Clayton Comments

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DAMAGE LIMITATION: THE COURTS AND HUMAN RIGHTS ACT DAMAGES

Introduction

It is sometimes thought that the only appropriate remedy for a human rights violation is a declaration. However, the remedial power to award damages plays an important role in domestic human rights instruments like the American Bill of Rights,[1] the New Zealand Bill of Rights Act,[2] the Canadian Charter of Rights[3] and the South African Constitution Act. It is also a prominent feature of international human rights law: the International Covenant on Civil and Political Rights creates an enforceable right to compensation for anyone who has been unlawfully arrested, detained or convicted;[4] the Inter-American Court of Human Rights has awarded damages under the American Convention on Human Rights on several occasions;[5] and the African Commission has decided that it can, in principle, make an award of compensation under African Charter on Human and People's Rights.[6]

The European Court of Human Rights (ECtHR) has made numerous awards of just satisfaction under Article 41 of the Convention; and Article 41 has been carried into effect by the Human

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1 See *Bivens v Six Unknown Agents of the Federal Bureau of Narcotics* (1971) 403 US 388; *Davis v Passman* (1979) 442 US 228; *Carlson v Green* (1980) 446 US 14

2 *Simpson v A-G* [1994] 3 NZLR 667.

3 The Supreme Court of Canada has not considered the issue directly (see *McKinney v University of Gueph* [1990] 3 SCR 229 but various appellate courts have found that damages are an appropriate and just remedy under section 24(1) of the Charter: see decision of the Federal Court of Appeal in *Vespoli v The Queen* (1984) 12 CRR 185 and of the Quebec Court of Appeal in *Patenaude v Roy* (1994) 123 DLR (4th) 78.

4 Under Articles 9(5) and 14(6)

5 See *Velasquez, Rodriquez Case (Compensatory Damages)* (!989) 7 Inter-Am Ct HR (ser C); *Gangaram Panay v Surimane* (1994) 16 Inter-Am Ct HR (ser C); *Loyaza Tamayo v Peru (Reparations)* (1998) 43 Inter Am Ct HR (ser C).

6 Case 59/81 *Embga Melonga Louis v Camaroon*, 8th Annual Report of the ACHPR 1994/95 ACHPR/8TH/ACT/RPT/XVII, Annex IX.

Rights Act (HRA). The HRA therefore marks a radical departure in English public law since maladministration by public bodies does not entitle the injured party to compensation.[7]

However, I shall argue that the approach taken by the English courts to date has been disappointing. Claims for HRA damages has been considered in very few cases. The general principles formulated by the Court of Appeal in *Anufrijeva v Southwark LBC* [8] and by the House of Lords in *R(Greenfield) v Secretary of State for the Home Office,*[9] are more restrictive than the terms of the Act itself would mandate. As a result, it is unlikely that HRA damages will significantly add to the effective protection of human rights.

The power to award damages under section 8

Section 8 of the HRA states:

> (1) In relation to any act (or proposed act) of a public authority which the court finds (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) But damages may be awarded only by a court which has the power to award damages, or to order the payment of compensation in civil proceedings.
> (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), 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 it is made.
> (4) In determining–

[7] See eg *R v Deputy Chief Constable of the Thames Valley Police ex p Cotton* [1989] COD 318; *R v Knowsley MBC ex p Maguire* [1992} COD 499.
[8] [2004] QB 1124.
[9] [2005] 1 WLR 673.

(a) whether to award damages, or
(b) the amount of an award,
the court must take account of the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention ….

There are a number of points about the construction of section 8 which are worth emphasising. The overarching remedial principle under the HRA is that section 8(1) confers a very broad discretion; the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Under section 8(2) there is no entitlement to damages; the court has the power but not a duty to award damages.

The preconditions that must be satisfied before damages can be awarded appear to be very fact sensitive; the language of section 8(3) shows that making an award will ultimately depend on the particular circumstances of the case. However, section 8(3) enjoins the court to address two specific factors. Section 8(3)(a) requires the court to consider any other relief granted by it or any other court. If, for example, a claimant receives just satisfaction from a quashing order, then HRA damages will not be awarded.

Section 8(3)(b) is more obscure; it requires the court to take account of the consequences of any decision of that or any other court in respect of the unlawful act. Although it has been suggested that this factor would allow the court to take account of general policy issues such as floodgate arguments,[10] the better view is that section 8(3) is unlikely to detract from the basic requirement for just satisfaction to the person in whose favour it is made: since this could otherwise not be reconciled with the fundamental principle of *restitutio in intregrum*.[11]

[10] See M Amos "Damages for breach of the Human Rights Act 1998" [1999] EHRLR 178.
[11] Law Commission Report No 266 *Damages under the Human Rights Act* Cm 4853 para 4.41.

Section 8(4) makes the power to award damages under section 8(3) subject to an obligation to consider Strasbourg authorities. However, the obligation in question is not drafted in very strong terms. First, a court must consider the Strasbourg principles; and is not duty bound to apply them: in contrast, for example to its obligations under European Community law. Secondly, section 8(4) requires consideration of the "principles" of the ECtHR jurisprudence. It is therefore a weaker formulation than the general approach to HRA cases required by section 2(1). Section 2(1) means the court must take account of any Strasbourg "decision" if it is relevant to the proceedings.

The Strasbourg principles

The immediate difficulty in applying section 8(4) is to identify the ECtHR "principles". One former judge of the ECtHR has stated privately "we have no principles"; another judge says "we have principles, we just do not apply them";[12] and Sir Robert Carnworth has described the assessment of damages by the ECtHR as something of a jury exercise.[13]

The view expressed by the textbooks is equally unencouraging. Lester and Pannick argue that the principles of the ECtHR are, in truth, little more than equitable assessments of the facts of the individual and the case law lacks coherence; advocates and judges are in danger of spending time attempting to identify principles which do not exist.[14] Grosz, Beatson and Duffy suggest that courts and tribunals are likely to be frustrated in their search for the principles applied by the ECHR.[15] Simor explains that the discretionary nature of the Court's powers under Article 41

12 D Sheldon *Remedies in International Human Rights Law* (OUP, 1999) at 1.
13 'ECHR Remedies from a common law perspective" (2000) 49 ICLQ 517
14 *Human Rights Law and Practice* at para 2.8.4 (2nd Ed, Butterworth, 2004).
15 *The Human Rights Act: the 1998 Act and European Convention* para 6.20 (Sweet & Maxwell, 2000)

and the fact that the Court has rarely given reasons for how it has exercised its discretion means that it is difficult to discern the principles on which such awards are granted or not granted.[16] Clayton and Tomlinson suggest that there are serious concerns about the lack of consistency in the case law, about the obscure basis on which the ECtHR makes awards and about the moral judgments made when the ECtHR assesses, for example, claims by convicted criminals to just satisfaction.[17]

The process of understanding the ECtHR jurisprudence was significantly eased when the Law Commission published a report on HRA damages in October 2000.[18] The report (which remains the most authoritative treatment of the topic) was not a typical Law Commission paper; its purpose was to inform practitioners and public bodies of the Strasbourg jurisprudence rather than to promote law reform. [19]

The Law Commission suggested that the absence of clear principles in the Strasbourg case law arose for several reasons. The ECtHR does not apply a strict rule of precedent; there are diverse traditions within Europe for the calculation of damages (for example, in French private law, the measure of damages is regarded as a matter for the "sovereign power of assessment" of the judge of first instance); the ECtHR is an international court; and at a more practical level, the character and size of the ECtHR inevitably affects its ability to deal with detailed issues of damages in a consistent way: judges are drawn from different backgrounds and diverse jurisdictions; they will have varied experiences of awarding damages; it is inevitable that their views as to the proper level of compensation and the basis on which it should be assessed will differ. Furthermore, the ECtHR is highly dependent on the information and arguments put forward by the parties which will vary considerably from case to case. At least in relation to non pecuniary loss, the assessment

16 *Human Rights Practice* at para 19.063 (Butterworth)
17 *The Law of Human Rights* (OUP, 2000)
18 *The Law Commission on Damages under the Human Rights Act* Law Com No 266
19 Ibid, paras 1.2, 1.3

of damages is difficult; and it is impossible to draw direct comparisons between actual losses for particular types of injury between, for example, Germany and Turkey. In relation to pecuniary loss, the problem is exacerbated by the structure which is not well suited to the resolution of conflicting valuation evidence. Against this background, the Law Commission concluded that the absence of clear principle in the Strasbourg jurisprudence is understandable.[20]

Nevertheless, as the Law Commission also observed, the lack of principles in the Strasbourg jurisprudence presented the UK courts with a problem. On the one hand, there was no doubt that the ECtHR's explanation of its awards is often perfunctory or non existent. In such cases one can only speculate why a certain result was reached. On the other, the courts are under a statutory obligation to have regard to Strasbourg principles.[21]

The HRA damages cases

The first case to consider damages was *R (Bernard) v Enfield LBC*[22] where a local authority breached its duty[23] to re-house a severely disabled, doubly incontinent woman and her husband by leaving them in totally unsuitable accommodation for nearly two years. Sullivan J decided that Article 8 had been breached and that HRA damages should be awarded. He stated that awards made by the ECtHR are difficult to apply because of the need to take account of differing standards and costs of living throughout Europe.[24] In the absence of any useful ECtHR comparables, Sullivan J tried to identify domestic comparators as the Law Commission suggested. He decided that the award set should not be minimal because that would diminish respect for the policy underlying

20 Ibid, paras 3.4 to 3. 12
21 Ibid, para 3.15
22 [2003] LGR 423.
23 Under s 21 of the National Assistance Act 1948
24 Above, para 43.

the 1998 Ac;[25] and concluded that the local government ombudsman's recommended awards were the best available comparison because the case was, in essence, a case of maladministration. Damages of £10,000 were therefore awarded.

The possibility of awarding damages for Article 8 breaches was also discussed in two immigration cases.[26] In *R(KB) v Mental Health Review Tribunal*[27] Stanley Burnton J decided to award damages for a failure to provide a speedy hearing in breach of Article 5(4) to mental patients applying to the Mental Health Review Tribunal. He also concluded that loss of opportunity damages should not be given unless the allegation is proved on the balance of probabilities[28] (although this approach may be inconsistent with that taken by Lord Bingham in *Greenfield*);[29] and awarded damages for distress and anxiety in the range of £750 to £4,000. In *R(Wilkinson) v IRC* [30] the Court of Appeal considered damages in the context of a discrimination case, rejecting the argument that HRA damages should be awarded to level up so widowers could, in effect, receive widow's bereavement allowance.

However, the two most significant decisions on damages were made by the Court of Appeal in *Anufrijeva* and by the House of Lords in *Greenfield*.

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25 Above para 58, applying the remarks of May LJ in *Alexander v Home Office* [1988] 1 WLR 968 at 975 in relation to the policy underlying awards for hurt feelings under the Race Relations Act.

26 In *R(N) v Secretary of State for the Home Department* [2003] EWHC 207 (Admin) Silber J held that it was necessary to award damages for maladministration in processing an asylum claim; and in *R(M) v Secretary of State for the Home Department* [2003] EWHC 319 (Admin) Richards J said *obiter* in a family reunion case that damages of £1,000 to £2,000 would be appropriate for distress for breaching Article 8 from delays in the entry clearance system.

27 [2004] QB 936.

28 Ibid, para 64.

29 Above, para 15.

30 [2003] 1 WLR 2683.

Anufrijeva was heard by a Court of Appeal comprising Lord Woolf CJ, Lord Phillips MR and Auld LJ.[31] It considered issues of liability under Article 8 as well as damages. Lord Woolf, giving the judgment of the Court, analysed certain features of the remedial scheme provided by section 8[32] to which I shall return. He accepted the Law Commission's view that there was a lack of clear principles in the Strasbourg case law; but identified certain basic principles: the fundamental principle underlying an award that a claimant should, so far as possible, be placed in the same position as if his Convention rights had not been infringed; that the ECtHR case law on damages for anxiety and distress is not consistent or coherent; that the ECtHR is disinclined to pay compensation for procedural errors; and that the ECtHR approach is an equitable one involving consideration of a range of factors including the seriousness and manner of the violation.[33] The Court of Appeal formulated principles for the assessment of damages; and approved the approach in *Bernard*[34] (later reversed by the House of Lords in *Greenfield*); and then laid down some procedural rules for cases where HRA damages are claimed.[35]

Greenfield originally concerned a claim that the imposition of additional days imprisonment for breach of the prison disciplinary procedure breached Article 6. However, the only live issue before the House of Lords was a claim for HRA damages.[36]

Lord Bingham held that the courts had to look to the jurisprudence of the ECtHR for guidance and that the focus of the Convention was the protection of human rights rather than the award of compensation. The ECtHR therefore treated a finding that article 6 was breached as, in itself,

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31 The Court appeals from Newman J in a community care case and the two Article 8 immigration cases, *N* and *M*.

32 Ibid, paras 52 to 56.

33 Ibid, paras 57 to 70.

34 Ibid, paras 71 to 78.

35 Ibid, paras 79 to 81.

36 Following the decision of the Grand Chamber in *Ezeh and Connors v United Kingdom* (2003) 39 EHRR 1 the Government conceded liability

affording just satisfaction; and did not speculate on what the outcome of the particular proceedings would have been if the violation had not occurred.

Lord Bingham emphasised that the ECtHR awarded monetary compensation only where it was satisfied that a breach actually caused loss or damage, although the ECtHR occasionally made awards if the applicant had been deprived of a real chance of a better outcome. However, awards of compensation for anxiety and frustration for article 6 violations were made very sparingly and for modest sums.

In expressing his views on Article 6 Lord Bingham attached considerable weight to the Grand Chamber decision in *Kingsley v United Kingdom*, [37]a case which had been specifically referred to the Grand Chamber on the issue of just satisfaction. However, *Kingsley* is not regarded as a seminal case in Strasbourg itself. It has only been cited subsequently in four UK cases;[38] and there are numerous instances where the ECtHR has awarded just satisfaction in Article 6 cases where the reasoning of *Kingsley* would dictate otherwise.

The most important aspect of the *Greenfield* judgment was Lord Bingham's holding that domestic courts should not aim to be significantly more or less generous than the ECtHR might be in awarding damages. I shall consider this topic below.

37 (2002) 35 EHHR 117 para 40.

38 *Edwards and Lewis v United Kingdom* Judgment, 27 October 2004; the Grand Chamber in *Ezeh and Connors v United Kingdom* above; *Somjee v United Kingdom* Judgment 15 October 2002; *Wilson v United Kingdom*

The pre-conditions for awarding HRA damages

In *Anufrijeva* the Court of Appeal placed several important limitations for recovering HRA damages; these require closer examination.

In the judgment Lord Woolf [39] took the view that an award of HRA damages must strike a balance between the rights of the individual and the public as a whole (apparently deriving the principle from *Rights brought Home, the Human Rights Bill,* the White Paper, preceding the HRA's enactment).[40] The principle of fair balance is of course inherent to the Convention as a whole.[41] However, ECtHR has never applied the fair balance principle to questions of just satisfaction: the idea that the court should expressly balance an individual rights with the general interest of the community before awarding HRA damages has no basis in ECtHR case law; and the principle is also inconsistent with Lord Bingham's view in *Greenfield* that the British courts must look to Strasbourg for guidance when awarding damages.[42] Furthermore, the Court of Appeal appears to be adding a gloss to the broad statutory discretion conferred by section 8 of the HRA.

In *Anufrijeva* the Court of Appeal also said that the award of HRA damages will be a remedy of last resort,[43] based on Scorey and Eike *Human Rights Damages, Principles and Practice*.[44]

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39 Above, para 56.

40 (1997) Cmnd 3782 which said at para 2.6 "What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages".

41 *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 para 65; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 35 para 69; *Brown v Stott* [2003] 1 AC 681 at 704E/F per Lord Bingham.

42 Above, para 6.

43 Above, para 56.

44 Above, para A4-040.

However, the ECtHR has never described the award of just satisfactions as a remedy of last resort; and this important limiting principle cannot be justified by reference to Parliament's intention as expressed in section 8 itself.

HRA damages and the Ombudsman

The procedural guidelines in *Anufrijeva* state that where a claim form seeks HRA damages, permission for judicial review should be deferred until the case has been referred to the Ombudsman. Unfortunately, this approach conflicts with the statutory provisions which govern the Local Government and Parliamentary Ombudsman. These provisions (which are in identical terms)[45] deprive the Ombudsman of jurisdiction to entertain a complaint where a claimant has issued proceedings or might have a remedy- subject to one proviso, that there are circumstances particular to his case which made it not reasonable for him to resort to proceedings. It is therefore well established that the Local Government Ombudsman is not entitled to consider complaints where the courts have jurisdiction unless the proviso applies.[46]

The conflict between the Court of Appeal's emphasis on the Ombudsman and the jurisdictional bar on the Ombudsman's jurisdiction is made more problematic because the Legal Services Commission has told practitioners that no legal aid will be granted unless the client can demonstrate that only the court (rather than the Ombudsman) can adequately deal with the

[45] Section 26(6) of the Local Government Act 1974; s 5(2) of the Parliamentary Commissioner for Administration Act 1967.

[46] See *R v Local Commissioner for North and East Area of England ex p Bradford MBC* [1979] QB 287 per Lord Denning MR at 310G/H; *R v Commissioner for Local Administration ex p Croyden LBC* [1989] 1 All ER 1030 per Woolf LJ at 1038e/f; *R v Commissioner for Local Government ex p H* (1999) COD 382 (Turner J); leave to appeal refused per Simon Brown LJ at [1999] ELR 314; *R(Umo) v Commissioner for Local Government* [2004] ELR 265.

claim.[47] Legal aid is now routinely refused where HRA damages are sought. Consequently, since October 2003 when *Anufrijeva* was decided, only one case has canvassed the possibility of awarding damages,[48] an approach which is significantly at odds with that taken by the ECtHR towards just satisfaction.

HRA damages as an effective remedy

The limitations imposed by *Anufrijeva* indicate that damages may not be an effective remedy available to claimants whose rights have been violated. Indeed, the approach seems to breach the right to an effective remedy under Article 13 of the Convention since a remedy will not be effective for the purposes of Article 13 if, in practice, the procedure cannot be used.[49] Section 8 cannot properly be construed so restrictively.[50]

Furthermore, the views in *Anufrijeva* appear to be inconsistent with those of the New Zealand Court of Appeal in *Simpson v A-G*.[51] In *Simpson* the Court of Appeal implied a remedial provision permitting the award of damages into the New Zealand Bill of Rights Act- even though Parliament had clearly intended none to be enacted. The absence of a remedies provision in the Act was particularly significant because the draft bill published in the White Paper preceding the Act had included a remedial provision (although it was not ultimately enacted). Nevertheless,

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47 See the Commissions newsletter setting out guidance to practitioners, *Focus* (December 2003) contained in *Claims for Compensation based on breach of Human Rights: the Anufrijeva decision*.

48 *Ali v Head Teacher and Governors of the Lord Grey School* [2004] QB 1231

49 See eg *Camenzind v Switzerland* (1999) 28 EHRR 458 para 56; *Rotaru v Romania* (2000) 8 BHRC 449 para 70.

50 Although Article 13 is not incorporated into the HRA, the reason for its omission was that sections 7 to 9 of the Act were intended to lay down an appropriate remedial structure to give effect to Convention right; see *Brown v Stott* [2003] 1 AC 681 at 715D/E per Lord Hope; and see also his views in *R v Kansal (No 2)* [2002] 2 AC 69 at para 70.

51 [1994] 3 NZLR 667.

Cooke P said that the Court of Appeal would be failing in its duty if it did not give an effective remedy by awarding compensation in an appropriate case; a mere declaration would be toothless.[52]

Issues concerning quantum

In *Greenfield*[53] Lord Bingham observed that the sums the ECtHR awarded for opportunity loss or anxiety of frustration in Article 6 cases were noteworthy for their modesty. He drew attention to remarks made in *Osman v United Kingdom*[54] and *Curley v United Kingdom,*[55] indicating that the ECtHR does not apply principles or scales of assessment used by domestic courts when awarding just satisfaction; and declined to follow the approach the ECtHR took in *Perks v United Kingdom*[56] which Sir Robert Carnworth had chronicled.[57] Lord Bingham then proceeded to reject the approach used in *Bernard,*[58]*KB,*[59]and *Anufrijeva*[60] that HRA damages should not be on the low side compared to tortious awards; that English courts should be free to depart from the scale of damages awarded by the ECtHR; and that English awards should provide the appropriate comparator.

Lord Bingham gave broader reasons for reaching his conclusion.[61] The HRA was not a tort statute; its objectives were different and broader; a finding of a violation is an important

52 Ibid, see 676- lines 38 to 49;: see also Casey J at 691 lines 21 to 39 and 692 line 38 to 49; Hardie Boys J at 699 line 10 to 700 line 5 and 702 lines 35 to 50; McKay J at 717 line 50 to 718 line 15.
53 Above, para 18.
54 (1998) 29 EHRR 245 par 164.
55 (2000) 31 EHRR 401, para 46.
56 (1999) 30 EHRR 33.
57 'ECHR Remedies from a common law perspective" above.
58 Above, para 45.
59 Above, pares 47 and 53.
60 Above, paras 73 and 74.
61 Above, para 19.

vindication of the right asserted; and damages need not ordinarily be awarded to encourage high standards of compliance by member states since they are already bound by international law to perform their Convention duties in good faith. He said that the purpose of incorporating the Convention was to give claimants the same remedies that they would recover in Strasbourg; and observed that the White Paper, *Rights brought home: the Human Rights Bill*[62]said that, in taking account of the principles of the ECtHR in awarding damages, individuals would be able to obtain compensation equivalent to what they would have received at Strasbourg. He also pointed out that section 8(4) requires the courts to take into account the principles of the ECtHR in determining the amount of damages. The ECtHR routinely describes its awards as equitable (which Lord Bingham thought) meant they were not precisely calculated; but were instead to be judged by the ECtHR as being fair in the particular case. He suggested that the courts under the HRA must make a similar judgment in the case before it; and should not aim to be significantly more or less generous than the ECtHR might be expected to be.

The analysis of HRA damages in *Greenfield* obviously has enormous implications. It appears to reflect the wider perspective, that the HRA should mirror the Strasbourg jurisprudence. Thus, Lord Bingham in R*(Ullah) v Secretary of State for the Home Department*[63] emphasised that the duty of national courts is to keep pace with the Strasbourg jurisprudence over time as it evolves: no more, but certainly no less.[64] As a result, Lord Steyn has rejected the idea that domestic cultural traditions should determine the scope of Convention rights; [65] and Lord Bingham has expressed reservations about the value of examining Commonwealth case law in HRA cases

62 Above, para 2.6.

63 [2004] 2 AC 323 para 20

64 See *Price v Leeds CC* [2005] EWCA Civ 289 where the Court of Appeal considered the effect of s 2(1) in circumstances where a House of Lords decision had become incompatible with a later decision of the ECtHR.

65 *R(Marper) v Chief Constable of Yorkshire* [2004] 1 WLR 2196 at para 27 rejecting the view of Lord Woolf CJ in the Court of Appeal concerning identity cards at [2002] 1 WLR 3223 para 34.

since the UK must take its lead from Strasbourg.[66] Nevertheless, it is respectfully submitted that a number of Lord Bingham's observations in *Greenfield* are open to question.

First, it is difficult to tell from its exiguous reasoning whether, and to what extent, the ECtHR applies domestic scales of damages when making awards of just satisfaction. However, the position taken by the ECtHR in *Perks* (in which it drew on a table of English false imprisonment awards) is not gainsaid by *Osman*. In *Osman* the ECtHR was provided for the purposes of guidance only schedules of special damages for financial loss; and was invited to make its own damages assessment in accordance with its established principle.[67] Nor is the decision in *Curley* very illuminating. In that case the applicant submitted that on the basis of domestic scales of compensation for unlawful detention, he should receive £50,000 for 15 months detention or £25,000 for three months detention. In fact, the ECtHR held that domestic scales of compensation did not apply where there was no equivalent finding of unlawfulness.[68] In any event, the applicant failed to apply the appropriate domestic scale; he did not reduce hourly rates for unlawful detention so as to ensure that damages were kept proportionate with personal injury awards as required by Lord Woolf MR in *Thompson v Commissioner of Police for the Metropolis*.[69]

Secondly, when the White Paper referred to HRA damages being equivalent to compensation from the ECtHR, it is unclear whether the Government was discussing the scope of the damages remedy, issues affecting quantum or both. More importantly, as aid to construction, the White Paper cannot of course prevail over the terms of section 8(4) itself.

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66 *Sheldrake v DPP* [2004] 3 WLR 876 para 33.
67 Above, paras 160 to 164.
68 Above, para 46.
69 [1998] QB 498 at 515D/G

Thirdly, the language of section 8(4) militates against a construction that requires a court to pitch HRA damages at Strasbourg levels. If Parliament had intended the English courts to apply these standards, the legislation could easily have been drafted to achieve this objective. Instead section 8(4) requires the court to take account of the "principles" the ECtHR applies to "the amount of damages", an obligation which might, for example, prevent a court from awarding HRA damages which included exemplary[70] or aggravated damages; but which does not entail the proposition that HRA mirror ECtHR awards quantum in respect of quantum.

However, the principal problem arising from *Greenfield* is a practical one. The reasoning in ECtHR just satisfaction cases is normally too brief to provide real assistance. Identifying a tariff for compensation is extremely difficult since the range of awards is often very wide. These variations, in part, reflect different standards and costs of living among various members of the Council of Europe; but sometimes reveal other factors which are not expressly articulated. Frequently, finding comparative awards in analogous circumstances is impossible, as became apparent when the ECtHR case law was trawled in *Bernard*. Practitioners are therefore unlikely to learn much from examining the ECtHR cases, assuming that the level of HRA awards justifies maintaining a damages claim; and that legal aid is available to pursue it.

No doubt HRA damages awards will be lower following *Greenfield*. It therefore means, for example, that HRA damages for distress will be much lower than that awarded in race or sex discrimination case[71]- which is difficult to reconcile with the idea that the HRA enjoys the status of being a constitutional instrument.[72]

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70 The ECtHR rejected claims for exemplary damages in eg *Selçuk and Asker v Turkey* (1998) 26 EHRR 477 paras 116–118 and *Akdivar v Turkey*,[70] RJD 1998-II 711 paras 35–38.but it did not explain its reasoning in any detail.

71 *Vento v Chief Constable of the West Midlands* [2003] ICR 318

72 See eg *R v Offen* [2001] 1 WLR 253, 275 per Lord Woolf CJ; *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277, 297 per Lord Steyn.

Conclusion

Developing principles for HRA damages confront the court with a sensitive policy dilemma: making awards necessarily impose burdens on public authorities. In general, the HRA authorities have not explicitly discussed this issue. However, as Sullivan J indicated in *Bernard*,[73] a "restrained" or "moderate" approach will provide the necessary degree of human rights protection- whilst not unduly depleting the funds available for the benefit of others in need in the community. Prodigal awards of HRA damages would obviously undermine respect for the HRA itself. However, marginalising the role of HRA damages is unlikely to secure compliance with the Act or to promote a culture of rights.

Published: Public Law [2005] 429

[73] Above, para 58; approved and applied in *KB* per Stanley Burnton J above at paras 52, 53; and in M per Richards J at para 130(iii)).