
GARDEN COURT
CHAMBERS

Damages for Visa Revocation and Maladministration by the Home Office

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21 October 2020

Damages for visa revocation: Looking for remedies in a hostile environment

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Curtailment and the hostile environment

- The introduction of the hostile environment since 2012 has changed completely the landscape of life for migrants in this country. The effect of the 2014 and 2016 Acts is that a person without leave:
  - Cannot work
  - Cannot study
  - Cannot rent
  - Cannot open a bank account
  - Cannot drive

- In the same period the government brought in the Immigration Act 2014, with the effect that most immigration decisions including: (i) most visa refusals; and (ii) curtailment decisions, no longer carry a right of appeal.

- Since then the government has liberally used curtailment powers and refused leave on a virtually blanket basis in certain categories of cases (e.g. 322(5) cases; TOEIC cases) without any, or with minimal, consideration of individual factors.

Need for a remedy

- In many cases individuals were left without any means of vindicating their right to remain and it took significant litigation to establish this (see e.g. *Ahsan v SSHD* [2018] INLR 2017; *Balajigari v SSHD* [2019] WLR 4647).

- However in many cases, by the time it is established that the original decision was unlawful, after years of exposure to the hostile environment they will have:
  - Lost a place at a University
  - Lost university fees
  - Lost a job and/or earnings
  - Accrued serious debts
  - Suffered injury to their mental health (personal injury)
  - Lost thousands in legal fees

- Increasingly, for people who have been the victims of a major injustice, the eventual grant of leave alone is not enough – there needs to be a further remedy.

What are the options?

- False imprisonment
- Misfeasance
- Negligence
- Data Protection Act
- Francovich
- Human Rights Act 1998
- Ombudsman/Ex gratia scheme

False imprisonment

- Where a public law error bears on the decision to detain that will affect the lawfulness of detention (*Lumba v SSHD* [2012] 1 AC 245).

- The Supreme Court in *DN(Rwanda) v SSHD* [2020] AC 698 emphastically rejected the argument that an unlawful underlying immigration decision could be separated from the decision to detain (§17 per Lord Kerr):

  > *"Detention… was for the express purpose of facilitating the deportation. Without the existence of a deportation order, the occasion for (much less the validity of) detention would simply not arise. To divorce the detention from the deportation would be, in my view, artificial and unwarranted."*

- Therefore, if your client was detained in reliance on an unlawful curtailment or refusal decision that may well render the detention unlawful if it bore on and was relevant to the decision to detain.

Misfeasance

- Misfeasance in public office is a notoriously difficult tort to make out because (i) it requires "bad faith" and (ii) the Home Office fights these claims ruthlessly.

- The test for misfeasance remains that set out in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 as clarified in *Muuse v SSHD* [2010] EWCA Civ 453 as follows (at §54 per Thomas LJ), which requires a Defendant to have acted:

  > *"(i) In the knowledge of, or with reckless indifference to, the illegality of their actions.*
  > *(ii) In the knowledge of, or with reckless indifference to, the probability of causing injury to him."*

- If your client's leave was curtailed in circumstances when the Home Office (i) knew that there was a real possibility that decision was unlawful; and (ii) knew that decision would harm your client, you may have a misfeasance case.

Negligence

- Traditionally, it has not been possible to bring claims against public authorities, and especially the Home Office, for negligence in respect of actions carried out pursuant to a statutory discretion (*Home Office v Mohammed* [2011] 1 WLR 2862; *W v Home Office* [1997] Imm AR 302).

- However recent decisions suggest that it may now be possible to formulate a duty of care in certain circumstances, e.g. in respect of conduct that would be tortious if committed by a private body (*Poole Borough Council v GN* [2019] 2 WLR 1478).

- In *Husson v SSHD* [2020] EWCA Civ 329 the Court of Appeal held that it was arguable that there was a duty of care between the Home Office and a person to whom it had been undertaken that a BRP would be provided. It was the undertaking that was key.

- It is equally arguable that where the Home Office has itself *created a danger* – e.g. by proactively curtailing a person's leave and exposing them to the hostile environment.

Data Protection Act 2018

- It may be possible to obtain an award of damages if data is processed in a manner inconsistent with the six data processing principles: Lawfulness, fairness and transparency; Purpose limitation; Data minimisation; Accuracy; Storage limitation; Integrity and confidentiality (security).

- It is important to determine whether your client's case falls under the Data Protection Act 2018 or the old regime in the 1998 Act (can still bring a claim under the 1998 Act by virtue of the transitional provisions in Schedule 20 to the 2018 Act.)

- Note the wider exemptions in para 4 of Schedule 2 to the 2018 Act in respect of the processing of information for the maintenance of effective immigration control, or in respect of activities that would undermine it (upheld as lawful in *R(Open Rights Group) v SSHD* [2019] EWHC 2562 (Admin) – on appeal to the CA).

Francovich damages

- Damages may be recoverable for a breach of EU law *Francovich v Italian Republic* [1991] ECR I-5357.

- In order for damages to be recoverable: (i) the rule breached must have been intended to confer rights on individuals; (ii) the breach must be "sufficiently serious"; (iii) there must be a causal link between the breach and the damage caused (*Brasserie du Pêcheur S.A. v Federal Republic of Germany* and *R v Secretary of State for Transport, ex p. Factortame Ltd (No. 4)* [1996] QB 404.

- Examples of cases in the immigration context where Francovich damages have been awarded are *R(Santos) v SSHD* [2016] EWHC 609 (Admin) at §§156-163.

Damages for Visa Revocation and Maladministration:

The Human Rights Act 1998

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Presentation outline

- Consider 4 key issues:
  - Is the ECHR engaged, and if so, on what basis?
  - Damages under the Human Rights Act 1998, principles and practice.
  - Determining quantum.
  - Alternative remedies: Ombudsman and ex gratia scheme?

Is the ECHR engaged? (1)

- What decision is being challenged?
  - Curtailment of leave to enter / remain?
  - Delay in determining application?
  - Delay or failure to provide proof of immigration status (e.g. Biometric residence permit).
- Consider **impact** of decision:
  - Prohibition on employment and or study; and
  - Exposure to wider 'hostile environment'

Is the ECHR engaged? (2)

- Developing area of law, but a number of helpful authorities in respect of Article 8, ECHR.
- Insofar as domestic authorities are concerned, see:
- *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [§45]-[§46], and [§62];
- *SSHD v Said* [2018] EWCA Civ; and
- *R (Husson) v SSHD* [2020] EWCA Civ 329.

Is the ECHR engaged (3)

- As to Strasbourg authorities:
- *Niemitz v Germany* (1992) 16 EHRR 97, [§29];
- *Sidabras v Lithuania* (2006) 42 EHRR 6, at [§47];
- *Campagnano v Italy* (2006) 48 EHRR 43, at [§53]-[§54], [§59]-[§60];
- *Campagnao & Kyriakides v Cyprus* (App No 39058/05) (16 October 2008);
- *Kuric & Ors v Slovenia* [2012] ECHR 1083;
- *Sudita v Hungary* [2020] ECHR 315 (12 May 2020) [§31]-[§41].

Claiming damages for ECHR violations under the HRA 1998 (1)

- **Limitation period** under s 7(5), HRA 1998.
    - As to discretion to extend time, see *Dunn v Parole Board* [2009] 1 WLR 728 and *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 (although see also the less than helpful case of *AP v Tameside MBC* [2017] 1 WLR 2127.
- The power to award **damages**, s 8 HRA 1998.
    - Principles distilled in *R (Greenfield) v S*SHD [2005] 1 WLR 673.

Claiming damages for ECHR violations under the HRA 1998 (2)

- Just satisfaction provided for under Art 41, ECHR, i.e. state compensation for a victim's loss and suffering.
- Absence of consistency as to exactly when just satisfaction is required.
- Key Strasbourg principles summarised by Leggart J (as he then was) *in Alseran v Ministry of Defence* [2018] 3 WLR 95, at [§908]-[§917].

Determining quantum (1)

- Not straightforward…
- Domestic route through s 8 HRA 98, taking into account Strasbourg principles (s 8(5) HRA 98), which are not consistent or coherent: *Alseran* at [§923] (see also *R (Penninngton v The Parole Board* [2010] EWHC 78 (Admin), at [§16]-[§17]).
- Compensation awarded in Strasbourg 'ungenerous' in comparison to English tort standards: *Watkins v SSHD* [2006] 2 AC 395, at [§64].

Determining quantum (2)

- Highly fact sensitive…
- No authorities exactly on point, but insofar as non-pecuniary loss is concerned, consider generally (and with caution):
- *R (Bernard) v London Borough of Enfield* [2002] EWHC 2282;
- *Medway Council v M & T (By Her Children's Guardian)* [2015] EWFC B164;
- *Kuric & others v Slovenia* [2012] ECHR 1083; and
- *Sudita v Hungary* [2020] ECHR 315 (12 May 2020).

Alternative remedies? (1)

- In judicial review, is the remedy "nowhere near so convenient, beneficial and effectual?" *R (C) v Financial Services Authority* [2012] EWHC 1417, at [§89].
- Parliamentary and Health Service Ombudsman:
  - Consider it's role and powers, outlined on it's own website: https://www.ombudsman.org.uk/making-complaint/what-we-can-and-cant-help.
  - SSHD argued – unsuccessfully – in *Husson* that the Ombudsman provided an alternative remedy.

Alternative remedies? (2)

- Home Office ex gratia scheme: allows payment of sum of money where there is no obligation or liability to pay it, to redress maladministration.
- Outlined in policy: UK Visas & Immigration, Ex-Gratia Payment, Financial Redress Guidance (v 10, February 2019). Worth considering guidance in full.
- Critically, payment entirely at the discretion of the Home Office.
- Delay not classed (by the Home Office) as maladministration under the scheme.
- Potential payments appear to be modest…

Damages for Visa Revocation and Maladministration: Practice and Procedure

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21 October 2020

Judicial Review v Civil Action

- Depends on the remedy you seek. If need a mandatory order to prevent removal or challenge the legality of detention then the claim will be issued in the Upper Tribunal/Administrative Court.

- If there is an important point of public law on the substance may still be appropriate to issue by way of judicial review even if no mandatory order is required and only declaratory relief and damages is sought.

- If not then issue in the QBD/County Court.

- Limitation may be a factor. If beyond 3 months since decision or release then civil action.

Judicial Review

- If you have a claim for damages arising from a challenge by way of judicial review you should claim it in the relief because of the risk that a later civil action would be treated as an abuse of process : *BA v Home Office* [2012] EWCA Civ 944
- The heads of claim for damages should also be particularised: *Nazeem Fayad* [2018] EWCA Civ 54:

"54. In particular claims for judicial review which include a claim for damages for breach of the HRA should be properly pleaded and particularised. They should set out, at least in brief, "the principles applied by the European Court of Human Rights" under Article 41 of the Convention which are said to be relevant. I note that, in the present case, the Claimant at one time claimed damages for loss of earnings and for "humiliation and distress". No explanation was given as to the principles applicable under Article 41 would govern such heads of loss: cf., for example, Scorey and Eicke, Human Rights Damages: Principles and Practice, ch. 2."

- If you are seeking urgent relief preventing removal or seeking release or are not in a position to do plead it then you should state that and reserve the right to plead the damages claim including after full disclosure.
- A schedule of heads of damage can be helpful.
- Witness evidence from the client can give further particulars of the loss and damage.

Transfer from JR Court to QBD/County Court

High Court : CPR 30.
PD 7A :

"2.1
Proceedings (whether for damages or for a specified sum) may not be started in the High Court unless the value of the claim is more than £100,000.
2.2
Proceedings which include a claim for damages in respect of personal injuries must not be started in the High Court unless the value of the claim is £50,000 or more (paragraph 9 of the High Court and County Courts Jurisdiction Order 1991 (S.I. 1991/724 as amended) describes how the value of a claim is to be determined).
2.3
A claim must be issued in the High Court or the County Court if an enactment so requires.
2.4
Subject to paragraphs 2.1 and 2.2 above, a claim should be started in the High Court if by reason of—
(1)the financial value of the claim and the amount in dispute, and/or
(2)the complexity of the facts, legal issues, remedies or procedures involved, and/or
(3)the importance of the outcome of the claim to the public in general,
the claimant believes that the claim ought to be dealt with by a High Court judge.
(CPR Part 30 and Practice Direction 30 contain provisions relating to the transfer to the County Court of proceedings started in the High Court and vice-versa.)"

Upper Tribunal

- UT makes a transfer order under s 18(3) TCEA 2007, if the proceedings no longer fall within its statutory jurisdiction. See also UT rule 33A and applies if you are no longer seeking one of the public law remedies set out in s 15(1) TCEA 2007 and are only seeking damages.

- If you have achieved the relief you sought and all that remains is declaratory relief and/or damages then may be hard to resist transfer and may in fact be highly beneficial given the disclosure obligations, the fact finding function of civil courts, experience of damages claims, more likely to get a favourable settlement. However have to be able to deal with the complex procedural rules and cost budgeting.

- See (ZA(Pakistan) http://www.bailii.org/ew/cases/EWCA/Civ/2020/146.html) contrast the approach of the CA in Husson http://www.bailii.org/ew/cases/EWCA/Civ/2020/329.html

Mixed claims which include a detention claim

- Can any consequential damage flow from unlawful detention? Did the detention end employment or prevent re-employment or is it only the substantive revocation of leave to remain ? Did detention impact on mental health and ability to resume work? Has the gap in employment created a handicap in the labour market.

- Have to be conscious of costs implications of pursing a more difficult damages claim with a strong detention claim because of costs risk and offset/statutory charge. However, typically short periods of detention followed by prolonged inability to work , crippling debt loss of earnings and mental illness.

Group Litigation Orders

- Group litigation orders are not strictly available in judicial review but they have been used as a model for some important test case litigation conducted in the Administrative Court.

Two Examples

Case Study 1 : Challenging decisions taken to dispute age and to detain : A and Others

Historic claims, the policy having been changed in November 2005 as a result of a judicial review but Defendant disputed previous policy and decisions made under it were lawful and no entitlement to damages for false imprisonment. Defendant conceded that the age dispute policy had been unlawful and a Consent Order was made by Munby J.

Case Study 2 : Challenging the Detained Fast Track (DFT): R (JM and others) v SSHD [2015] EWHC 2331 (Admin) and (PU and others v SSHD CO/678/2015 et al)

Systemic challenge to the terms and operation of the DFT and the failure to identify and safeguard vulnerable adults e.g. victims of torture, trafficking, mental illness and with protected characteristics relating to sex, gender, sexuality, and disability. High Court (Blake J) declared in approving a consent order that "*the DFT as operated at 2 July 2015 created an unacceptable risk of unfairness to vulnerable or potentially vulnerable individuals*"

CPR Rule 19.10

- Definition1 19. 10 A Group Litigation Order (“GLO”) means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the “GLO issues”).

Group Litigation Order 19. 11

(1) The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues. (Practice Direction 19B provides the procedure for applying for a GLO.)
(2) A GLO must— (a) contain directions about the establishment of a register (the "group register") on which the claims managed under the GLO will be entered;
(b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
(c) specify the court (the "management court") which will manage the claims on the group register.
(3) A GLO may— (a) in relation to claims which raise one or more of the GLO issues—
(i) direct their transfer to the management court;
(ii) order their stay(GL) until further order; and
(iii) direct their entry on the group register;
(b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and
(c) give directions for publicising the GLO.

Effect of the GLO1 19. 12

(1) Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues—

(a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and

(b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

(2) Unless paragraph (3) applies, any party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal the order.

(3) A party to a claim which was entered on the group register after a judgment or order which is binding on him was given or made may not—

(a) apply for the judgment or order to be set aside(GL), varied or stayed(GL); or

(b) appeal the judgment or order, but may apply to the court for an order that the judgment or order is not binding on him.

(4) Unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims— (a) on the group register; and (b) which are subsequently entered on the group register.

Thank you

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