



Considerations, quantum, and costs; putting some shape into HRA claims.

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Human Rights Act 1998



HRA 1998 Section 6 states:

6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

This is straightforward but often misunderstood. The act which is incompatible is **unlawful**. Nothing more is needed



Claims



A claim is available 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—

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

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.



European Convention of Human Rights 1950 art 6



ECHR Article 6 - Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...



European Convention of Human Rights 1950 Article 8



ECHR Article 8 - Right to respect for private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



HUMAN RIGHTS ACT 1989

Judicial Remedies (con't)



(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.



European Convention of Human Rights 1950 art 41



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.

If the court feels that a **declaration** does not provide just satisfaction it may consider awarding **damages**.



Starting Point



The starting point for damages is section 8(3) of the Human Rights Act 1998 which states:

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 the order is made.*



What RESULT?
(thinking about quantum)



As a starting point, damages should be awarded as a result of the breach of the party's human rights.

Distress,

Anxiety,

Loss of relationship,

Loss of a chance,

Which arises as a result of the breach of art 6 or 8

FOR EXAMPLE

SHOULD BE CONSIDERED

(LOOKS LIKE A PERSONAL INSURY CLAIM?)



European Jurisprudence



Considerations for an Award of Damages

The Law Commission report dating from October 2000 offers guidance on the general principles to be considered before awarding damage for breach of each of the relevant Articles of the Convention. Paragraph 6.159 of the report focusses 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.'



ECtHR



The ECtHR has been willing to award damages for **distress, anxiety and loss of relationship** as a consequence of a violation of Article 6 or 8. *H v United Kingdom (Just satisfaction) Series A, No.136-B* (1988), (1991) 13 EHRR 449

The ECtHR has acknowledged that procedural failures which are so intimately connected to the interference of one of the most fundamental rights should not be overlooked and that 'just satisfaction' required damages to be paid (*H v UK*).



CASE LAW- English jurisprudence

Re H (A Child: Breach of Convention Rights: Damages) [2014] EWFC 38 European Court
generally favours an award of damages

In *Northamptonshire v AS, KS, and DS* [2015] EWHC 199 (Fam) Keehan J **damages flowed from the breach.**

Re P [2007] EWCA Civ 2, **a lost opportunity** ‘a major ingredient of the quantification of the damages’ in Strasbourg cases.

Courts in the UK have historically rejected a tort based approach.



Thought given to quantum



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)]



Costs – legal test



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.



The problem of quantum and costs



HHJ Rowe set out in an unreported case in July 2015 the problems of quantum and costs

'There is little guidance as to the proper quantum of damages... Miss J highlighted the unfairness of a system where any award to the mother would, unless either it exceeded the costs incurred under the mother's funding certificate in the care proceedings as a whole or I awarded the mother costs in that full sum, be recouped by the Legal Services Commission in part repayment of her publicly funded costs. Since Miss J did not suggest that such a substantial award would be appropriate in this case, she recognised that an award of damages will not directly benefit the mother financially. It will be, in effect, a mark of the court's recognition of the mother's distress at the unlawful removal and subsequent unlawful retention of her son for over a month. It is vitally important that no removal of a child in similar circumstances should happen again.'



Statutory Charge Regulations



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.



Overriding 'just satisfaction'



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.



Recent decisions



There are three recent cases which are important to consider in respect of costs 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.

This is J in the case of *Kent v M & K* [2016] EWFC 28

And, hot off the press, *Keehan J P v A Local Authority* [2016] EWHC 2779 (handed down 04.11.16)



State of the law



The state of the law is set at present by these decisions 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.

