each Claimant was nominal at best, the duration of any delay was minimal, there was no bad faith, the delay was not deliberate and there was no lasting breach of consequence [and as] such, a declaration in each Claimant's

case is sufficient to afford 'just satisfaction'". Mr Tam QC urged in oral argument that the present cases were not equivalent to the State withdrawing support to someone who was suffering.

341. In my judgment harm was suffered by reason of delay, and to vulnerable people. The harm suffered was not nominal and the delay was far from minimal. I accept that there was no bad faith. The delay was not deliberate, but it persisted and there was a choice not to do more about it. An award of damages is necessary but taken with the declarations, a non-nominal award of £1,000 to each claimant who claims damages is sufficient for 'just satisfaction'. The case is not about money. It is the declarations that matter."

66. Insofar as the Claimants are concerned, the harm started from the date on which the NRPF condition would have been lifted had a lawful regime (i.e. the current regime) been applied to them. There then passed a period of time in which Ms Yeboah was dissuaded from making a CoC application because she would not have got through the door of the Old Regime and for the Claimants a period of time when the CoC application was made unsuccessfully because the Old Regime was applied. There were further periods of time between the making of (successful) applications, making of decisions on the applications and implementing those decisions. This meant the periods of actual destitution commenced, at the very latest, when the (successful) CoC applications were made and ended on implementation of the decisions to lift the NRPF condition.
67. W was of no benefit to the Claimants; no decision was made for any of the Claimants on the ground of imminent destitution. No other redress has been provided to the Claimants. I have already addressed the effect of denying public funds upon the Claimants.
68. Accordingly I cannot see how, on the facts of this case, just satisfaction can be achieved without an award of general damages.

CONCLUSION AND CONSEQUENTIAL MATTERS

69. The answer to the preliminary issue is thus:

The Claimants do have a right to damages for breach of their procedural rights under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions

on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in W to breach the procedural right under Article 3 of the ECHR.

70. Unless the parties manage to settle the claims the case will need a further directions hearing.

71. I invite counsel to agree and submit a proposed minute of order or a request for listing with a time estimate. For the purposes of both appeal and permission to appeal, in order to avoid any procedural traps:

(a) The hearing is adjourned to 28th October 2021;

(b) Any party who seeks permission to appeal from me must apply informally by e-mail before 2pm 28th October 2021 and I will adjourn the case further so that the application can be heard;

(c) Further to Rule 52.12 2(a) any appellant's notice must be filed with an appeal court not later than 21 days after issue of a minute of order pursuant to this judgment.

HHJ RALTON

28th October 2021