

Costs in HRA Claims – the LAA statutory charge & the conundrum of ‘just satisfaction’

Article 6(1) of the Human Rights Act 1998 provides that, *‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’*.

A claim is available to party to care proceedings pursuant to s7(1)(b) of the Human Rights Act 1998 which states:

7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings but only if he is (or would be) a victim of the unlawful act.

The basis of claim may arise as a result of actions or inactions by the local authority. Upon such a claim being made the court must consider what just satisfaction, if any, is demanded.

HRA 1998 Section 8 provides for ‘Judicial Remedies’

(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) ...

(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),

(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 –

*whether to award damages, or
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.

ECHR 1950 Article 41 describes ‘Just satisfaction’

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.

In many cases a declaration is just satisfaction for the violation. In a more limited number of cases the breach is so egregious as to demand consideration of financial compensation.

The starting point for damages is section 8(3) of the Human Rights Act 1998. The Law Commission report dating from October 2000 offers guidance on the general principles to be considered before awarding damages for breach of each of the relevant Articles of the Convention.

Paragraph 6.159 of the report focuses on the Strasbourg law in relation to children taken into care.

‘... In these cases it is the manner of the decision rather than the justification for the decision to place the children into care, which is the subject-matter of the dispute. For example, the Court has found violations of Article 8 on account of the undue length of proceedings, or for insufficient involvement of the parents in the decision-making process.’

This area of law is expanding currently in relation to accommodation of children under section 20 of the Children Act 1989 with considerations having been given to the nature, length, and effect of the breach and thought given to the issue of quantum [see *Medway Council v M & T (By Her Children's Guardian)* [2015] EWFC B164 (13 October 2015)]

Even though these cases are being heard within the family division the test of unreasonability in respect of costs does not apply in HRA 1998 claim element of these proceedings; costs follow the event. *Re S* 2015 UKSC 20 does not apply in civil proceedings. Instead, when a claimant succeeds in a claim under the Human Rights Act 1998 the Civil Procedure Rules apply in respect of costs.

CPR 44.2 (2) (a) provides the following in respect to the court’s discretion to award costs, ‘*the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party*’ subject to the provisions set out in the rest that rule.

As parents and children are entitled to non-means, non-merits tested legal aid in care proceedings the issue of costs should be simple: the respondent in these cases repay the costs of the HRA claim to the LAA; the LAA funding for the care proceedings remaining unaffected. This would leave the claimant with the amount of

damages awarded to them because the breach of their human rights was so egregious as to attract an award in the first place.

Alas, that is not so which is problematic.

The relevant provision in the Civil Legal Aid (Statutory Charge) Regulations 2013 (“the regulations”) is that in a claim under the HRA ‘*arising out of a family relationship*’, which includes care proceedings, unless ‘*the Director has made an exceptional case determination under section 10 of the Act (exceptional cases)*’ the whole of the costs of the case are recoverable. This amount, the amount of the costs of the proceedings, will, almost always eclipse any award made.

The Legal Aid Agency views HRA claim and Children Act proceedings as ‘*connected*’ as they arise out of ‘*a family relationship*’ and will seek to recover a statutory charge on all work completed under the claimant’s legal aid certificate from any damages awarded to him in respect of a HRA claim. This means that the costs of the HRA claim are the costs of the case including the costs of the Children Act proceedings.

Care proceedings are not included in the exceptions and partial exceptions set out in regulations 5 and 6 of the regulations.

Paying the money into court does not prevent the charge applying. The Legal Aid Statutory Charge Manual, April 2014, provides that, ‘*If a legally aided individual’s opponent pays money into court during a case, and the individual either accepts that money in settlement or wins the case and gets an order that the money be paid out, the individual has recovered property and the statutory charge attaches to that money*’. Unless there has been an exceptional case determination then there is, it seems, no way around the statutory charge. Any suggestions are welcome.

The result of this recovery under the statutory charge regime is that the damages awarded as just satisfaction for the breaches under the HRA will not be given effect. This allows the LAA to take steps which overrides the decision of the court and removes the ‘just satisfaction’ from the claimant.

This, arguably, could not have been the legislative intention of the draftsmen of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

There are two cases which are important to consider in which damages were awarded under the HRA 1998

within care proceedings.

The first is *Re B (Worcestershire County Council v Mother and Child)* handed down on 29.01.16. His Honour Judge Rundell decided that,

'I turn now to the question of costs. The parties recognise the extreme difficulty in this area caused by the legal aid agency regulations. B's solicitor has researched this aspect of the case; her helpful position statement is contained within the court bundle and has not been the subject of any challenge. B has the benefit of a full legal aid certificate, covering the revocation application and, by a subsequent amendment, the human rights claim. The usual rules in relation to the agency's statutory charge cover both of these proceedings and would do so regardless of whether the human rights claim was separated from the revocation proceedings. The most recent cost schedule served by B's solicitor shows her costs to amount to £6700. It follows, therefore, that the statutory charge will take the whole of the damages unless I also make an award of costs in B's favour. I am faced with a stark choice, either I make the usual order in Children Act cases, no costs, the result of which will be that B receives not a penny and renders the entire exercise pointless (save for the making of declarations, which will be of no practical benefit to the child), or I order the local authority to pay the costs of the proceedings. Ms Temple Bone invites me to adopt the former course, arguing that the local authority ought not to be required to make good the defects in the legal aid regime. On the other hand, Ms Kushner invites me to make an order for costs, to give meaningful effect to my award of damages. I prefer the latter approach. I have found the local authority and the IRO service, both public authorities, on their own admissions, to be seriously at fault and to have breached B's convention rights in a variety of respects and have concluded that it is appropriate that he should be awarded damages by way of just satisfaction. Another public authority has made regulations which would effectively prevent him from receiving those damages. That cannot be right, and is certainly neither just nor proportionate. The justice of the case demands that B receives his damages and that, therefore, the local authority must pay the entire costs of these proceedings, on the standard basis, to be subject to a detailed assessment if not agreed.'

The local authority in that case has not appealed the decision.

The second is the decision of Theis J in the case of *Kent v M & K* [2016] EWFC 28 which included an award of damages in association with a child having been accommodated under section 20 of the Children Act 1989. From the judgment at paragraphs 82-84,

82. *Mr Hall seeks an order for the LA to pay the costs of the proceedings. He submits the HRA claim has succeeded, the*

court should be mindful of the impact of the statutory charge and in the circumstances of the case the court should make an order for the LA to pay the cost of the proceedings.

84. Ms King resists this application. She submits the court should not depart from the general position in family cases that costs are not usually awarded in family proceedings (see Re S (A Child) [2015] UKSC 20 paras 15 and 29). She submits the LA have not taken an unreasonable stance. In any event, the LA should not be responsible for the cost of the proceedings, merely as a device to avoid the full impact of the statutory charge. She submits there are discrete costs concerning the HRA application.

84. I recognise the financial pressures on the LA and that it is unusual for the court to make a costs order in care proceedings. Against that I have determined that the HRA claim succeeds, I rejected the submissions of the LA and made an award of damages. In the circumstances of this case, where the breaches continued for such a long period of time, I have reached the conclusion the LA should pay K's costs of the HRA application only...I will make no order for costs as between M and the LA.

The state of the law is set at present by this decision but the conundrum persists. It seems to this author that a challenge to the relevant act, guidance, and practices engaged in relation to the statutory charge such cases is likely.

Kate Makepeace Grieve
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And ...

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P v A Local Authority [2016] EWHC 2779