

DAMAGES UNDER THE HUMAN RIGHTS ACT

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The role of damages in human rights cases

1. The primary remedy in human rights claims is a declaration recognising that a human right has been violated. The European Convention on Human Rights is unique (compared to other international human rights instruments such as the International Covenant on Civil and Political Rights) in allowing the ECtHR to award damages.² The New Zealand Bill of Rights Act 1990 did not contain a damages provision and the courts implied one.³ The power of the courts to award damages under the Canadian Charter of Rights and Freedoms 1992 and under the South African Constitution Act 1996 has had a modest impact.
2. It is important to bear the limited role of damages in human rights cases in mind when considering whether HRA damages will encourage the development of a compensation culture, particularly because s 8(3) in terms contemplates that damages will not be awarded routinely.

The statutory provision under the HRA

3. The court has a power under section 8 of the HRA to award damages.
4. S. 8(1) provides that
“In relation to any act ... of a public authority which the court finds is ... unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”.
5. S. 8(3) provides that:
“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,

¹ Co-author *The Law of Human Rights* (Oxford University Press, 2000).

² See, generally, D Sheldon *Remedies in International Human Rights Law* (OUP, 1999)

³ *Simpson v AG* [1994] 3 NZLR 667.

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

6. S. 8(4) states that:

“In determining

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.”

7. Article 41 of the Convention states:

“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Parties allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

8. It is important to note that the right to an effective remedy under Article 13 of the Convention was not made part of English law under s 1 HRA. However, in *Brown v Stott*⁴ Lord Hope expressed the view that s 8 was enacted to give the appropriate remedial effect to Convention rights.

The HRA cases

9. There have been to date very few cases where damages have been sought or awarded under the HRA

10. In *R (Bernard) v Enfield LBC*⁵ damages were awarded a severely disabled woman and her husband-carer, had been left in unsuitable accommodation for 20 months in breach of their rights under Article 8. Sullivan J took the view that awards should be comparable to tortious awards and there was no justification for a reduction that would reduce awards below the level of tortious damages. The award set should not be minimal because that would diminish respect for the policy underlying the 1998 Act. The local government ombudsman's recommended awards were the best available comparison because this case was, in essence, a case of maladministration. The appropriate award was £10,000 to be divided as £8,000 to Mrs Bernard and £2,000 to her husband.

⁴ [2003] 1 AC 681, 715.

⁵ [2003] HRLR 4.

11. In *R(Mambakasa) v Secretary of State for the Home Department*⁶ Richards J said *obiter* that damages of £1,000 to £2,000 would be appropriate for distress for breach of respect for family life resulting from delays in the entry clearance system.
12. Where there was a failure to deal speedily with applications made by mental patients to the Mental Health Review Tribunal, modest damages for distress were awarded in *R(KB) v Mental Health Review Tribunal*⁷ in the range of £750 to £4,000.
13. In *R(IH) v Secretary of State for the Home Department*⁸ the House of Lords declined to award damages to a mental health patient since the violation has been publicly acknowledged and his right had been vindicated, the law has been amended in a way which should prevent similar violations in future, and he had not been the victim of unlawful detention, which article 5 is intended to avoid.
14. The most important case so far is the decision where the Court of Appeal gave general guidelines in *Anufrijeva v Southwark LBC*⁹ which I shall discuss below.

Unchartered areas for HRA damages

15. Because there are so few cases there are a number of important areas where the possibilities of damages has not been considered eg:
 - damages for financial loss where the approach of the ECtHR is not highly developed;
 - damages under Article 5(4);
 - issues of causation where ECtHR applies two tests.¹⁰

⁶ [2003] EWHC 319

⁷ [2003] 2 All ER 209

⁸ The Times, 14 November 2003

⁹ The Times, 17 October 2003.

¹⁰ The *Law Commission on Damages under the Human Rights Act* (Law Com No 266) states that the ECtHR normally apply a strict causation test, particularly in relation to pecuniary loss (para 3.58). However, in relation to speculative losses the ECtHR has not been consistent and has not made clear the reasons for distinguishing between two approaches (para 3.59). Sometimes it applies a strict causation test (paras 3.61, 3.62) and some times it applies a loss of opportunity test (paras 3.62 to 3.65). It is impossible to reconcile the two approaches (paras 3.66 to 3.69).

16. The proper construction of section 8(3) also requires some consideration since the Court of Appeal in *Anufrijeva* declined to do so.
17. However, s 8(4) has been subject to some analysis. The obligation under s. 8(4) is to take account of the Strasbourg principles. The statutory provision is therefore comparable to the duty under s. 2(1) to take account of ECHR cases when considering Convention rights if relevant.
18. In the absence of some special circumstances the Court should follow any clear and constant jurisprudence of the ECtHR: see *R (Alconbury Developments) v Environment Secretary* [2001] 2 WLR 1389 per Lord Slynn.¹¹
19. As Silber J pointed out in *R(N) v Secretary of State for the Home Department*¹² para 180 s 8(4) requires the Court to take account into account the principles” whereas s 2(1) requires it to “take into account the decisions” of the Strasbourg courts. This indicates that in dealing with damages, the English courts have to try and define the principles and then apply Lord Slynn’s dictum. It is therefore open to the court to seek assistance when considering quantum from other relevant sources including personal injury awards and awards by ombudsmen (as in *Bernard*).

The decision in *Anufrijeva*

20. The Court of Appeal emphasised the following points:
 - the court has a discretion as to whether damages should be awarded;
 - the award must be “necessary” to award “just satisfaction”;
 - exemplary damages are not awarded;
 - in considering whether to award damages and, if so, how much, there is a balance to be drawn between the interests of victims and of those of the public as a whole;
 - damages are a last resort;

¹¹ [2001] 2 WLR 1389 at 1399, para. 26
¹² para 180

- the approach under the HRA should be no less liberal than that taken by ECtHR;
- the approach is an equitable one;
- the violation must be sufficiently serious to attract damages;
- the level of damages to be awarded should reflect those in tort.
- comparisons can be made as appropriate with personal injury awards or ombudsman awards.

21. A number of observations of the Court of Appeal are open to question:

- balancing the interests of the victim with the public is not part of Strasbourg case law;
- the suggestion that damages is the last resort has no support in ECtHR case law; and the approach may be in breach the right to an effective remedy under Article 13 of the Convention;
- the emphasis on the fact that the ECtHR takes account in awarding damages of a number of factors including, in particular, the character and nature of the parties. That particular emphasis is surprising since the Law Commission observed at para 4.53, this consideration would be hard to justify under the HRA since, as a general principle, the status of a claimant is irrelevant to damages in tort;
- the Court of Appeal's statement that there is a disinclination of the ECtHR to pay compensation for procedural errors is too broad; their view depends on causation.
- the stress on saying the critical message is whether the remedy is "necessary" does not accurately reflect ECtHR case law;
- the Court failed to address the question of whether awards in discrimination cases for injury to feelings are appropriate comparators

Anufrijeva guidelines on procedure

22. The Court of Appeal also suggested:

- the court should look critically at any attempt to claim for maladministration which should normally only be brought in the Administrative Court by way of judicial review;
- before permission is granted the Court must require explanation as to why the claim is not being made to any relevant Ombudsman;
- if other relief is sought permission should be deferred on the damages aspect until alternative dispute remedies have been exhausted or it can be remitted to a judge or master for summary disposal on the basis that damages are not required to achieve just satisfaction;
- the citation of more than 3 authorities must be justified and the hearing should be limited to ½ a day except in exceptional circumstances.

23. Unfortunately, none of these procedures were canvassed in court; and they give rise to a number of difficulties.

- it is difficult to see why maladministration in sex abuse cases should be brought in the Administrative Court;
- the obligation to involve the Ombudsman creates complications because he will not entertain a claim for compensation if proceedings are extant;
- the reference to three authorities is arbitrary and makes it difficult to support any argument that Strasbourg cases show a tariff in a particular type of case and may breach s 8(4).

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