Neutral Citation Number: [2010] EWCA Civ 453

Case No: A2/2009/1703

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Deputy Judge John Leighton Williams QC
[2009] EWHC 1886 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 April 2010

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE THOMAS
and
SIR SCOTT BAKER

- -

Between :

Abdillaahi Muuse	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**

- -
- -

Tom Poole (instructed by **The Treasury Solicitor**) for the **Appellant**
Stephen Knafler QC and Abdurahman Jafar (instructed by **Messrs Pickup & Scott**) for the **Respondent**

Hearing date: 17 February 2010

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Judgment

Lord Justice Thomas:

1. In this appeal, the appellant (the Home Secretary) did not dispute that the respondent (Mr Muuse), a Dutch national who had been born in Somalia, had been unlawfully detained on the orders of officials pending deportation to Somalia in circumstances where there was no right to deport. However the Home Secretary challenged the decision of Mr Leighton Williams QC, sitting as a Deputy Judge of the High Court, that the unlawful detention had arisen from misfeasance in public office by officials of the Department. Whilst the Home Secretary did not dispute the award of compensatory and aggravated damages to Mr Muuse for his unlawful detention, he challenged the award of exemplary damages.

THE FACTS

2. The facts found by the judge were clear and there is no appeal against them.

(i) Mr Muuse's nationality

3. Mr Muuse was born on 1 July 1968 in Somalia. In 1988/89 he married, moved to Ethiopia and had his first son in 1993. In 1994 his wife and son fled to the Netherlands and he joined them a year later. They were granted asylum. In the period 1995-2001 he had four further children. In 2001-2 he became a Dutch citizen. At about the same time he moved with his wife and family to the United Kingdom; a sixth child was born in the United Kingdom.

4. Mr Muuse's relations with his wife deteriorated. In 2005 he was made the subject of a restraining order in the Milton Keynes Magistrates' Court. In March 2005, he was convicted of criminal damage and given a custodial sentence of 4 months.

(ii) Mr Muuse's remand into custody and sentence

5. On 18 February 2006 Mr Muuse was charged with common assault and two breaches of the restraining order. He was remanded into custody. The Detained Persons' Property Record made at the police station showed that a passport and driving licence in his name was received; his Custody Record Sheet showed his place of birth as Somalia, but that he was a national of Holland. The police would have forwarded this information to the Immigration Directorate at the Home Office.

6. Mr Muuse was transferred the same day to HM Prison Woodhill. At that time, the officers in the Prison Service and the officials of the Immigration Directorate were within the Department of the Home Secretary. It was only on 9 May 2007 that the Prison Service was transferred to the Department of the Secretary of State for Justice.

7. The Resettlement Questionnaire at Woodhill recording information about Mr Muuse dated that same day, 18 February 2006, described him as a foreign national with Dutch nationality, as did Form CCT1, a copy of which would have been sent to the Immigration Directorate to confirm that Mr Muuse was lawfully in the UK. His property record compiled on the same day recorded receipt of a passport, driving licence and identification card (ID card). The Immigration Directorate were informed at that time of Mr Muuse's detention and his Dutch nationality.

8. Mr Muuse remained in custody until 7 July 2006 when he appeared at Aylesbury Crown Court. An application for bail was made and he was released on bail, on condition that he surrendered his Dutch passport at Milton Keynes Police Station. On 8 July his passport was surrendered at Milton Keynes Police Station; he was admitted to bail and received back his Dutch ID Card and driving licence. The original receipt for his passport or copy of the receipt remained attached to his property record at Woodhill.

9. On 7 August 2006 he surrendered to his bail at Aylesbury Crown Court and pleaded guilty. He was sentenced to concurrent sentences of three months imprisonment on each of the breaches of the restraining order and a six months consecutive sentence for the assault. As he had been in custody for 147 days, the judge ordered his immediate release.

(iii) Mr Muuse's unlawful detention by the Home Secretary on 7 August 2006

10. As he was about to leave the court after the judge had ordered his release, he was asked by the dock officer to return downstairs to the cells. He agreed to do so and was told he was going to be detained in Woodhill. An explanation was given to him that it was "for immigration". The Home Secretary was unable to identify which official at the Immigration Directorate had given these instructions and thus deprived Mr Muuse of his liberty.

11. Mr Muuse spoke to his advocate and showed him his Dutch ID card. His advocate went off to telephone and came back saying he had given the information on the ID card to the Home Office. His advocate told him that if he was not released the following day, his detention would be unlawful.

12. Mr Muuse was taken to Woodhill where his property was listed; the list included his Dutch driving licence and his Dutch ID card. An "Immediate Release Checklist" was completed at Woodhill that day showing his nationality as Dutch. Woodhill would also have held the file containing the Resettlement Questionnaire which, as set out at paragraph 7 above, showed his nationality as Dutch. As on the previous occasion, the Immigration Directorate would have been given this information.

13. Under procedures laid down by the Home Secretary and clearly set out in the relevant manual, officers taking a person into custody pending deportation should be provided with a document called an "IS91" which was intended to act as the warrant of authority for the detention; the form made provision for the grounds for detention to be set out. In addition another form, form IS91(R), should be given to the person detained along with the Notice of Detention explaining the reasons for detention.

14. A form IS91 which purported to justify the detention of Mr Muuse had a date of 7 August 2006; the judge found it had not been signed by anyone, though it appears from a copy in the file that it may have been signed at some stage, though the signature and the name of the person signing has been redacted. It had been faxed to Woodhill. The grounds for detention had not been filled in. The approval of the decision to detain was made by a Higher Executive Officer Senior Case Worker. The further information provided by the Home Secretary in answer to a request by Mr Muuse was that this Case Worker did not have access to Mr Muuse's identity

documents, but only to information provided which "appeared to suggest that [Mr Muuse] was either Dutch or Somali".

15. The judge concluded that the IS91 was not on its face valid. Neither it nor form IS91(R) was in any event provided to Mr Muuse and he was not at that stage given any formal reasons for his imprisonment. His imprisonment was in fact unlawful for two quite separate reasons:

    i) Mr Muuse was not liable to deportation.

        a) The Home Secretary is given authority to deport a person who is not a British citizen under the provisions of s.3(5)(a) of the Immigration Act 1971:

        > "A person who is not a British citizen is liable to deportation from the United Kingdom if—"
        >
        >> "(a) the Secretary of State deems his deportation to be conducive to the public good;"

        b) The Home Secretary had made clear through a policy statement issued by the Immigration Directorate that no citizen of the European Economic Area (EEA) would be removed under those provisions unless the prison sentence imposed was two years or more.

        c) Thus there was no basis for lawfully detaining Mr Muuse under the provisions of the 1971 Act.

    ii) If Mr Muuse had been imprisoned on the basis that he was Somali and there therefore existed grounds on which he could be deported, Mr Muuse could only have been detained under the provisions of paragraph 2 of Schedule 3 which provides (as amended):

    > "(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order."

        a) Under this provision, which applied until a Deportation Order was made, the Home Secretary would only have had authority to detain if a Notice of Decision had been issued.

        b) There was no evidence that such a Notice of Decision, an ICD 1070, was issued until 11 September 2006 – see paragraph 17 below.

        c) There was thus, even on the erroneous basis that Mr Muuse was Somali, no lawful authority to detain Mr Muuse. The officials had not issued a Notice of Decision (an ICD1070) and therefore acted unlawfully by issuing an instruction to the prison escort contractors and

to the Governor of Woodhill to take the Respondent into custody and imprisonment.

(iv) The making and service of the Notice of Detention

16. It was not until 9 September 2006 that any consideration was given to the issue of a Notice of Decision (an ICD1070) by anyone authorised to issue such a Notice. There were documents in the file that made this clear. The form for the person with such authority had been carefully designed to point the decision maker to all the relevant considerations. The decision was recorded in the following terms:

> "All the known facts of this case have been considered, Mr Muuse has no known close ties in the United Kingdom. He was convicted of common assault and two counts of harassment. I consider any appeal insufficient to stay in contact. Detention is proportionate to the risk of him offending."

17. On 11 September 2006, a Notice of Decision to Make a Deportation Order (ICD 1070) was signed on behalf of the Home Secretary. It informed Mr Muuse that the Home Secretary had decided to make a deportation order and proposed to give directions for his removal to Somalia. It informed Mr Muuse of his right of appeal. A letter was sent by Alexander Nwanji of the Criminal Casework Team at the Immigration Directorate to the Governor at Woodhill asking him to inform Mr Muuse of the decision to make a deportation order and asking him to serve the forms, including the signed ICD1070 and a further letter addressed to Mr Muuse. That further letter (in the form of an ICD 1913) stated that "having carefully considered the particulars of your case", the writer was satisfied that his detention was justified because he was liable to abscond and setting out the grounds for his detention.

18. When an official acting on behalf of the Home Secretary considers issuing a Notice of Decision, that official must make a careful review of the evidence. The official must be satisfied that there is evidence that the person to be made the subject of the order is liable to be deported in accordance with the policy of the Home Secretary, that the person is a citizen of the country to which he is to be deported and that his deportation is conducive to the public good.

19. The judge found that Mr Muuse's case had not been considered as it should have been. No adequate investigation of his status was made and no adequate justification in accordance with Home Office guidelines was followed. The Home Office through both the Prison Service and the Immigration Directorate had ample records to show that Mr Muuse was Dutch – see paragraphs 5, 7 and 12 above.

20. It is again a basic requirement of justice that such a Notice be promptly served on the detained person. Moreover Rule 9 of the Detention Centre Rules so provides. However, the Notice was not served until 3 November 2006 (see paragraph 27) or possibly a day or two earlier on 1 November 2006 (the date given for service on the Notice). No IS91(R) was ever served on the claimant. The explanation given to the judge was that this may have been due to a shortage of staff, an explanation that the judge did not find convincing.

(v) The reaction of officials to Mr Muuse's assertion of his Dutch Nationality

21. During his period in prison in Woodhill Mr Muuse persistently protested that he was Dutch and that his Dutch ID card was held in the prison with the other property that had been taken from him. Most of the protests were oral, but there was a written prison record dated 25 September 2009 of his assertion of his Dutch nationality, citizenship of the EU and that his passport and ID were held by the police or the prison authorities.

22. At Woodhill, the Foreign National and Legal Service Office in the Resettlement Department and the lead officer dealing with immigration matters was Ms Debbie Freeman – the sole witness called on behalf of the Home Secretary. The judge did not find her a satisfactory witness. He did not believe much of her evidence, including her evidence that she had explained to Mr Muuse at the outset of his return to custody that, if he had changed his nationality, he could say so and produce documents. He found that some of the prison officers, including Ms Freeman, closed their minds to Mr Muuse's protestations that he was Dutch.

23. The judge accepted Mr Muuse's evidence that he was told by a prison officer at a meeting in September 2006 when he told the officer he was Dutch: "You are not Dutch, look at you. You are an African" and that his documents were fake. A document was read to him that purported to say that the Dutch Government did not want him returned.

24. The judge found that "insufficient, almost nothing, was done to verify his claims that he was Dutch". He found that HM Prison Service took no initiative to discover why he was being held and to verify his claim to Dutch nationality, even though this could simply have been done by checking his property.

25. The judge also found that the Immigration Directorate also failed to follow its own procedures set out in its Manuals that the detention be kept under close review; this should have been the responsibility of the Criminal Casework Directorate. It does appear that his case was considered on 23 October 2006 by a person whose name has been redacted; the note of that consideration made it clear that it was unknown whether he had any close ties in the UK. A monthly report addressed to Mr Muuse was written the same day by E. Power-Gibbs, a casework Executive Officer. It made clear he had been kept in detention because he had not provided satisfactory evidence of his nationality and that he did not have enough close ties such as a family to make it likely that he would stay in one place.

26. Attached to the report was a "bio-data information form" which showed Mr Muuse's nationality as Somali. This form was taken to him at the end of October. The judge accepted Mr Muse's evidence that when he told Ms Freeman in connection with this form that he was Dutch, he was simply told he was Somali, an illegal and had no family, friends or documents. He was terrified. When he gave his details again, he was given a similar answer.

(vi) The decision to deport Mr Muuse

27. On 3 November 2006, Tunji Ogunmisi, another official in the Criminal Casework Directorate of Immigration Directorate, wrote to Mr Muuse a letter known as an ICD

1914. This stated that the Directorate had written on 11 September 2006 seeking reasons why he should not be deported - this was a reference to the Notice of Decision (the ICD1070) to which I have referred at paragraph 17 but which had not been given to Mr Muuse. The letter went on to state that no representations had been received, but having reviewed the facts known, it had been concluded that his deportation would be conducive to the public good and that he would be deported to Somalia. The letter pointed out that no evidence had been received from him, but consideration had been given to his rights under the Convention. It again informed him of his right of appeal. This letter was faxed to Woodhill Prison and passed to Mr Muuse, probably at the same time as the ICD1070 signed on 11 September 2006.

28. Mr Muuse should have been given five days to provide his reasons as to why he should not have been deported. As the ICD1070 was served only on 3 November 2006, it followed that no time was allowed for Mr Muuse to provide his reasons. When the Immigration Directorate at the Home Office subsequently wrote to the Asylum and Immigration Tribunal (AIT) on 7 December 2006 requesting an oral hearing of Mr Muuse's appeal against the deportation order (see paragraph 35 below), their account of events confirmed that this right had not been accorded to him.

> "On 1 November 2006 [Mr Muuse] was informed of the decision to make a deportation order against him and was asked for any reasons why he considered he should not be deported. No reply was received by 3 November 2006 and on 3 November 2006 Mr Muuse was notified that he was to be deported to Somalia."

The judge found that the official had either been unaware of the obligation to give Mr Muuse five days to appeal or chose to disregard the obligation; evidently the practicality of returning reasons within 2 days was not considered.

(vii) The evidence obtained by Mr Muuse's solicitors

29. Mr Muuse had instructed solicitors on 28 September 2006. They had set about trying to obtain confirmation of his Dutch nationality. They wrote to the police and to HM Prison Service attempting to obtain Mr Muuse's passport; no reply was received to their letter. They did, however, obtain a copy of his passport from an employment agency by 7 November 2006.

30. After Mr Muuse had forwarded the Notice of Decision to make a Deportation Order to his solicitors, on 9 November 2006 they instituted an appeal to the AIT which received it the same day. The notice of appeal stated he was Dutch and, as his sentence had been under two years, he could not be detained or deported. The solicitors enclosed various documents supporting his Dutch nationality. The Home Secretary contended, without adducing any evidence, that the letter was only received on 15 November 2006.

(viii) The making of the Deportation Order by the Minister

31. The solicitors also wrote on 1 November 2006 to the criminal case work department of the Immigration Directorate stating that Mr Muuse was Dutch and that the authorities held his passport and ID. The letter was not answered. It was clear,

however, from a response made by the Home Secretary's officials in a Race Relations Questionnaire which they were required to answer under s.65(1)(b) of the Race Relations Act that the officials were aware by early November that Mr Muuse was claiming he was Dutch, but they wanted proof. As the judge observed, they already had that proof. The fact they knew they had the proof is confirmed by a very urgent request sent by Fax on 6 November 2006 by Mr James Burley of the Criminal Casework Team at the Immigration Directorate requesting various documents, including a copy of Mr Muuse's passport.

32. Despite this, on 7 November 2006, an official of the Immigration Directorate, Mr Ogunmisi, prepared a submission to Mr Liam Byrne, the Minister of State, recommending a deportation order be made. It asserted that Mr Muuse was a Somali national and made a number of other false statements such as the assertion that Mr Muuse had been notified on 10 September 2006 of the decision to make a Deportation Order against him. Records show that this submission was sent to a Senior Case Worker, Karen Nicholls, to check on 7 November 2006 and that she sent it to the Minister's private office on 10 November 2006 with a Deportation Order for the Minister to sign. In the copy of the document produced for the court the name of the official who signed it and those to whom it was copied (other than the Home Secretary) were redacted.

33. On 15 November 2006 the Minister of State on the basis of that submission made a Deportation Order authorising the deportation of Mr Muuse to Somalia. As set out at paragraph 30 above, it was asserted on behalf of the Home Office, without evidence, that a copy of the Notice of Appeal and accompanying documents was not received at the Immigration Directorate until 15 November 2006; nonetheless, despite the receipt of these documents on the day the Deportation Order was made, Tunji Ogunmisi of the Criminal Casework team at the Immigration Directorate sent the copy of the signed Deportation Order to Woodhill on the following day.

34. The judge found in respect of this course of conduct by officials in the Immigration Directorate of the Home Office:

> "Having set in play the process the Immigration Directorate appears to have been intent on pursuing it to the end in disregard of the safeguards to be observed and did so to the extent that in early November 2006 the process was accelerated to double quick speed regardless of appeal rights with the end result that the notice of deportation was signed by the Minister on 15 November 2006, even though solicitors had been sent proof of the Claimant's Dutch nationality on 6 November 2006. It is no excuse that the contents of his letter did not reach the decision maker until 15 November 2006, an assertion not supported by any evidence. If it did not, the system was defective."

The judge pointed out that a telephone call to the Resettlement Department at Woodhill would have resulted in discovering that the prison service held his Dutch ID card.

(ix) The failure to release Mr Muuse for a further month

35. A further month then elapsed in which nothing was done to release Mr Muuse from custody. A note on the computer records dated 22 November 2006 written by K Laird stated:

> "Although Mr Muuse Abdullahi has been convicted of a serious offence, as an EEA national with 14 months conviction in total he does not meet the CCT criteria. There was an issue with Muuse's nationality. However it has now been confirmed that Mr Muuse and family were granted asylum/permanent status in the Netherlands in 1995/6. Documents to prove this have been faxed over from POU Stoke by Matt. As a Deportation Order has already been served on Mr Muuse this would have to be revoked. Case referred to SEO Glynnis Walford to authorise release and warning letter to be issued. File also to be requested from POU Stoke in order for DO to be revoked."

36. Despite this and the evidence that the officials at the Immigration Directorate now had, on the Home Secretary's own case, Elizabeth Stallard, an official of the Appeals Customer Focus Team at the Immigration Directorate requested on 6 December 2006 an oral hearing of Mr Muuse's appeal against the Deportation Order. The request asserted that Mr Muuse's nationality was Somali and enclosed the documents relied on for the deportation, including the Deportation Order made by the Minister. A further letter was sent on 7 December 2006 to Mr Muuse's solicitors to say that the relevant documents had been sent to the AIT and that if Mr Muuse did not wish to proceed with his appeal the Home Office should be notified promptly.

37. On 11 December 2006 Mr Muuse was put in a prison van to be taken to the AIT Hearing Centre at Nottingham for the scheduled hearing date for his appeal. During the course of the journey, the prison officials at Woodhill were told that Mr Muuse's presence was no longer required at the hearing. This message was passed to those escorting him in the prison van. The vehicle stopped, waited about half an hour and then returned to Woodhill. Mr Muuse was given no explanation by those escorting him as to what was happening. He gave evidence, which the judge accepted, that he was frightened. It appears that the AIT had determined that it had become apparent that Mr Muuse was Dutch and that the Home Secretary had conceded there was no basis for his removal.

38. Yet again, despite this, no steps were taken to free Mr Muuse until 15 December 2006. The judge made clear no explanation had been given to him for this further delay. He concluded that no interest appeared to have been taken by officials acting for the Home Secretary to ensure the claimant was promptly released. Even then, when he was released, it was without the documents necessary to prove his status. His Dutch ID card and driving licence were not returned to him until five months later on 13 May 2007.

39. On 14 December 2006, Tunji Ogunmisi wrote to Mr Muuse stating that the Home Secretary had given consideration to his conviction and decided to take no further action on this occasion. It warned him that the Home Office might not be prepared to exercise such leniency should he come to adverse notice again. There was no apology.

40. Mr Muuse complained about his treatment on 19 January 2007.

(x) The commencement of proceedings

41. On 4 June 2007 Mr Muuse commenced proceedings in the High Court against the Home Secretary alleging false imprisonment, unlawful detention, breaches of the Data Protection Act, the Human Rights Act and the Race Relations Act 1976, negligence and misfeasance in public office. Aggravated and/or exemplary damages were claimed.

42. The defence of the Home Secretary was served on 11 December 2007, accompanied by a statement of truth. At paragraph 6 it was admitted that the Home Secretary was liable to compensate Mr Muuse by an award of basic compensatory damages in respect of loss and damage which was caused to him by his detention between 7 August and 15 December 2006. The essence of the defence was contained in paragraph 7 which read as follows:

> "For the avoidance of doubt, it is admitted that throughout [Mr Muuse]'s detention between 8 August and 15 December 2006 he was an EU national and, therefore, not liable to deportation. It is the [Home Secretary]'s case that this was not discovered until enquiries were made following notification of the Claimant's appeal on 15 November 2006. As soon as the [Home Secretary] was aware that the claimant was contending that he was an EU national all reasonable steps were taken to ascertain his nationality. Once it had been confirmed that he was an EU national, all reasonable steps were taken to release him. In the premises, it is averred that at all material times the [Home Secretary], its servants and agents, exercised powers conferred by the 1971 Act and acted in accordance with their duties. It is denied that the [Home Secretary]'s treatment of [Mr Muuse] was discriminatory and that the [Home Secretary], its servants or agents, were negligent and/or acted in misfeasance of public office."

43. The claim was listed for hearing on 25 November 2008. The Home Secretary had not served witness statements. Mr Muuse provided a witness statement during the course of the day and the Home Secretary applied for an adjournment. At the resumed hearing on 26 January 2009 the Home Secretary asked for a further adjournment, as the evidence which was needed had not been gathered in the time available. As Mr Muuse did not object, a further adjournment was given. The resumed trial was listed for 28 April 2009, but the statements, including one from Ms Debbie Freeman, were not served until 24 April 2009. This necessitated Mr Muuse seeking an adjournment.

44. The trial eventually started on 30 June 2009. In addition to maintaining the defence set out at paragraph 42 above, it was contended on behalf of the Home Secretary that Mr Muuse's detention occurred through innocent error because officials believed that Mr Muuse was a Somali national and that his identity was confused with that of another of a similar name. The only witness called on behalf of the Home Secretary was Ms Freeman. No one was called from the Immigration Directorate

The apology tendered

45. At the hearing the advocate appearing for the Home Secretary tendered an apology on behalf of the Home Secretary. This was some 2½ years after Mr Muuse's unlawful imprisonment.

46. We enquired whether the Minister who had signed the Deportation Order, Mr Liam Byrne, had been informed of the withdrawal of the Deportation Order. We were told that he had not been. The withdrawal had in fact been made by a "Senior Executive Officer" in the Directorate, as that was the grade which had authority to make that decision. Despite the title, the official is very junior in the hierarchy of the Civil Service.

47. No one more senior appears to have been told what had happened nor of the fact that the Minister had made an order on the basis of a submission that was wrong and which, on the judge's findings, had misled the Minister into making an Order he should not have made.

THE JUDGE'S DECISION

48. After setting out the facts which I have summarised, the judge concluded at paragraph 73:

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

49. The judge examined at length the assertion made by the Home Secretary without calling any evidence, as to the error made. It was asserted that the Immigration Directorate recorded Mr Muuse's nationality as Somali on the basis of information received from the Prison Service's Population Management Unit on or about 7 August 2006; it was further asserted that that error had subsequently been compounded by confusion with another Somali of similar name who shared the same month and day of birth and who had previously been deported from the UK. The judge rejected this as comprising "assertion not substance". His reasons, in summary, were:

    i) The information from the Prison Service Population Management Unit was no basis for a decision to detain when other information they held showed he was Dutch. The decision maker had not been called to give evidence.

    ii) The suggestion of confused identity was a weak after thought.

    iii) There was no evidence to show that the Immigration Directorate had made any enquiries, as was claimed, on receiving notification of his appeal (see paragraphs 33 and 42 above). All they had to do was to look at the

information in their files. There was no evidence to show how the officials had received confirmation of his Dutch nationality.

50. The judge found as follows in respect of the claims:

i) The claim for false imprisonment and unlawful detention had been admitted.

ii) The claim for breach of duty under the Data Protection Act 1998 did not give rise to any further specific damage and so did not take that further.

iii) As to the claim for a breach of the Race Relations Act,

> "I am not satisfied that his detention was the result of racial discrimination. Words such as "Look at you, you are African" and the suggestion that he should go back to Africa may cause offence, but in a prison context, where rough offensive language is not unknown I am not satisfied that such should sound in any damages which will not be embraced by my award for false imprisonment."

iv) Article 5 of the Convention had been breached. As Mr Muuse was told he should go back to Africa, there was a prima facie breach of Article 14. The rights under the Convention, save for the right not to be discriminated against, were protected by the tort of false imprisonment and would be properly compensated by damages for false imprisonment.

v) The claim for misfeasance in public office succeeded.

51. It was common ground that Mr Muuse should receive compensatory damages. The judge also considered he should also receive aggravated and exemplary damages, making an award of £25,000 as basic compensatory damages, £7,500 as aggravated damages and £27,500 as exemplary damages. He considered that the total award of £60,000 was appropriate and not out of proportion to the facts of the case.

THE APPEAL

52. The Home Secretary appeals on three grounds:

i) The judge had been wrong to find misfeasance in public office.

ii) The findings of fact did not merit an award of exemplary damages.

iii) The award of exemplary damages was in any event too high.

There was no appeal against the award of aggravated damages.

(1) The finding of misfeasance in public office

53. On the claim for misfeasance in public office, it was not in issue that those acting for the Home Secretary were public officers and acting as such when their actions resulted in Mr Muuse's detention. The issue centred on whether Mr Muuse could establish the necessary state of mind of those acting for the Home Secretary. The

parties were agreed before the judge and before this court that the law was clearly established in the opinion of Lord Steyn in *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 where he said at page 191 and at 195:

> "The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts, knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.
>
> …..
>
> Enough has been said to demonstrate the special nature of the tort, and the strict requirements governing it. This is a legally sound justification for adopting as a starting point that in both forms of the tort the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member. In presenting a sustained argument for a rule allowing recovery of all foreseeable losses counsel for the plaintiffs argued that such a more liberal rule is necessary in a democracy as a constraint upon abuse of executive and administrative power. The force of this argument is, however, substantially reduced by the recognition that subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law. ..."

54. The judge found that there was no targeted malice. It was common ground therefore that that Mr Muuse had to establish that those acting for the Home Secretary detained him:

    i) In the knowledge of, or with reckless indifference to, the illegality of their actions.

    ii) In the knowledge of, or with reckless indifference to, the probability of causing injury to him.

55. The judge's findings as to this were set out at paragraphs 88-91 of his judgment.

> "88. The conduct of the [Home Secretary]'s officers has to be considered. There is no evidence which could justify a finding that [Mr Muuse] was the subject of targeted malice. This case, if a case of abuse of power, falls into Lord Steyn's second category where reckless indifference to the consequences of one's act in the sense of subjective

> recklessness i.e. not caring whether the consequences happen or not is sufficient for liability
>
> 89. I have been provided with no witness by the [Home Secretary] to offer any acceptable explanation for the many failures that have occurred in protecting [Mr Muuse]'s interests. There has been a wholesale disregard of the precautions that ought to have been taken to protect his interests. He was detained without thorough consideration by a responsible person of whether he should be, initially without any written authority and then without any proper authority; documents which should have been served on him were either not issued and/or if issued were not served on him; there were not robust, regular and documented reviews; there was a rushed operation to deport him in disregard of his rights of appeal; it took from 15th November according to the [Home Secretary] (earlier on [Mr Muuse]'s case) to 11th December 2006 for the [Home Secretary] to confirm Mr [Muuse']s nationality when he already knew what it was and tangible evidence, in the form of the ID card, was in his control. Even then [Mr Muuse] was not released until 15th December 2006.
>
> 90. I am quite satisfied that such a state of mind has been established on the part of some of the [Home Secretary]'s officers. Those concerned with the detention of others with a view to deportation and with the process of detention prior to a decision being made to deport are directed to the numerous precautions which have to be taken to safeguard the freedom of individuals. They cannot but be aware of the need to exercise great care in the decisions they recommend and/or make and the need for clear evidence to be obtained in support of their recommendations or decisions. Immigration staff made decisions about [Mr Muuse] that they could not have made had they not been indifferent to the consequences for [Mr Muuse]. Those who have the day to day care of detainees have a duty to heed the reasonable requests and assertions of detainees and have procedures to follow to ensure detainees' rights are observed and that detainees are not needlessly detained. In the present case [Mr Muuse]'s requests went for the most part unheeded and I am driven to conclude that some HMPS staff did not care whether [Mr Muuse] was deported or not.
>
> 91. I am satisfied that misfeasance in public office is proved against [the Immigration Directorate] and HMPS and therefore against the Home Secretary."

56. It is common ground that the judge made in the paragraphs I have set out, the second of the necessary findings - a finding of reckless indifference to the probability of causing injury to Mr Muuse. However, the Home Secretary contends that the judge failed to make the first of the necessary findings, namely a finding that the officials had acted in the knowledge of or with reckless indifference to the illegality of their

actions. It was submitted that in order to establish the tort of misfeasance in public office the judge had to find that the officials acting on behalf of the Home Secretary were recklessly indifferent to the legality of their actions. This had to be a finding of subjective, not objective, indifference: see *Society of Lloyd's v Henderson* [2007] EWCA 930, [2008] 1WLR 2255 at paragraphs 46-49 and *London Borough of Southwark v Dennett* [2007] EWCA 1091 at paragraphs 21-22. In the absence of such a finding, the judge should not have found that misfeasance in public office was established.

57. It is clear, in my view, that the judge did not expressly make the first of the necessary findings. It is very clear from what he said at paragraph 88 that he was there addressing the consequences of the detention, not the legality of the detention; the whole of paragraph 90 is again directed at the officials' state of mind as regards the consequences to Mr Muuse and not to their state of mind in respect of legality. In paragraph 89 the judge concluded that there had been a wholesale disregard of the precautions that ought to have been taken to protect Mr Muuse's interests; however nowhere in that paragraph or in the following paragraph does the judge address the question of knowledge of or reckless indifference to legality.

58. It was submitted on behalf of Mr Muuse that, as the judge had set out the law correctly and had found that the tort was established, he must have reached the conclusion that the officials had acted with at least reckless indifference to legality. Although it was not possible to point to a particular passage in the judgment, the judge had in fact found that the Home Secretary's officials had acted with knowledge of or reckless indifference to the illegality of their actions, if the findings that the judge made were read as a whole. The scale and the quality of the evidence that was in the possession of the Prison Service and the Immigration Directorate showed to anyone opening the file that Mr Muuse was or might well have been Dutch and thus his detention was illegal, unless those who had the file were recklessly indifferent to the legality of his detention. It was significant that the Home Secretary had been unable to find a single official to give evidence that he or she honestly believed that Mr Muuse was Somali or that the documents authorising his detention had been prepared with an honest belief as to the legality of their actions.

59. In my view plainly there was evidence on which the judge could have reached the conclusion that the officials in both the Immigration Directorate and the Prison Service had acted with reckless indifference to the illegality of Mr Muuse's detention. It is, in my view, astonishing that no witnesses were called from the Immigration Directorate. The reason given in the Further Information provided by the Home Secretary was:

> "It is not the [Home Secretary]'s policy to call junior staff workers as witnesses in a trial."

This is not acceptable in a case such as this. As was submitted on behalf of Mr Muuse, the inevitable inference that a court would draw is that no one in the Immigration Directorate was prepared to give evidence to explain the decisions made. Given the failure to call anyone to provide an explanation (particularly as to the assertion of confusion and the failure to release immediately on 16 November 2006), the lack of documentation which should have existed and the evidence held by the Immigration Directorate and the Prison Service that plainly showed Mr Muuse was

Dutch, it would not have been the least surprising if the judge had found that there had been reckless indifference to the illegality of Mr Muuse's detention.

60. There can be no doubt that if such a finding was to be made, the judge should have made it expressly. But, as it was not, can I nonetheless conclude that the judge must have made such a finding by necessary implication? I regret I cannot do so, as it is not a finding that can be inferred as inevitable from the primary findings made by the judge:

i) It was not necessary for the officials to know the detailed statutory provisions. These were set out in everyday language in Manuals which emphasised all the relevant duties. These included the necessity to use detention sparingly, to give written reasons for detention to the detainee, and to keep detention under review.

ii) These were designed to make clear to officials exercising the power to deprive a person of his liberty that the power had to be exercised with scrupulous care to prevent arbitrary detention.

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

iv) Mr Poole submitted on behalf of the Home Secretary that it was quite possible that incompetence and negligence, in contradistinction to reckless indifference to legality, could well explain the actions of the officials. Although that is not an easy submission for a Home Secretary to make in respect of his own Department's competence in 2006, it is one that I accept.

v) On the evidence manifest and unsupervised incompetence in the Immigration Directorate is the possible explanation of Mr Muuse's arbitrary detention to the alternative of reckless indifference to legality. Three examples will suffice. First, in paragraph 28 above I referred to the fact that Mr Muuse had not been given five days in which to appeal; the judge said of this: "The writer of the letter was either unaware of that or chose to disregard it. … Such a letter hardly instils confidence that the affairs of detainees are in competent and reliable hands." Second, in relation to submissions about documents relating to the identity of the person with whom the Home Office alleged Mr Muuse had been confused, the judge was not satisfied that these documents had been manufactured as opposed to being the result of incompetence. Third, as I have set out in paragraph 48 above, the judge set out his overall conclusions on the conduct of the Home Office; although he condemned the conduct as "an appalling indictment" of the way in which the Home Office operated and that it reflected an indifference to doing justice, he did not find a reckless indifference to legality.

61. As it is not possible in my view to infer that the judge found that the officials had acted with reckless indifference to legality, the judge's decision that there had been misfeasance in public office cannot be upheld.

(2) The finding that an award of exemplary damages should be made

(i) The judge's decision

62. The judge, after noting that the Home Secretary accepted that an award of basic compensatory damages should be made, considered first the award of aggravated damages. He based his approach on the law as set out in *Thompson v Commissioner of the Police for the Metropolis* [1998] QB 498 where Lord Woolf MR made clear that although there could be a penal element in the award of aggravated damages, these were primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated or where those responsible had acted in a high handed insulting or malicious manner.

63. The judge then considered the effect on Mr Muuse of the detention and in particular his concern about what was to happen to him and anxiety as to whether he would be deported to Somalia. That concern would have increased the longer he was detained and been increased by the events in November and December 2006 until he was released. The judge took into account his family circumstances and the effect of prison on him, given the fact he had already been to prison in the UK. He considered a number of cases on the quantum of basic damages for false imprisonment and the decision of Kenneth Parker QC (as he then was) in *R(B) v SSHD* [2008] EWHC 3189 where aggravated damages were awarded. The judge concluded that his decision on the amount should be expressed as an award of basic damages of £20,000 and aggravated damages of £7,500, so that it was better understood.

64. He then turned to the award of exemplary damages, again following what Lord Woolf MR had said in *Thompson* at page 516:

> "(12) Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury: (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be

> available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose"

65. The judge expressed the view that the conduct of those acting for the Home Secretary had been so bad that it was worthy of punishment. However, appreciating that there would be an inevitable overlap in the factors, he took care to avoid this.

66. He concluded at paragraph 117:

> "But what makes the Claimant's imprisonment far more serious than the more usual case, which itself is serious enough, is the high handed and oppressive way in which it was not only initiated but maintained for such a long time in complete disregard of laid down procedures. The decision to imprison him, keeping him in custody without good cause and adequate explanation, disregard of the concerns I am satisfied he expressed to prison officers, acceleration of his deportation in early November, when his nationality could easily have been confirmed from the outset, not publicly acknowledging his nationality until 11th December and then not ensuring his immediate release were individually and cumulatively "high handed" and "oppressive". These factors, in my judgment justify a significant punitive award."

(ii) The submission of the Home Secretary

67. It was accepted on behalf of the Home Secretary that there did not need to be a finding of misfeasance in public office before an award could be made, as it was common ground that it was "oppressive, arbitrary or unconstitutional action by servants of the government" which were the conditions for such an award, as made clear by Lord Devlin in *Rookes v Barnard* [1964] 1 AC 1129 at 1226.

68. It was contended on behalf of the Home Secretary that no award should have been made, as an award in respect of the oppressive, arbitrary or unconstitutional conduct of government officials should only be made where the conduct was outrageous and disclosed malice, fraud, insolence, cruelty or the like. It was submitted that Dr Harvey McGregor QC was right in his view to this effect expressed at paragraph 11-019 of his work *Damages* (19th edition).

(iii) The requirement of oppressive, arbitrary or unconstitutional conduct

69. A number of authorities were cited as being helpful in determining how Lord Devlin's summary of the legal position should be refined including *Holden v Chief Constable of Lancashire* [1987] QB 380 and *AB v South West Water* [1993] QB 507. In the first case, Puchas LJ considered that, although Lord Devlin used the words "oppressive, arbitrary or unconstitutional" disjunctively, it was not enough that the action be simply unconstitutional; there had to be an improper use of "constitutional or

executive power". In the second, Sir Thomas Bingham MR (at page 529) after pointing out that Lord Devlin's phrase ought not to be subject to minute textual analysis as it was a judgment, not a statute, considered that there was no doubt what Lord Devlin was talking about:

> "It was gross misuse of power, involving tortious conduct by agents of the government"

70. Lord Devlin's phrase "oppressive, arbitrary or unconstitutional" must be read, as was made clear by Lord Hutton in *Kuddus v Chief Constable of Leicestershire* [2001]UKHL 29, [2002] AC 122 at paragraph 89, in the light of Lord Devlin's further view at page 1128:

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."

As Lord Hutton observed, the conduct had to be "outrageous" and to be such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law.

71. In my view, the guidance given by Sir Thomas Bingham MR and Lord Hutton is sufficient. There is no need for this to be qualified by further looking for malice, fraud, insolence cruelty or similar specific conduct. There is no authority that supports Dr McGregor's view to this effect.

(iv) The unlawful imprisonment of Mr Muuse was an outrageous exercise of arbitrary executive power.

72. There are a number of factors that show that the unlawful imprisonment of Mr Muuse in this case was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous. It called for the award of exemplary damages by way of punishment, to deter and to vindicate the strength of the law.

73. The junior officials acted in an unconstitutional and arbitrary manner that resulted in the imprisonment of Mr Muuse for over three months. The outrageous nature of the conduct is exhibited partly by the way in which they treated Mr Muuse and ignored his protests that he was Dutch, partly by the manifest incompetence in which they acted throughout and partly by their failure to take the most elementary steps to check his documents which they held:

    i) The actions of the junior officials who exercised the power to imprison Mr Muuse and keep him imprisoned cannot be explained on any basis other than that the officials were incompetent to exercise such powers on the assumption favourable to them (which I have made for the reasons already given) that they were not recklessly indifferent to the legality of their actions.

ii) They disobeyed the order of the court to release Mr Muuse for no reason.

iii) They did not consider the conclusive evidence they held as to his nationality – his ID card and passport – and their other records. As a Dutch national and a citizen of the EU he could not, in the circumstances, be deported.

iv) Even if they thought there was a power to deport, they made no enquiries to determine whether detention was necessary pending deportation. It was for the Home Office to justify this, as no person should be deprived of his liberty without proper enquiry. No effort was made to ascertain that his wife and family lived in the UK and no explanation has been given for the failure to do so.

v) No proper examination was made of the grounds for deportation; his detention was simply ordered without even the Notice of Detention being issued for over a month. No explanation of this illegal and arbitrary act has been given.

vi) They gave him no reasons in writing of his detention until 1 or 3 November 2006.

vii) They threatened him with deportation to Somalia – a state which they knew was a failed state.

viii) They failed to look at the evidence in their possession even when it was pointed out to them.

ix) They failed to accord him the necessary time to appeal.

x) They did not revoke the Deportation Order when they were sent copies of the documents. This failure is again unexplained. Instead, the officials detained him for a further month without any possible justification.

xi) Although the judge found that his detention was not the result of racial discrimination, he found that the detention to which Mr Muuse was subjected was aggravated by racist remarks such as "look at you, you are an African" and suggestions that he should go back to Africa. Treatment of this kind which is calculated to degrade and humiliate is typical of abuses which occur when power is exercised by those who are not competent to exercise that power.

xii) S.3(8) of the Immigration Act 1971 provides

> "When any question arises under this Act whether or not a person is a British citizen, or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is."

This section does not exempt the Home Office from proving that the imprisonment of a person is required – it simply deals with proof of nationality. Moreover, although paragraph 64.6 of the manual makes clear that efforts may be made to identify the individual's identity and nationality, where a person is in custody and his documents are held by the prison authorities, the permissive provisions of the manual are mandatory. Reliance, as the Home Secretary

asserted in the further information provided to Mr Muuse during these proceedings, on the provisions of s.3(8) in relation to a person whose documents are held by the prison authorities has a Kafkaesque ring in that they required Mr Muuse to provide the documents they held.

74. However, though it is more than sufficient to uphold the decision of the judge to award exemplary damages on the basis of this high handed and outrageous arbitrary conduct of the junior officials, it would not be fair to those officials to say nothing of the system that allowed this to happen. That system was the responsibility of the Home Secretary and his senior officials:

i) The power to deprive someone of their liberty is a power that should only be entrusted to those who are competent to exercise that power. The longer the period that a person can be detained pursuant to the powers without judicial authority, the more competent those exercising the power need to be and the greater the checks need to be to see that the power is being properly and lawfully exercised.

ii) Although I accept that the manuals and the forms were prepared to assist the officials in exercising their powers lawfully, preparing forms and manuals by itself is not enough. There was no evidence that anyone had examined the competence of the officials given powers to imprison without judicial authority. The facts strongly suggest that no one of any real seniority exercised any supervision over them.

iii) Indeed the system in place in the Immigration Directorate was such that the officials led a Minister into making an unlawful decision to deport Mr Muuse on the basis of a submission which was wholly deficient. The lack of supervision is evident from the fact that it was a junior official who had power to revoke the Order, he took a month to revoke the Order and release Mr Muuse and the Minister was never even told of the fact he had made an unlawful decision and the action taken to remedy it.

75. The decision to make an award of exemplary damages was moreover a good example of the type of case referred to by Lord Devlin in *Rookes v Barnard* at page 1223 where its effect will serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power". There has been no Parliamentary or other enquiry into Mr Muuse's case. No Minister or senior official has been held accountable. We were not told of any internal or other enquiry conducted by the Permanent Secretary or Head of the Immigration Directorate (or as it now is the UK Border Agency). The only way in which the misconduct of the Home Office has been exposed to public view and his rights vindicated is by the action in the High Court.

76. We were told, in answer to a request we made, that the successor to the Immigration Directorate, the UK Border Agency, had sought to improve its procedures by asking a foreign prisoner to provide the Agency with any documentary evidence of nationality he held, by interviewing the foreign prisoner and making enquires, if appropriate, of the foreign embassy; if the nationality remains in dispute, then the Agency sends the prisoner a nationality status questionnaire and/or conducts, with the assistance of an interpreter, a foreign language test in the language of the nationality which the prisoner claims. In all, the officials sought to determine nationality on the best

evidence available. It is difficult, however, to see how these improvements have done anything to remedy the lack of competence of those who make the day to day decisions in respect of persons in the position of Mr Muuse or put in place proper systems of control and supervision over their exercise of powers to deprive persons of their liberty.

77. Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages. The making of such an award, as Lord Hutton observed in *Kuddus,* also serves to vindicate the strength of the law. It further demonstrates that the award of punitive damages under the common law has a real role in restraining the arbitrary use of executive power and buttressing civil liberties, given the way the United Kingdom's Parliamentary democracy in fact operates.

78. There is one further point. In the course of the submissions made on behalf of Mr Muuse, the court's attention was drawn to the Home Secretary's policy of according anonymity to officials who deprived a person of his liberty and declining to call them as witnesses to explain their conduct. Arbitrary detention by unidentified persons who have been accorded the cloak of anonymity and immunity from explanation of their unlawful conduct could be considered a further factor in stigmatising the conduct as outrageous. However, I have not found it necessary to consider this. First, although an attempt was made to redact the names on some documents, this was not done on all. It was therefore possible to identify, with the aid of the computer records provided by the Home Office, the officials who had acted in an arbitrary and unlawful manner. Second, it can be inferred that there was no explanation that could be given for their conduct, as the only explanation tendered was characterised by the judge, as set out at paragraph 49, as "assertion, not substance".

79. Nonetheless, it is difficult to understand the policy of attempting to give officials anonymity and of exempting them from giving an explanation, as those who make decisions that deprive a person of his liberty should not be permitted to claim anonymity and be shielded from explaining their conduct to a court. It is moreover difficult to see how such a policy is consistent with the rule of law in a democracy.

(3) The amount of the award for exemplary damages

80. As I have set out at paragraph 51 above, the judge awarded £27,500. He did so following the guidance given by Lord Woolf in *Thompson* at p 516:

> "(13) Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent."

81. As the judge pointed out these figures as adjusted for inflation are £6,800, £34,000 and £68,000 respectively.

82. The three conditions for assessing the award of exemplary damages were made clear by Lord Devlin at pages 1227-8 – the person claiming had to be the victim of the punishable behaviour, restraint must be exercised in the making of the award and regard had to be paid to the means of the defendant.

83. It could not be disputed that these conditions were met (on the assumption that an award was appropriate). It was, however, contended that the amount was excessive; the findings of fact did not support an award at the mid-point of the range suggested in *Thompson.*

84. I cannot accept this submission. The judge carefully approached the question of quantum. The conduct was an arbitrary abuse of executive power which can readily be characterised as outrageous. It could have merited an award at the mid-point of the range suggested in *Thompson,* but the judge made an award a little below that figure. As an amount, £27,500 is miniscule in the context of the Home Office budget, but such an award was needed to stigmatise the conduct of the officials at the Home Office as an outrageous and arbitrary exercise of executive power for the reasons I have given.

Conclusion

85. Although I would allow the appeal in relation to the judge's decision on misfeasance in public office, I would dismiss the appeal on the award of exemplary damages.

Sir Scott Baker:

86. I entirely agree with the conclusions of Thomas LJ and his careful analysis of the issues. It might be said that the Secretary of State is fortunate that the finding against his Department must be of incompetence and negligence rather than reckless indifference to legality. Be that as it may, it is to be hoped that the worrying issues raised by this case have been or will be addressed. Nothing less is acceptable in a true democracy.

The Chancellor of the High Court:

87. I too agree with the conclusions of Thomas LJ and his reasons for them. I agree also with the comments of Sir Scott Baker. The circumstances indicated in the judgment of Thomas LJ demand, in my view, urgent investigation and action by the Secretary of State.