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Damages

[746]

In *Anufrijeva v Southwark London Borough Council*; *R (N) v Secretary Of State For The Home Department*; *R (M) v Secretary Of State For The Home Department* [809](#) the Court of Appeal gave guidance in relation to awards of damages in respect of human rights claims. Lord Woolf said: [810](#)

'The following points need to be noted:

- - (a)The award of damages under the [HRA 1998](#) is confined to the class of unlawful acts of public authorities identified by s 6(1) – see s 8(1) and (6).
 - (b)The court has a discretion as to whether to make an award (it must be “just and appropriate” to do so) by contrast to the position in relation to common law claims where there is a right to damages – see s 8(1).
 - (c)The award must be necessary to achieve “just satisfaction”; language that is distinct from the approach at common law where a claimant is invariably entitled, so far as money can achieve this, to be restored in the position he would have been in if he had not suffered the injury of which complaint is made. The concept of damages being “necessary to afford just satisfaction” provides a link with the approach to compensation of the European Court of Human Rights under Art 41.
 - (d)The court is required to take into account in determining whether damages are payable and the amount of damages payable the different principles applied by the European Court of Human Rights in awarding compensation.
 - (e)Exemplary damages are not awarded.'

And:

'it is possible to identify some basic principles the European Court of Human Rights applies. The fundamental principle underlying the award of compensation is that the court should achieve what it describes as *restitutio in integrum*. The applicant should, insofar as this is possible, be placed in the same position as if his European Convention rights had not been infringed.' [811](#)

And further:

'In determining whether damages should be awarded, in the absence of any clear guidance from Strasbourg, principles clearly laid down by the [HRA 1998](#) may give the greatest assistance. The critical message is that the remedy has to be “just and appropriate” and “necessary” to afford “just satisfaction”. The approach is an equitable one. The “equitable basis” has been cited by the European Court of Human Rights both as a reason for awarding damages and as a basis upon which to calculate them. There have been cases where the seriousness or the manner of the violation has meant that, as a matter of fairness, the European Court of Human Rights has awarded compensation consisting of “moral damages”. The Law Commission stated in its report that the European Court of Human Rights took account of “a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law.”



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The scale and manner of violation can therefore be taken into account.’ [812](#)

In *R (Sturnham) v Parole Board* [813](#) the Supreme Court held that English courts should be guided by any clear and consistent practice of the European Court, and that the quantum of awards should broadly reflect the level of awards made by the European courts in comparable cases brought by applicants from the UK or other countries with a similar cost of living.

[747]

The appropriate level of damages which should be awarded in cases where a local authority has been responsible, by failing to make appropriate plans for a child in its care, for a breach of Convention Rights (usually Art 8 and/or Art 6) is ‘highly fact-sensitive’. [814](#) In *Medway Council v M and T* [815](#) HHJ Lazarus reproduced a table drawn up by counsel summarising the level of damages awarded in a number of cases where a local authority’s failure to carry out sufficient review of a child’s placement and needs had led to a breach of the child’s rights under ECHR Arts 6 and 8. In *Kent County Council v M and K* [816](#) Theis J referred to this table when awarding damages of £17,500 to a child whose Article 6 and 8 rights had been breached by a failure by the local authority to make appropriate plans for her over a period of four years. In *GD v Wakefield Metropolitan District Council*, [817](#) Cobb J awarded damages of £10,000 to a mother and £5,000 to each child following systemic failure in handling a case of alleged sexual abuse.

The following table takes the Medway Council table as its starting point and includes subsequent cases. It is provided for illustrative purposes only, in light of the fact that many of the awards were determined by agreement.

The following factors may be relevant to the level of the award:

- The duration of the breach;
- The culpability of the local authority (in *Northamptonshire CC v AS & Ors* [818](#) Keehan J described the breaches by the local authority as ‘appalling’);
- The impact of the breach on the child. [819](#)

In other cases the courts have declined to award any sum for damages on the basis that the declaration of breach by itself is sufficient. [820](#)

Case	Breach Found	Impact of Breach	Damages Awarded	Inflated (RPI) to 2018
<i>W v UK</i> (1987) 10 EHRR 453	Article 8: Insufficient involvement in decision making; termination of contact; unreasonable length of proceedings	Loss of opportunity, mental anguish and distress	£12,000	£30,585



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Article 6: No availability of a remedy

<i>H v UK</i> (1991) 13 EHR 449	Article 6: Unreasonable length of proceedings (2.5 years) due to delay in LA filing evidence; failure to notify parties of placement for adoption for 5 months	Loss of opportunity, feeling of frustration and helplessness.	£12,000	£24,313
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Article 8: Delay in proceedings

<i>TP & KM v UK</i> [2001] 2 FLR 549	Article 8: Failure to involve parents in decision making by not disclosing information. 1 year period of breach.	Loss of opportunity, distress and anxiety	£10,000 per applicant (mother and child)	£15,597
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Article 13: No availability of a remedy to determine the allegations made by Local Authority.

<i>P v UK</i> [2002] 2 FLR 631	Article 6: lack of representation. Article 8: removal of child shortly after birth, lack of involvement in decision making.	Loss of opportunity, distress and anxiety	€12,000 per parent	£11,863
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<i>Venema v The Netherlands</i> [2003] 1 FLR 552	Article 8: non-involvement in decision making; separation of 5 months	Distress and anxiety	€15,000 for both parents jointly	£14,612
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<i>Re P</i> [2007] EWCA Civ 2	Article 8: Failure to involve in decision making (but mother's solicitor kept up to date).	No evidence that exclusion from decision making caused any independent or additional injury	No award of damages	-
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<i>Coventry CC v C</i> [2012] EWHC 2190 (Fam)	Article 8: Failure to obtain proper consent to s20 and disproportionate removal of child	Not referenced	Quantum agreed - between parents and LA. Unknown but reference to it	-
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				being used to provide long-term therapy to M.	
<i>H (A Child – Breach of Convention Rights – Damages)</i> [2014] EWFC 38	Articles 6 and 8: Failure to issue proceedings in timely manner; failure to involve in decision making process; failure to explain all available options, timescales and consequences in relation to non-consent; delay in assessing mother; 11 month period of breach	Stress and anxiety causing increased seizures for F and increased self-harm for M.	£6,000 per parent		£6,326
<i>Northamptonshire County Council v AS & Ors (Rev 1)</i> [2015] EWHC 199 (Fam)	Articles 6 and 8: Delay of 9 months in issuing proceedings whilst under s20; LA causing/contributing to delays in filing evidence (child removed at 15 days, final order made 2 years after birth); failure to organise contact with mother	No reasoning as to causation but concerns over “possible irredeemable consequences for the child’s future welfare and development”	£12,000 to child £4,000 to mother	(agreed settlement)	£12,766 £4,255
<i>Re AS (Unlawful removal of a child)</i> [2015] EWFC B150	Unlawful removal. 1 month period of breach	Distress, although M would have been unable to care for child over the period in any event.	£3,000		£3,137
<i>Medway Council v M & T</i> [2015] EWFC B164	Article 6: Failure to issue proceedings in timely manner Article 8: Unlawful removal; failure to obtain valid section 20 consent (for 2 years, 3 months); failure to involve M in decision making; failure to adequately address the issues in the case	Loss of opportunity, distress of separation but no additional impact of the breach on M’s mental health	£20,000 each for mother and child		£20,940



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<i>Re B (a child)</i> [2016] EWFC B10	Articles 6 and 8: Failure to issue proceedings in timely manner (delay of 3 years before applying to revoke placement order); failure to properly consider contact between M and child and possible sibling contact	Loss of access to justice, loss of opportunity	£5,000 to child.	£5,249
<i>Kent CC v M & K</i> [2016] EWFC 28	Articles 6 and 8: Failure to issue proceedings in timely manner (delay of 3 years, 8 months); failure to properly assess child for 3 years, 4 months; failure to implement care plan to give effect to recommendations of LAC reviews (for 3 years, 4 months)	Negative effect on child's emotional health and development due to high level of placement breakdown.	£17,500 to child	£18,141
<i>Thurrock BC v CW & BB</i> [2016] EWFC B53	Article 6: Delay in issuing proceedings (13 months) Article 8: Failure to promote contact with M, siblings or extended family; failure to provide counselling	Not referenced	£7,500 to child	£7,745
<i>P v A Local Authority</i> [2016] EWHC 2779 (Fam)	Article 8: Disclosure by LA of child's details to third party connected to child's adoptive parents (following order stating that adoptive parents should not be given information).	Distress and adverse impact on mental health – number of suicide attempts and self-harming.	£4,750 to child	£4,861
<i>D (Children) v Wakefield MDC</i> [2016] EWHC 3312	Articles 6 and 8: Failure to consider rehabilitation to M in timely manner once informed by police she had been excluded from enquiries; failure to promote contact; failure to disclose relevant information; inappropriate conduct of ABE interviews	Not referenced	£10,000 to mother £5,000 to each child	£10,142 £5,071



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(case brought against
 LA and police)

<p><i>Re W (Children) (Convention Rights Claim: Procedure)</i> [2017] EWHC 450 (Fam)</p>	<p>Articles 6 and 8: Lack of communication with father in respect of Child Protection Conference process; failure to put in place any detailed and time-limited plan as to how recommended assessment would take place; breaches continuing until proceedings issued (10 months)</p>	<p>Not referenced</p>	<p>£15,000</p>	<p>£15,134</p>
<p><i>Re R and E (Children)</i> [2017] EWFC B22</p>	<p>Article 8: LA allowed children to be known by surname of prospective adopters before adoption orders made.</p>	<p>No adverse impact on children. At most F deprived of opportunity to contest an application by LA to change the name.</p>	<p>No award of damages.</p>	<p>-</p>
<p><i>Re CZ (Human Rights Claim: Costs)</i> [2017] EWFC 11</p>	<p>Article 6 and 8: Failure to inform parents of hearing resulting in without notice removal of child. Separation lasted 11 weeks.</p>	<p>Not referenced</p>	<p>£3,750 per parent (agreed and approved by court)</p>	<p>£3,796</p>

[748]

In *Re SW and TW (Human Rights Claim: Procedure) (No 1)*, [821](#) Cobb J considered the impact of the Legal Aid Agency recouping its costs under the statutory charge out of any damages and observed:

‘This case illustrates once again that the cost of pursuing relief under the [HRA 1998](#) can very swiftly dwarf, or indeed obliterate, the financial benefits sought. Many such cases are surely suitable for non-court dispute resolution (NCDR), and I enthusiastically recommend that parties divert away from the court to mediate their claims; I am led to understand that many Court of Protection disputes with similar characteristics are resolved away from the court room. This is a case which could/should have been self-referred for NCDR. Parties in cases of this kind would do well to remind themselves of the comments of the Court of Appeal in *Anufrijeva v LB Southwark & others* [\[2003\] EWCA Civ 1406](#) [\[2004\] 1 FLR 8](#) at paras 79–80:

“...we were concerned that, even if the proceedings were conducted as economically as possible, the cost of the proceedings would be totally out of proportion to the damages likely to



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be awarded. This has proved to be the position... The costs at first instance of each party were totally disproportionate to the amount involved. When the total costs of both sides are looked at including the appeal, the figures are truly horrendous, and the situation is made even more worrying by the fact that all the parties are funded out of public funds.

[80] The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded. Furthermore, as we have made plain, there will often be no certainty that an entitlement to damages will be established at all.”

In *Northamptonshire CC and Another v The Lord Chancellor (via the Legal Aid Agency)* [822](#) Francis J gave guidance on the circumstances in which damages awarded under the [HRA 1998](#) following care proceedings will be subject to a Legal Aid Agency statutory charge in respect of the costs of the care proceedings. Appended to the judgment is a position statement prepared on behalf of the LAA intended to act as guidance to parties in similar cases.

Where a damages claim is contemplated, practitioners should follow the guidance set out in *H v Northamptonshire CC and the Legal Aid Agency* [823](#) and issue separate proceedings under a separate legal aid certificate (or seek to settle the damages claim outside of the care proceedings). Provided that this course is followed, the costs of the care proceedings will not form a statutory charge on the damages awarded (although the costs of the damages claim will do so). Conversely, where damages are sought and awarded within the care proceedings, the full costs of the care proceedings will form a statutory charge on the damages and in many cases will extinguish the damages awarded.