FINANCIAL REMEDIES AGAINST THE STATE

FOR BREACHES OF PUBLIC LAW

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Introduction

1. The law on financial remedies against the State for public law wrongs is conservative, restrictive, and arguably lacks coherence and principle. Thus many cases involving claims for financial remedies have negative results for claimants.

2. A good example of this is *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2004] 3 WLR 1. The FCO unlawfully prevented Quark fishing from obtaining a fishing licence. This had a severe financial effect on the company, but it could not recover damages.

3. This follows from the rule that to claim damages or another financial remedy in a judicial review, the claimant must have a cause of action for such remedy. Public law wrongdoing does not by itself confer such a remedy. See section 31(4) of the Senior Courts Act 1981.

Breach of statutory duty

4. This restrictive rule of public law is bolstered by the narrow approach to damages for breach of statutory duty seen in *X v Bedfordshire* [1995] 2 AC 633. This only allows a claim where (1) the duty was imposed for the protection of a limited class of the public, and (2) Parliament intended to confer a private right of action for breach of that duty.

5. For an example of this narrow approach depriving a claimant of damages, see *Olutu v Home Office* [1997] 1 WLR 328. Prosecutors failed to comply with statutory custody time limits, but the claim for damages failed. Note that this case pre dates the HRA, which could produce a different outcome.

6. In *Cullen v RUC* [2003] 1 WLR 1763, the police breached a statutory duty to provide the claimant with reasons for delaying his right of access to a solicitor. Despite strong dissent from Lords Bingham and Steyne, the damages claim failed.

Negligence

7. The situation will often be no better if relying on common law negligence. That is because, as Lord Hoffmann said in *Stovin v Wise* [1996] AC 923 at pp 952E-953D, the policy of the statute is a crucial factor in deciding whether it was intended to confer a right to compensation for a breach of a duty imposed by the statute, and *a fortiori* for the imperfect exercise of a power conferred by the statute: "If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care."

8. Contrast Lord Slynn in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at p. 572B

> "….. the ultimate question is whether the particular issue is justiciable or whether the court should accept that it has no role to play …..The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought."

9. Against this background, the decision in *A and Kanidagli v Home Office* [2004] EWHC 1585 (Admin) appears somewhat surprising. The public law errors there were a mistaken endorsement of a passport with an entry clearance prohibiting A from having any recourse to public funds, and an eight month delay in grant of exceptional leave to remain. The errors deprived the applicants of public funds, and the Court accepted negligence liability on the basis of assumed facts.

10. The Court of Appeal took a more restrictive approach in *Mohammed v Home Office* [2011] EWCA Civ 351, rejecting a claim for damages arising from a delay in granting ILR. As a general rule the proximity created by a statutory relationship did not by itself create a duty of care. The theme of cases considering the imposition of a duty of care was the availability of other, possibly equivalent, forms of redress. The absence of an alternative form of redress, however serious its consequences, might not be enough to establish a duty of care, but its presence might be sufficient, even assuming sufficient proximity created by a statutory relationship, to make it less than fair, just and reasonable to add a common law liability in negligence. In the instant case, X could refer their complaints to the Parliamentary Ombudsman, who could recommend payment of compensation. There was nothing in the

instant claims to call for an incremental change to the margins of common law liability. X's negligence claims were struck out.

11. Similarly, in *Murdoch v DWP* [2010], the High Court rejected a claim for damages following wrongful suspension of social security benefits.

12. *R (Attapatu) v Home Office* [2011] EWHC 1388 (Admin) is a rather quirky decision about the Secretary of State holding onto to a Sri Lankan's passport. A claim for conversion damages succeeded, but at at the same time the passport was not treated as a possession for the purposes of A1P1 ECHR.

Other torts

13. Other tort claims can be dealt with more briefly. They are either nearly impossible to establish (misfeasance in public office), or relatively straightforward (for example, false imprisonment).

14. Misfeasance is a rarity because of the very high test. The claimant must prove (1) that a public body intended to harm the claimant or (2) that it knew or was reckless that its conduct was unlawful and was likely to harm the claimant: *Three Rivers DC v Bank of England* [2003] 2 AC 1.

15. Note also *Watkins v Home Office* [2006] UKHL 17 [2006] 2 AC 395, establishing that misfeasance requires proof of material damage. Even the unconstitutional nature of the wrong (interference with a prisoner's correspondence) was no basis for a free standing damages claim.

HRA claims

16. A fairly restrictive approach to HRA damages has been established following *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406 [2004] QB 1124 and *R (Greenfield) v Home Office* [2005] UKHL 14 [2005] 1 WLR 673.

17. *Anufrijeva i*nvolved mishandled housing and asylum applications. The Court held that there was a wide discretion as to whether damages should be awarded (unlike common law damages which are awarded as of right). An award should be made only when it is necessary in order to afford just satisfaction. The finding of a violation would often itself be just satisfaction. The exercise of the discretion as to damages should include consideration of the balance between the interests of the victim and of the public as a whole (para.56).

18. In *Greenfield*, the House of Lords adopted the Strasbourg approach of treating a finding of human rights infringement as sufficient without awarding general damages.

19. For an example of a conservative application of *Anifrijeva,* see *R (Downing) v Parole Board* [2008] EWHC 3198 (Admin). This concerned delay in a parole hearing. The damages claim failed. It could not be said that art.5(5) provided a freestanding entitlement to compensation as it had to be read in accordance with the Human Rights Act 1998 s.8. It was clear from s.8 of the Act that the court had a wide discretion as to when to award damages for a breach under art.5 and that damages were a secondary consideration only to be awarded if necessary to give just satisfaction to an individual.

20. *Anufrijeva* left open a more generous approach in respect of provable pecuniary loss, as opposed to general damages. This approach was applied in

see *R (Infinis plc) v Gas and Electricity Markets Authority* [2013] EWCA Civ 70. The Gas and Electricity Markets Authority had been wrong to refuse accreditation for two power stations on the basis that they fell within exclusions under the statutory scheme for accreditation of non-fossil fuel generating stations. Since the refusal had caused the stations' owners and operators a clear and calculable financial loss, they were entitled to damages by way of just satisfaction under the Human Rights Act 1998 s.8 as a result of the violation of their rights under A1P1, based on the principle of *restitutio in integrum*.

EU damages

21. A damages claim may be made against the State for a sufficiently serious breach of EU law, provided that the law in question is intended to confer rights on individuals. This principle was first demonstrated in *Francovich v Italy* - damages may be awarded for failure to implement a Directive. The approach to conferring rights on individuals is wider than the context of breach of statutory duty.

22. The Factortame litigation provided another route to damages. There the UK breached EU law by legislating in a manner inconsistent with it. Once again the test of sufficiently serious breach was applied, and held to be satisfied in Factortame itself: *Factortame (number 5)* [2000] 1 AC 524.

23. *R (Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 151 shows a restrictive approach to *Francovich*, refusing damages for inadequate implementation of a directive in the context of fresh asylum claims. Although in some cases failure to transpose a specific

provision by a required date could amount to a sufficiently serious breach of EC law, a bona fide attempt at transposition attracted a more nuanced approach. The breach of EC law in the instant case did not entitle N to automatic reparation: the UK's breach was unintentional, arising from a genuine misapprehension of the true legal position. The misunderstanding was not deliberate, cynical or egregious and was not confined to the secretary of state. Although the position was clarified by *ZO (Somalia),* it was not self-evidently clear before that case.

Conclusion

24. Any hopes that human rights or EU law might lead towards a more open and coherent approach to financial remedies against the State have not been met, and a patchwork of rules remain that are mostly restrictive in effect.