Clayton Comments

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WHEN PRECISELY IS IT POSSIBLE OR APPROPRIATE TO ATTACH CLAIMS FOR DAMAGES OR RESTITUTION ONTO PUBLIC LAW JR CASES?

GENERAL PRINCIPLES

1. Section 31(4) of the Senior Courts Act 1981 defines the circumstances in which the court may award damages, restitution or the recovery of a sum due on a claim for judicial review and states:

> *On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if—*
>
> > *(a) the application includes a claim for such an award arising from any matter to which the application relates; and*
> >
> > *(b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.*

2. CPR 54.3(2) states:

> *A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone.*

3. As a result, a claim for damages or for the recovery of money paid by a public body (restitution) may be included in a claim for judicial review. Such a claim may, however, only be included in addition to a claim for one of the prerogative remedies or a declaration or injunction; a claimant may not seek damages or restitution alone in a claim for judicial review.

4. In ***R(Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*** Baroness Hale said:[1]

> *Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998.*

5. Judicial review procedure, therefore, does not create any <u>new</u> right or remedy in damages; it simply provides that, if a claim for damages or restitution exists in private law, it may, in appropriate cases, be claimed in the judicial review procedure alongside the claim for a prerogative or other remedy to vindicate a public law right.

[1] [2006] 1 AC 529

6. In fact, the largest category of judicial review cases where damages are sought in the Administrative Court are unlawful detention cases. In ***R(Lumba) v Secretary of State for the Home Department***[2] the Supreme Court confirmed that the principles which applied to the exercise of the Home Secretary's statutory power to detain foreign national prisoners were subject to the ***Hardial Singh*** principles:[3]

    - that the power could be used only for the purpose of detaining a person whom the Home Secretary intended to deport;
    - that detention should only be for a period which was reasonable in the circumstances;
    - that, if before the expiry of the reasonable period it became apparent that deportation could not be effected within a reasonable period, the Home Secretary should not seek to exercise the power of detention; and
    - that the Home Secretary should act with reasonable diligence and expedition to effect the deportation

7. In practice, damages claims made in judicial review claims will be transferred to be heard in the Queen's Bench Division. In ***R(Kurdistan Workers' Party) v Secretary of State for the Home Department)*** Richards J stated the general principles as follows:[4]

> *where there is a claim for damages as part of an otherwise appropriate claim for judicial review, the claim for damages would normally be left over to be dealt with as a discrete issue, if still relevant, after the main issues of public law had been determined. Even if still dealt with under CPR Part 54, rather than transferred out of the Administrative Court, it would still generally be subject to directions bringing it broadly into line with a damages claim commenced in the normal way.*

THE SCOPE FOR CLAIMING DAMAGES IN JUDCIAL REVIEW PROCEEDINGS

8. A claimant may seek damages in any case where he has an existing right to claim damages such as:

    - damages for a tortious claim such as damages in relation to unlawful detention or an unlawful search warrant;
    - damages under the Human Rights Act (HRA); and
    - EU damages under ***Francovich*** principles.[5]

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[2] [2012] 1 AC 245

[3] ***R v Governor of Durham Prison ex p Hardial Singh*** [1984] 1 WLR 704

[4] [2002] EWHC 644 (Admin) [87]

[5] ***Francovich v Italian Republic*** [1991[ECR I-5357

9. Damages claims are not, in themselves, a good reason for permitting judicial review proceedings to continue.[6] However, in ***R(Machi) v Legal Services Commission*** Ouseley J accepted that a properly framed declaration would create an issue estoppel in those proceedings and might be of assistance to a court in determining the private law claim.[7]

PROBLEM AREAS

The relationship between judicial review and a private law damages claim

10. In ***Tchenguiz v Director of the Serious Fraud Office*** Eder J was required to consider in detail the precise relationship between judicial review and a damages claim that was subsequently brought.[8] Following the collapse of a large Icelandic bank, the Serious Fraud Office began an investigation into a suspected dishonest conspiracy between senior executives to steal funds from the bank. It had applied for search warrants and executed them at the homes of two individuals, who had subsequently been arrested and investigated. In the related judicial review proceedings, ***R(Rawlininson and Hunter Trustees) ex p Serious Fraud O***ffice, the Divisional Court declared that the SFO's entries, searches and seizes were unlawful on public law grounds and that they should be quashed.[9] The search warrants had been set aside and directions given for consequential claims.

11. In preparation for the proceedings, the claimants served heads of claim and the SFO had admitted liability for trespass in its response. However, when the claims were issued, in which damages of some £300 million were sought, liability for trespass was denied- the SFO maintained that it had only made the admission because it thought that liability in trespass followed automatically from the court's quashing of the warrants. The issues Eder J had to consider were whether the order made in the judicial review proceedings precluded the SFO from disputing liability for trespass on the basis of estoppel *per rem judicatem*; and, if not, whether the SFO should be permitted to withdraw its admission of liability.

12. Eder J allowed the admission of liability to be withdrawn. It was permissible to claim private law damages as part of a judicial review claim which sought other public law relief. He assumed that the claims for damages included claims for private law damages for trespass, even though that was contrary to what they had told the court below. Based on that assumption, the SFO had failed to raise, in its detailed grounds for contesting the private law claims, the defences that it now wished to rely on, namely the s 6 of Constables Protection Act 1750 s.6 and the defence of lawful justification under the principle in ***Percy***.[10] Eder J took the view that the declaration of unlawfulness was limited to unlawfulness on public law grounds and had not intended to determine any private law claim for damages

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[6] [2002] EWHC 644 (Admin) [87]

[7] [2001] EWHC Admin 580 [24]; the CA decision is reported [2002] 1 WLR 983

[8] [2013] Lloyd's Rep FC 535

[9] [2012] EWHC 2254 (Admin)

[10] ***Percy, Olotu v Secretary of State for the Home Department*** [1997] 1 WLR 328

13. The court had a discretion to allow the withdrawal of the SFO's admission under CPR 14.1(5). He found that justice undoubtedly favoured withdrawal of the admission for the following reasons: (a) as it was agreed that the merits of the defences that the SFO now sought to raise should not be considered, it was to be assumed that they were at least arguable; (b) the amounts at stake were potentially significant; (c) there was no reason to suppose that the SFO's application had been made in anything other than good faith; (d) the overriding objective required the court to reach a decision that was correct in law, rather than on a foundation based upon an admission which might be incorrect as a matter of law; (e) there was no prejudice to the claimants in being required to meet the defences on their merits, whereas there was considerable prejudice to the SFO if it was prevented from pursuing its defences.

Abuse of process

14. There is a general procedural rule the rule that public law claims can only be brought by way of judicial review. The rule, itself, derives from ***O'Reilly v Mackman***.[11] In that case a number of prisoners alleged that disciplinary decisions of the Boards of Visitors had breached of the rules of natural justice and sought declarations that those decisions were a nullity by proceedings brought as writ actions or in some instances by an originating summons. The prison authorities applied to strike out these proceedings as an abuse of process under RSC Order 18 rule 19. The House of Lords unanimously decided that the proceedings should be struck out. As Lord Diplock observed:[12]

> *it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he is entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.*

15. However, in recent years the courts have taken a more flexible approach to the exclusivity principle. Lord Slynn stressed in ***Mercury Communications v Director General of Telecommunications*** that:[13]

> *It is of particular importance, as I see it, to retain some flexibility as the precise limits of what is called 'public law' and what is called 'private law' are by no means worked out. The experience of other countries seems to show that the working out of this distinction is not always an easy matter. In the absence of a single procedure allowing all remedies - quashing, injunctive and declaratory relief, damages - some flexibility as to the use of different procedures is necessary. It has to be borne in*

[11] [1983] 2 AC 237

[12] Above, 283

[13] [1996] 1 WLR 48, 57

mind that the overriding question is whether the proceedings constitute an abuse of process.'

16. The impact of the Civil Procedure Rules on this exclusivity rule was discussed in ***Clark v University of Lincolnshire*** where Sedley LJ expressed the view that:[14]

> *the CPR 1998 have given substance to its suggestion that the mode of commencement of proceedings should not matter, and that what should matter is whether the choice of procedure (which will now be represented by the identification of the issues) is critical to the outcome. This focuses attention on what in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual will in many cases circumvent the valuable provision of RSC, Ord. 53 r 4(1)—which, though currently due to be replaced by a new Civil Procedure Rule, is unlikely to be significantly modified—that applications for leave must be made promptly and in any event within three months of when the grounds arose, unless time is enlarged by agreement or by the court. Until the introduction of the CPR this was a dilemma which could be solved only by forbidding the use of the contractual route—a solution which, as* ***Roy***[15] *demonstrated, could not justly be made universal. But, as Lord Woolf MR explains in his judgment, the CPR now enable the court to prevent the unfair exploitation of the longer limitation period for civil suits without resorting to a rigid exclusionary rule capable of doing equal and opposite injustice. Just as on a judicial review application the court may enlarge time if justice so requires, in a civil suit it may now intervene, notwithstanding the currency of the limitation period, if the entirety of circumstances—including of course the availability of judicial review—demonstrates that the court's processes are being misused, or if it is clear that because of the lapse of time or other circumstances no worthwhile relief can be expected.*

17. In ***Richards (by his deputy and litigation friend Anne Minihane) v Worcestershire County Council*** the court refused to strike out a private law claim seeking restitution of sums spent on private care.[16] The claimant argued that the care he purchased privately should have been provided free of charge by the public authorities, under the Mental Health Act, s. 117 and sought recovery of sums he spent on care over a period of 10 years. The local authority contended that: (i) the claim amounted to an alleged breach of public law duties, (ii) that such a claim should have been brought by judicial review (which could include a claim for restitution) and that any claim for judicial review would now be out of time; (iii) that the private law claim was an abuse of process as it sought to avoid the strict time limit applicable to judicial review; and (iv) in any event, breach of s. 117 did not give rise to a private law right.

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[14] [2000] 1 WLR 1988 [17]

[15] [1992] 1 AC 624

[16] [2016] EWHC 1954 (Ch)

18. The local authority argued that ***Clunis v Camden and Islington Health Authority*** established that it was not possible to bring a private law claim arising from the failure to carry out duties under s 117.[17] However, the court held that ***Clunis*** was distinguishable as it concerned a claim in tort for breach of statutory duty, and was not authority as to the availability of a claim in unjust enrichment. The court, therefore, held it was arguable that the local authority had been enriched at the claimant's expense, and that the defendants had not succeeded in establishing that the claimant could not have a restitutionary claim.

19. The court rejected the local authority's' abuse of process argument, holding that there are exceptions to the rule that challenges to decisions by public authorities should usually be made by way of judicial review – see ***O'Reilly v Mackman*** .[18] The court also rejected the contention that a claim for restitution for breach of public law duty had to proceed by judicial review. The court observed that, although restitution could be claimed within judicial review applications, such an application could not be for restitution alone and the claimant only sought restitution rather than any other relief. The court also expressed doubt as to whether a private law claim for restitution should be subject to the strict time limits which were applicable in judicial review applications.

20. The Court of Appeal has granted permission to appeal. The appeal is due to be heard in November 2017.

DEVELOPMENTS UNDER THE HRA

General principles and procedure

21. The principles to be applied when seeking HRA damages are well-established: see eg R***(Bernard) v Enfield BC***;[19] ***Anufrijeva v Southwark LBC***;[20] and ***R(Greenfield) v Secretary of State for the Home Department***.[21] However, more recently in ***R(Sturnham) v Secretary of State for Justice*** Lord Reed, giving the majority judgment, stated:[22]

> *3. At the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided, following* ***R(Greenfield) v Secretary of State for the Home Department****,[23] primarily by any clear and consistent practice of the European court.*

[17] (1997) 40 BMLR 181
[18] [1982] 3 All ER 1124
[19] [2003] UKHRR 148
[20] [2004] QB 1124
[21] [2005] 1 WLR 673
[22] [2013] 2 AC 254
[23] [2005] 1 WLR 673

4. In particular, the quantum of awards under section 8 should broadly reflect the level of awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living.
5. Courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so.
6. Where it is established on a balance of probabilities that a violation of article 5.4 has resulted in the detention of a prisoner beyond the date when he would otherwise have been released, damages should ordinarily be awarded as compensation for the resultant detention.
7. The appropriate amount to be awarded in such circumstances will be a matter of judgment, reflecting the facts of the individual case and taking into account such guidance as is available from awards made by the European court, or by domestic courts under section 8 of the 1998 Act, in comparable cases.

22. In a postscript to his judgment Lord Reed sets out his views on procedural issues when making an HRA damages claim:

99 In the present appeals, the Strasbourg case law was presented to the court in the usual way. The court was provided with bound volumes of authorities in which the cases appeared in alphabetical order, and counsel referred the court to the authorities in the order in which they featured in their submissions. Around 75 Strasbourg authorities were cited to the court. It was a time-consuming process to be taken through each of the cases at least twice, as each counsel in turn presented their analysis of it. Eventually the court requested to be provided with a schedule of the kind I shall shortly explain. The manner in which the authorities were presented also made it difficult for the court to discern how the case law had developed over time, as it was difficult to keep track of how the cases related to one another chronologically. Counsel are not to be criticised for having proceeded in this way, but with the benefit of hindsight it is apparent that it would be possible to present the authorities to the court in a more helpful way.

100 With that aim in mind, the following guidance should be followed in any future cases where it is necessary to cite substantial numbers of Strasbourg decisions on the application of article 41 with a view to identifying the underlying principles. That exercise will not of course be necessary in relation to any future case on article 5.4, which should take the present judgment as its starting point.

101 First, the court should be provided with an agreed Scott schedule, that is to say a table setting out the relevant information about each of the authorities under a series of columns. The information required is as follows:

1. *The name and citation of the case, and its location in the bound volumes of authorities.*

2. *The violations of the Convention which were established, with references to the paragraphs in the judgment where the findings were made.*
3. *The damages awarded, if any. It is helpful if their sterling equivalent at present values can be agreed.*
4. *A brief summary of the appellant's contentions in relation to the case, with references to the key paragraphs in the judgment.*
5. *A brief summary of the respondent's contentions in relation to the case, again with references to the key paragraphs.*

102 *Secondly, the court should be provided with a table listing the authorities in chronological order.*

103 *Thirdly, it has to be borne in mind that extracting principles from a blizzard of authorities requires painstaking effort. The submissions should explain the principles which counsel maintain can be derived from the authorities, and how the authorities support those principles. Otherwise, to adapt Mark Twain's remark about life, the citation of authorities is liable to amount to little more than one damn thing after another; or even, to borrow a well-known riposte, the same damn thing over and over again.*

23. Lord Carnwath's judgment is also important to note:

104. *I ….merely suggest an alternative, and perhaps less laborious, route to the same end.*

105 *It is based on a more selective approach to the European Court of Human Rights jurisprudence, which also accords more closely to that of the Court of Appeal in this case. Given the enormous workload of the Strasbourg court, and the varied composition of the chambers to which cases are allocated, it is unrealistic to treat all decisions as of equal weight, particularly on the issue of damages. The great majority of such awards are made on an "equitable" basis reflecting particular facts. No doubt the judges attempt to achieve a degree of internal consistency. But most of the decisions are not intended to have any precedential effect, and it is a mistake in my view to treat them as if they were.*

Complex HRA damages cases: the *Bank Mellat* case

24. Although the courts have often considered HRA damages claim, they mostly seek damages for non-financial compensation. There have been very few cases in which the courts have considered how to approach claims for financial loss under the HRA.

25. In ***Bank Mellat v HM Treasury*** the Supreme Court held that measures taken by the Treasury under the Counter-Terrorism Act 2008 to restrict the access of an Iranian bank and its UK subsidiaries to the UK financial markets on the ground that it posed a significant risk to national security by providing banking services to those involved in the development or production of nuclear weapons in Iran were breached the right to possessions under Art 1 Protocol 1, were arbitrary and disproportionate and were because of a failure to give prior notice and an opportunity to make advance representations.[24] The essential question raised was whether the interruption of commercial dealings with the bank in the UK's financial markets bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programmes. There were two serious difficulties about the case against the Bank. First, they did not explain, let alone justify, the singling out of the Bank, and secondly, their justification for the order was different to that advanced by ministers when the direction was laid before Parliament. The order had initially been explained as being attributable to specific concerns about the bank. However, both lower courts found that justification was not in any problem specific to the bank, but in a problem with Iranian banks generally. They considered the direction to be the only reasonably practicable means of ensuring that the facilities of an Iranian bank with international reach would not be used to facilitate Iran's weapons programme, yet the direction made no attempt to place restrictions on every Iranian bank, only on the bank. The defendant, therefore, failed to show that it had minimally impaired the claimant's Convention rights.

26. The effect of the 2009 Order was, as HM Treasury intended, to shut Bank Mellat out of the United Kingdom financial sector. Mitting J, who had initially heard the claim, had found that Bank Mellat had suffered some damage to its Article 1 Protocol 1 possessions.[25] The Supreme Court remitted to the High Court the claim made by Bank Mellat. An order was then made for the trial of preliminary issues, including the question whether the claimant was able to claim the loss of 60% of the earnings before tax of a bank incorporated in England and Wales in which the claimant held 60% of the shares, Persia International Bank plc. Flaux J determined that issue in the affirmative.[26]

27. However, the Court of Appeal allowed the appeal, holding that, since Persia International Bank had been directly affected by the Financial Restrictions (Iran) Order 2009 as a person operating in the United Kingdom financial sector which had been prohibited from dealing with the claimant, that English bank was a "*victim*" of the making of the Order for the purposes of s 7 of the HRA. Therefore, the English bank, itself, had standing to bring a claim

[24] [2014] AC 700
[25] [2010] Lloyd's Rep FC 504
[26] [2016] 1 All ER (Comm) 766

for just satisfaction under s 8, and, as a matter of English law, the claimant could not claim for the loss which it had suffered in its capacity as a shareholder of the English bank;. The position was the same as a under ECtHR case law- save that in exceptional circumstances it was the company and not its shareholders which had the status and standing as a "*victim*" under art 34 of the Convention to bring a claim for losses sustained by the company as a result of a violation of its Convention rights; that no such exceptional circumstances applied in the present case. Consequently, although the English bank could bring a claim for the loss of its earnings, the claimant could not and so that part of the claim was struck out.

RESTITUTION AND JUDICIAL REVIEW

28. An individual may pay money in response to a demand by a public body. Where money is paid in the form of taxes or other levies, the House of Lords held in ***Woolwich Building Society v Inland Revenue Commissioners*** an *ultra vires* demand is recoverable by the citizen as of right.[27] Where money is paid under an agreement but the parties are unaware that it is *ultra vires*, the mistake of law means that, on the face of it, the person who paid the money is entitled to recover it on the grounds of unjust enrichment: see the House of Lords decision in ***Kleinwort Benson v Lincoln City Council***.[28]

29. However, the courts have recognised a number of possible defences to a claim for the recovery of money paid under a mistake of law such as where the recipient in good faith has changed his position in reliance of the payment.[29] It is not a defence that a defendant honestly believed that he was entitled to retain the money or that money was paid under a void contract which has been fully performed.[30]

30. In ***R(Kemp) v Denbighshire Local Health Board*** a claimant suffering from senile dementia lived at a nursing home, paying its cost.[31] The claimant's son took the view that the claimant should be entitled to be funded fully by the National Health Service in respect of both the accommodation and the care which he received at the nursing home. A special review panel concluded that the claimant was not, and had not at any stage been, entitled to funding for the healthcare he was receiving. The claimant brought judicial review proceedings which included a claim for restitution of sums paid out and interest under s 35A of the Supreme

[27] [1993] AC 70
[28] [1999] 2 AC 349
[29] ***Lipman Gorman v Karpnale*** [1991] 2 AC 548
[30] ***Lipman Gorman v Karpnale*** [1991] 2 AC 548
[31] [2007] 1 WLR 639

Court Act 1981. The review board refused to pay interest, but Langstaff J made an order that they do so.

31. The Privy Council in ***Waikato Regional Airport Ltd v A-G*** three regional airports in New Zealand commenced proceedings for judicial review and restitutionary relief, arguing that it was not in accordance with the principles of equity and efficiency as required by the s 135 of the Biosecurity Act 1993 to require them to meet the full costs of border control services whilst other airports were not required to do so.[32] The A-G contended that it was part of his function to discourage regional airports from venturing into international flights and his decision was, therefore, and submitted that relief should be refused on the grounds of delay, waiver and acquiescence. The Privy Council decided that the demands for payment were unlawful and ordered that the monies be repaid.

DEBT AND JUDICIAL REVIEW

32. CPR 54.3(2) also permits a claimant in judicial review proceedings to make a claim for debt.

33. In ***R(Elite Mobile) v Customs and Excise Commissioners*** Lindsay J held that a statutory debt for the repayment of VAT entitled the claimant to interest under s 35A of the Supreme Court Act.[33]

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[32] [2003] UKPC 50

[33] [2004] EWHC 2923 (Admin)