

Victims of trafficking: HRA 1998 remedies



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The issues

- HRA 1998 remedies: Declaration and damages.
- Establish a breach of Convention right: get a declaration.
- The issues:
 1. When are damages also recoverable?
 2. If they are, how do you assess them?
- The key statutory provision: section 8 HRA 1998.

Pre-conditions for damages

- Four pre-conditions for damages to be awarded (*R. (Greenfield) v SSHD* [2005] UKHL 14 at [6]):
 - (1) a finding of unlawfulness or prospective unlawfulness based on **breach or prospective breach** of Convention right by a public authority;
 - (2) the **court has the power** to award damages, or order the payment of compensation, in civil proceedings;
 - (3) the court is satisfied, taking account of all the circumstances of the particular case, that an **award of damages is necessary to afford just satisfaction** to the person in whose favour it is made; and
 - (4) the court considers an **award of damages to be just and appropriate.**

Whether to award and how to assess: s.8(4)

- Section 8(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.”

S.8(4): *Greenfield* approach

- The court is **not strictly bound** by the ECtHR's principles. But it **has to take them into account**.
- The courts **should not apply domestic scales** of damages in HRA claims.
- The courts **must therefore look to Strasbourg for guidance** on the award of damages.
- Problem: hard to identify the ECtHR's principles and reasons for awards.
- But maintained – with some additional nuance – by the SC in *R. (Sturnham) v Parole Board* [2013] UKSC 23.

The *Greenfield* approach: two examples

- Two examples relevant to VoTs.
 1. *O v Commissioner of Police of the Metropolis* [2011] EWHC 1246 (QB)
 2. *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB)

O v Commissioner

- Met Police breached the investigative duty in Art 3 and Art 4 (post-*Rantsev*).
- Declarations and damages of **£5,000** to each claimant.
 - Reference to one ECtHR case: *MC v Bulgaria* (2005) 40 E.H.R.R. 20 where an award of €8,000 made in 2003.
 - Distress and frustration as a result of the failure to investigate. But no psychiatric illness.
 - Damages covered summer 2007 to December 2008.

DSD v Commissioner

- DSD and NBV sexually assaulted by John Worboys. Brought an HRA claim against the MPS. The MPS had failed to conduct an effective investigation. Breach of Art 3. Had already recovered compensation from Worboys and CICA.
- Key points from review of Art 3 awards ([68]):
 1. Size of an award reflects quality of the evidence of harm before the ECtHR. Where there is expert evidence of a recognised condition awards are often higher.
 2. Sums awarded must be seen in light of the sums claimed.
 3. ECtHR hardly ever explains the reasons for a particular sum, but you can usually discern its rationale.
 4. Damages are usually awarded for *any* Art 3 violation.
 5. ECtHR might reduce award where there has been fault on part of the claimant.

DSD v Commissioner

6. ECtHR will take account of domestic comparables if put before court. Where they do awards usually rise.
7. Range of damages for relevant Art 3 violations:
 - **€1,000-8,000**: low or nominal award.
 - **€8,000-20,000**: routine violation where no serious or long term mental health issues and no unusual aggravating factors;
 - **€20,000-100,000 plus**: where there are aggravating factors.
- Awards in the case:
 - **£22,500** for DSD; **£19,000** for NBV.
 - Mainly non-pecuniary damage. But also some pecuniary damage for future treatment costs.
 - Note that took into account compensation from settlement and CICA.

Using *O* and *DSD/NBV*

- Additional reasons why *DSD/NBV* is useful:
 - Considers levels of damages where failure to investigate: a) has itself caused distress/psych harm; and b) resulted in inhuman/degrading treatment (through failure to arrest and prosecute the person carrying it out).
 - How to approach causation.
- Applying to VoTs:
 - Example 1: X is a VoT. Referral to police. Police breach Art 4 investigative duty. X is not only distressed by lack of effective investigation but develops a psychiatric condition as a result of it: more significant than *O* and closer to *DSD*.
 - Example 2: X is a VoT. Referral to police. Police breach Art 4 investigative duty. X is distressed by lack of effective investigation. Y is then trafficked, she wouldn't have been if had been effective investigation and develops a psychiatric condition. X's claim is closer to *O*. Y's claim is closer to *NBV*.

Art 4: some Strasbourg examples

- SM v Croatia (2018): Shortcomings in the investigation and trial of a man accused of forcing a VoT into prostitution. SM claimed €20,000 for non-pecuniary damage. Court awarded **€5,000** in light of the “*purely procedural nature of the violation.*”
- Chowdhury & Ors v Greece (2017): Claim by 42 Bangladeshi migrant workers exploited on a strawberry farm (and some injured). Greece breached Art 4 by failing to: prevent the human trafficking that had taken place, protect the victims, conduct an effective investigation into the offences and punish those responsible for the trafficking. Claimed non-pecuniary damage and (varying amounts of) pecuniary damage for unpaid wages. Court said it could not determine individual amounts for each applicant. Awarded either **€12,000 or €16,000** as total compensation.
- Rantsev v Cyprus & Russia (2010): Applicant claimed €100,000 in non-pecuniary damage following death of his daughter, Ms R. Court awarded **€40,000 against Cyprus** for failing to take steps to protect her trafficking and to investigate whether she had been trafficked, and also for (Art 2) failure to conduct an effective investigation into her death. Awarded **€2,000 against Russia** for procedural violation of Art 4.

Alternative approach: *Alseran*

- *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB).
- **Controversial approach:** relevance of domestic standards to HRA damages ([908]-[917]).
 - While courts should not apply domestic scales of damages, in some cases they're not only relevant but important to consider.
 - Where a victim is being compensated under the HRA for conduct which would in principle give rise to a claim in tort – as in *Alseran* – the compensation should generally be similar to whatever would be awarded in a tortious claim.
- Involved:
 - Looking at JC Guidelines for award for the claimant's particular injuries.
 - Reducing JC awards to reflect Iraqi economic circumstances.
 - Comparing to ECtHR awards to check not significantly more or less generous.

Using *Alseran*?

- **Why worth considering :**
 - Could be way of getting to higher damages award in a case where would be equivalent tortious claim (e.g. assault; trespass to the person).
 - There's scope for flexibility and argument.
 - Clarity of JC Guidelines especially useful where lack of comparable ECtHR cases.
 - Other aspects of *Alseran* clear and uncontroversial: e.g. description of ECtHR principles ([904]-[948]).
- **Reasons for caution:**
 - Approach to domestic levels of damage an outlier; arguably inconsistent with *Greenfield* and *Sturnham*. When *DSD* got to SC more recently, no criticism of Green J's conventional approach.
 - The claimants had in principle had tortious claims against the state. But in many trafficking cases wouldn't have tortious claim against state (as opposed to trafficker).
 - Particular context: trying to achieve certainty in large group litigation to enable settlement.
 - May not make much difference. Accepts that awards should not be much higher or lower than ECtHR.

Whether should get damages at all

- Has been said that compensation plays a secondary role in human rights claims and that concern is usually to bring the infringement to an end (*Anufrijeva v Southwark London Borough Council* [2004] QB 1124 [52]–[53]).
- But, per *Alseran* (at [933]), contrast:
 - Cases where seeking a public law remedy: e.g. quashing or mandatory order.
 - Cases where not seeking a public law remedy and violation is purely historic. Here compensation is of primary if not sole importance.
- Example where claim for damages rejected: *R. (on the application of SXC) v Secretary of State for Work and Pensions* [2019] EWHC 2774 (Admin). Universal credit regulation contrary to Art 14 and should be quashed, but no damages. “A classic example of an instance where the Human Rights Act is relied on for the purposes of a purely public law challenge” ([12]).

VoT examples

- For VoTs, will be cases at either end of this spectrum and cases in between.
- Example of pure public end:
 - JR of recent failure to refer to NRM where seeking to quash decision/mandatory referral.
- Example of pure HRA damages end:
 - Case of *O* (police failure to investigate but no longer asking for investigation).
 - Possibility of *TDT (Vietnam)* round 2: TDT re-emerges, having been re-trafficked, and brings an Art 4 damages claim for SSHD's failure to protect him from re-trafficking (and possibly Art 3 if has been subject to inhuman or degrading treatment).
- Example in between:
 - JR of failure to refer to NRM where client is re-trafficked but re-emerges to pursue JR and Art 4 damages claim.