



Public figures

A powerful remedy is emerging in relation to human rights damages, says **Tim Ward** and **Daniel Beard**



IT HAS long been conventional wisdom that public law proceedings did not give rise to any right to damages. However heinous the illegal action complained of, even if "so outrageous in its defiance of logic or accepted moral standards" (*Brind v Home Secretary* (1991)) that the Wednesbury test of reasonableness was satisfied, a victorious litigant generally had no prospect of obtaining compensation.

Part 54(3) of the Civil Procedure Rules (CPR) effectively precludes the award of damages in judicial review proceedings, save where there exists some other freestanding cause of action that could give rise to a claim for damages. Prior to the Human Rights Act (HRA), and absent of any claim in community law, that meant a litigant who sought damages in judicial review needed the fortuitous circumstances of a concurrent claim in private law.

On one hand, this situation is highly unsatisfactory. It might even be said that the ability to obtain compensation for unlawful harm is just as important a component of the rule of law in respect of state action as it is in the sphere of relations between private individuals. Why should those who perform unlawful acts that cause demonstrable harm be excused from the duty to compensate, merely because their actions fall within the sphere of public law? One answer that is sometimes given is that the threat of damages litigation would provide an unwelcome fetter on the state's ability to govern effectively. But arguments of the same kind have been heard as the law of professional negligence develops so as to extinguish the last pockets of professional immunity.

Moreover, the absence of a damages remedy in judicial review has been rendered

increasingly anomalous by developments in European Community (EC) law driven by the European Court of Justice (ECJ). Where the harm consists of a breach of an individual's EC rights, EC law demands an "effective remedy". In an appropriate case, that means either restitution or damages. From a client's perspective, it is simply bizarre that compensation might be available if a claim could be formulated in EC law, but not if the claim fell outside. As the complex case law on the scope of EC law demonstrates, the boundary of its application is often hard to discern and (at least perhaps from a client's perspective) arbitrary. Complaints based upon indirect taxation such as VAT are likely to be inside its scope, but matters of direct taxation lie outside. Pharmaceutical law is 'in', and yet health is 'out'. Why should the availability of compensation turn on this contingency?

When first enacted, the HRA appeared to promise a way through this quandary. Section 8 provided for the award of damages for the breach of any European Convention on Human Rights (ECHR) right. It therefore offered a freestanding head of claim, which could be used to found a claim for damages in judicial review within the scope of the CPR. While there are undoubtedly some claims in public law that cannot be formulated so as to include a claim for breach of ECHR rights, the broad and flexible nature of the ECHR is such that, in truth, any public lawyer worth their salt can find a human rights angle to most such challenges.

It was, however, immediately apparent that the right to damages under the HRA would be anything but automatic. The act made clear that the award of such damages was discretionary. Moreover, in determining whether to make an award, or the amount of

any award, the courts are required to take into account "the principles applied by the European Court of Human Rights" (Section 8(4) of the HRA). It has frequently been observed that the court does not apply any readily identifiable principles. In *KB v MHRT* (2003) Judge Burnton concluded that there was not a "clear and constant jurisprudence" of the Strasbourg court on the recovery of damages that could easily be applied by the UK courts. While some commentators feel this may go too far, it is certainly correct that the Strasbourg court has not consistently applied a truly compensatory approach to the award of damages, even though it has occasionally (and recently with increased frequency) stated that it does. Its approach is 'equitable'; it often concludes that its judgment is itself sufficient reparation, even where harm has been demonstrated.

The HRA raised another barrier to the award of ECHR damages. It required the court to take account of the circumstances of the case, including "any other relief or remedy granted" (Section 9(3)). That section not only offered encouragement to the domestic courts to embrace the judgment as sufficient reparation approach, but also raised the question as to how ECHR damages would sit alongside any award of compensation under any other head of domestic law. That question was answered in *Marcic v Thames Water Utilities Ltd* (2002), which is now on appeal to the House of Lords, in which the Court of Appeal held that an award of damages under the HRA which had been made by the judge at first instance for the flooding of the claimant's land by the defendant's sewers was "displaced" by an award for the same harm in common law nuisance.

For the first two years of the HRA, there

was a resounding silence from the courts in regard to damages. While other aspects of the act gave rise to a frenzy of litigation, little or nothing was said on the question of damages. But that has now all changed. Over the last year, a series of High Court decisions have started to give shape to a powerful remedy in damages – in some ways more powerful than that which exists at Strasbourg.

In *R (Bernard) v LB of Enfield* (2002) and in *KB*, the High Court concluded that there is no justification for an award of damages being lower under the HRA than it would be for a comparable tort. In other words, damages to put the victim in the position as if the breach had not been committed. Thus, where quantification of loss can be set out, and causation shown, damages may flow from the breach of a person's human rights. For example, in *Dennis v Ministry of Defence* (2003), once it had been found that RAF overflights were an unlawful breach of Article 8, the compensation due was held to be the loss of amenity, use and value of the property in question.

In February this year, the High Court went further. In *R(N) v Home Secretary* (2003), the claimant was an asylum seeker from Libya. He arrived in early 2000 but his claim was not granted until 2002. He claimed damages for the distress that had been caused by the "maladministration" of his claim by the Home Office. Judge Silber ordered that damages were due since he considered that the case was "almost unique" in the way that the Home Office had dealt with the claimant. That decision was subjected to significant criticism among practitioners. As one put it, if you come to the UK wanting to stay and you get to stay longer while your claim is dealt with, why should you get damages?

The Court of Appeal has now had the opportunity to consider *N* along with two other cases relating to HRA damages claims: *M* and *Anufrijeva* (2003). Notwithstanding the "unique" nature of the case in *N*, the Court of Appeal could clearly hear the floodgates creaking. It overturned the decision in *N*, recognising that "[i]f Silber J is correct, it will follow that any significant decision constituting maladministration, or even unjustified delay in reaching such a decision, will risk constituting an infringement of Article 8 if it induces stress which results in psychiatric harm".

Indeed, it made clear that claims for damages or compensation in respect of public law rights play a different role from similar claims in private proceedings. In so concluding, the Court of Appeal not only referred to the ECHR jurisprudence on "just satisfaction", but also the approach of the ECJ in dealing with claims for infringement of EC law. While comparison with relevant claims in tort may be appropriate – particularly where the action constitutes both a tort and a breach of human rights – damages for non-pecuniary loss must be assessed on an "equitable basis" and comparisons with awards made by ombudsmen may be apposite.

Although these decisions do not set precise guidelines for human rights damages, we are now seeing the courts grapple with the (sometimes confusing) Strasbourg case law in order to set out principles to fill a 'gap' in domestic law. These decisions are far from the conclusion of this process; they are merely the slow beginning. Nevertheless, what these cases show is that HRA damages are now a reality. The days of wholly uncompensated public law harms are drawing to an end. ■
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