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OBTAINING COMPENSATION FOR
HUMAN RIGHTS VIOLATIONS

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Introduction

1. In this workshop, we shall consider the principles which govern the recovery of damages under the Human Rights Act 1998 (“HRA”). Our paper falls into the following parts: (A) the HRA itself; (B) guidance from the European Court of Human Rights (“ECtHR”); (C) recent domestic authorities; and (D) some conclusions.
2. Before we deal with matters of substance, it is important to remember that these principles operate against the background of domestic and European public law doctrine. As a matter of domestic public law, the starting point is that there is no entitlement to compensation for losses suffered as a result of unlawful action by public authorities. As a result, a claimant seeking compensation for unlawful administrative action must be able to bring her case within one of the established torts such as breach of statutory duty or misfeasance in public office with all the limitations that these causes of action possess.
3. As a matter of the law of the European Union, it is sufficient for the claimant to demonstrate that they have suffered pecuniary loss as a result of a sufficiently serious breach of their EU rights to merit compensation. This right to damages only exists, of course, where there is a violation of a directly enforceable right in EU law.

(A) The Human Rights Act

4. The HRA makes relevant parts of the ECHR (“Convention rights”) directly enforceable in domestic courts for the first time. Convention rights are those included in Schedule 1 to the HRA, that is, Articles 2-12 and 14-18 and Articles 1-3 of the First Protocol. As such, the principal civil and political rights (freedom from torture and slavery and the rights to a fair trial, to property, to education and to privacy, free speech and association and to participate in elections) may be vindicated before any domestic court by way of direct action or defence.
5. The principal mechanism for protecting human rights in most international legal instruments is the declaration, but the ECHR has always held out the additional possibility of financial compensation for a breach of its provisions. The relevant part of the ECHR is Article 41 which provides:

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

6. The HRA seeks to give effect to this principle by means of section 8 of the Act:

*“8. - (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.”*

(3) 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.

(4) 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. A number of points are clear from these words. First, an award of damages may only follow a finding that a public authority has acted in breach of Convention rights according to section 6(1) of the HRA. Secondly, the court has a discretion whether or not to award damages. Therefore, unlike the position under domestic tort law, damages are not available as of right. Thirdly, damages will only be awarded where they are "necessary" to provide just satisfaction. Fourthly, the court must be guided by the principles established by the ECtHR. We address the principles established by the ECtHR in the next section.

(B) Guidance from the European Court of Human Rights

8. The basic tenet governing the award of damages in Strasbourg is restitutio in integrum, that is, the applicant should be placed, so far as it is possible to do so, in the same position as if her Convention rights had not been violated (for example, **Kingsley v United Kingdom** (2002) 35 EHRR 177, para 40). However, the ECtHR has frequently expressed the view that in most cases the simple finding of a breach of Convention rights is sufficient to constitute just satisfaction. This is perhaps not surprising given the nature of the majority of Convention rights. The ECtHR will also require the applicant to prove that any losses were in fact caused by the breach of his Convention rights and the quantum of such awards will be reduced to the extent that the applicant is found to have contributed to his damage or injury.
9. Where they are made, awards may cover both pecuniary and non-pecuniary losses. An example of the former is **Lustig-Prean and Becket v United Kingdom** (2000) 31 EHRR 601. In these cases, the applicants established that the decisions to dismiss them from the armed forces because of their sexual orientation were (among other things) violations of their rights to respect for their private lives under Article 8 of the ECHR. The ECtHR held that they were entitled to compensation for their loss of earnings and pension rights totalling some £150,000.
10. Most cases are less clear and the Strasbourg court is reluctant to award damages from non-pecuniary loss, such as the distress, anxiety and even psychiatric trauma which breaches of the Convention may be said to produce. Where awarded, such sums are usually modest. Although it is not very easy to discern general principles governing recovery for non-pecuniary losses, the ECtHR does appear to be

unsympathetic to applicants who have been accused or convicted of criminal offences or who complain of purely procedural violations. The task of identifying consistent trends is made more difficult by the general failure of the ECtHR to give reasons for its decisions whether to award damages.

11. However, some Articles of the ECHR appear to envisage that compensation may be payable as a matter of course. Thus Article 5(5) provides:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

12. However, even in relation to this provision, it is clearly established that it is sufficient for Article 5(5) that the applicant may apply for compensation even if the award is dependent on showing that damage resulted from the breach (**Wassink v The Netherlands** (Appn No 12535/86) (unreported) 27 September 1990).

13. Beyond these vary general statements, it is difficult to set out any clear principles which are consistently followed by the ECtHR (for example, contrast **Halford v United Kingdom** (1997) 24 EHRR 523 and **Kopp v Switzerland** (1998) 27 EHRR 91). Commenting on the Strasbourg jurisprudence, the Law Commission stated (**Damages Under the Human Rights Act 1998** (Law Commission Report No 266, para 3.12)):

“It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the European Court of Human Rights privately states: ‘We have no principles’. Another judge responds, ‘We have principles, we just do not apply them’.”

14. There may, of course, be a number of explanations for this. Nevertheless, it is against this background that domestic judges have sought to articulate some principles which provide guidance to lower courts while having due regard to the Strasbourg jurisprudence.

(C) Recent domestic authorities

15. Early decisions under the HRA did not contain any lengthy analysis of the doctrinal basis for awarding damages under section 8. Two matters of general importance which did emerge were that it was legitimate for courts to have regard to the level of awards which might be made by Ombudsmen in addition to those awarded by courts in analogous situations and that awards should not be so low that they would diminish respect for the policy underlying the HRA (**R (Bernard) v Enfield London Borough Council** [2002] EWHC 2287 (Admin); [2003] HRLR 4 (£10,000 awarded to a severely disabled and doubly incontinent woman and her husband where they had been left in entirely unsuitable accommodation for two years). Other recent cases include:

(i) **R (Mambakasa) v Secretary of State for the Home Department** [2003] EWHC 319 (Admin) (an award of £1,000-£2,000 may be appropriate for distress

caused by delays in the entry clearance system for interferences with family life).

(ii) **R (KB) v Mental Health Review Tribunal** [2003] EWHC 193; [2004] QB 936 (modest damages for distress caused by delays before the Mental Health Review Tribunal in the range of £750-£4,000).

(iii) **R (H) v Secretary of State for the Home Department** [2003] UKHL 59; [2004] 2 AC 253 (no award to a mental patient where the violation had been publicly acknowledged and where the law had been changed to avoid the situation in the future).

16. More recently, higher courts have suggested a framework within which HRA damages claims should be assessed. The leading authority is the decision of the Court of Appeal in **Anufrijeva v Southwark London Borough Council** [2003] EWCA Civ 1406; [2004] QB 1124. The case concerned a series of claims brought by a number of asylum seekers alleging that their rights under Article 8 had been violated by the failure to provide adequate support for them and their families and/or delays in the processing of their asylum claims. The Court of Appeal decided that it was not appropriate to award damages even though it accepted that the conduct complained of could amount in some cases to a breach of Convention rights.

17. The judgment of the influential court (Lord Woolf CJ, Lord Phillips of Worth Matravers MR and Auld LJ) set out the following general guidance (paras 49-81):

(i) damages play a less prominent role in actions based on breaches of Convention rights than in private law claims and the most important aspect of a claim under the HRA will usually be to bring the breach of Convention rights to an end;

(ii) claims under the HRA will often be conveniently brought by way of judicial review although the Administrative Court will not normally concern itself with disputed issues of fact and has limited experience in awarding damages;

(iii) exemplary damages will not be awarded;

(iv) in deciding whether to award damages and, if so, how much, there is balance to be struck between the interests of the victim and those of the public as a whole. This balance is necessary to reflect the interest of the public in the continued funding of the relevant public service;

(v) the approach of domestic courts should be no less liberal than that of Strasbourg or one of the purposes of the HRA will be defeated;

(vi) courts should adopt a broad-brush approach without a close examination of the authorities or an extensive examination of the facts;

(vii) within the court's broad equitable approach, the scale and manner of the violation may be taken into account;

(viii) the court should have regard to comparable figures awarded for torts as reflected in the guidelines issued by the Judicial Studies Board, the Criminal Injuries Compensation Board and by the Parliamentary and Local Government Ombudsmen; and

(ix) finally, the Court gave the following general case management guidance:

(a) the courts should look critically at any attempt to obtain damages for breach of the HRA by any procedure other than judicial review;

(b) although a claim for damages alone cannot be brought in the Administrative Court, the Court will entertain such a claim under the HRA;

(c) the judge of the Administrative Court should ask the claimant to explain why they should not pursue another avenue of complaint before seeking permission for judicial review;

(d) if there is a legitimate claim for other relief, the court should consider deferring consideration of the damages claim until the other matters are resolved; and

(e) the parties will be expected to justify citing more than three authorities and the hearing on damages should be limited to half a day.

18. To these principles, the House of Lords has recently added in **R (Greenfield) v Secretary of State for the Home Department** [2005] UKHL 14; [2005] 1 WLR 673 (concerning a challenge to a period of additional detention awarded to a prisoner in breach of Article 6's guarantee of a fair and impartial determination of a criminal charge). Lord Bingham's speech (paras 18-19) included the following:

(i) the HRA is not a tort statute and has different and broader objects. Even where the finding of a violation is not sufficient to provide just satisfaction, such a finding will be an important part of the remedy and that the court should have regard to the ECtHR's unwillingness to speculate on whether a breach of Article 6 made a difference to outcome of the case;

(ii) damages need not be awarded to encourage high standards of compliance by member states since they are already bound to do so in international law. However, it may be different if there is felt to be a need to encourage individual officials or classes of official;

(iii) domestic courts are obliged to have regard to the Strasbourg principles in relation to quantum as well as when deciding whether or not an award is appropriate and to have regard to the fact that awards for anxiety and frustration were rare and modest; and

(iv) awards by a domestic court ought not to be more generous than those awarded in Strasbourg (thereby rejecting the analogy with tort and Ombudsmen awards in **Bernard, KB** and **Anufrijeva**).

Conclusions

19. These principles invite a number of comments. First, the concept of balance (although inherent in the Convention system as a whole) have never formed part of the reasoning of the ECtHR in assessing just satisfaction. Secondly, the Court in **Anufrijeva** went beyond the Strasbourg jurisprudence in describing damages as a remedy of last resort. Thirdly, the procedural limitations mentioned in **Anufrijeva** may (along with the very short time-limits for judicial review) have the effect of breaching Article 13 which provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

20. Further, delaying the grant of permission to seek judicial review until a reference has been made to the Ombudsman is in direct conflict with the statutory limitation on the Ombudsmen's powers where a party may have a legal remedy. Finally, **Greenfield** marks a clear indication that awards should be modest and in linking them so closely to Strasbourg decisions, appears to fail to take into account the differences in living costs which make many ECtHR decisions so low. **Greenfield** also suggests that HRA damages will remain well below awards under the domestic discrimination legislation for injury to feelings which tends to undermine the HRA's status as a statute of constitutional importance. For these reasons, the present law remains unclear and unsatisfactory.

CASE STUDY

Sam is an employee of Shire Borough Council, an English local authority. Sam claims to have suffered a serious back injury in the Council's offices while he was on official duties. He has made a claim against the Council and is on fully paid sick leave. Sam claims he cannot walk or lift anything until his recovery. The Council suspects that Sam has exaggerated the level of his injuries in order to obtain substantial compensation and decides to use one of its security personnel, Mr. Merry, to investigate the matter. Mr. Merry is not known to Mr. Sam. Mr. Merry visits Sam's house pretending to be from the Middle England Gas Company and asks to read the meter. Sam allows Merry to enter on this basis, and Merry makes a secret video recording of Sam in his house during this visit. The video shows Sam undertaking heavy lifting and carrying out strenuous DIY work to his house. Mr. Merry reports the matter to the Council who write to Sam saying that he is dismissed on grounds of his fraudulent claims. What human rights claims, if any, does Sam have? What arguments can the Council use?

Group A advise Sam

Group B advise the Council.