

**The Law Commission  
and  
The Scottish Law Commission**  
(LAW COM No 266)  
(SCOT LAW COM No 180)

**DAMAGES UNDER THE  
HUMAN RIGHTS ACT 1998**

**Report on a Reference under Section 3(1)(e) of the Law  
Commissions Act 1965**

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by Command of Her Majesty  
Laid before the Scottish Parliament by the Scottish Ministers  
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# EXECUTIVE SUMMARY

The Human Rights Act 1998 provides citizens of the United Kingdom with important protection for certain of their rights under the European Convention on Human Rights (“the Convention rights”). Section 7 of the Act gives a new claim against public authorities where the public authority has acted in a way which is incompatible with one or more of those rights. The claim may be brought by a victim of the public authority’s action, and the remedies sought may include damages in compensation for the violation of the Convention rights. Section 8 of the Human Rights Act provides that before a court may award damages it must be satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. This is the test applicable to the European Court of Human Rights in Strasbourg under Article 41 of the Convention, and section 8 also provides that courts in this country must take into account the principles applied by the Strasbourg Court in deciding whether to award compensation for a violation of the Convention, and the amount of any award.

This report contains an article by article description of the case-law, and an analysis of the practice, of the Strasbourg Court in relation to the award of compensation. It also considers when damages may be awarded for violations of Article 5 of the Convention by judicial acts.

The primary principle governing the award of compensation by that Court is that the victim should, as far as possible, be placed in the same position as if the violation of his or her rights had not occurred. We discuss how that principle is applied by the Strasbourg Court, and when it requires the award of damages to the victim.

We then consider what the implications are for the award of damages by courts in the United Kingdom in relation to a claim brought under the Human Rights Act 1998. We conclude that in most areas the approach of the Strasbourg Court is not significantly different to the rules currently applied by courts in this country to the award of damages.

There are some points at which the practice of the Strasbourg Court does differ from courts in this country. For example, the Strasbourg Court does not award punitive damages. In contrast, the Strasbourg Court has awarded compensation in relation to some forms of non-pecuniary, or intangible, loss - such as for loss of relationship between parent and child - which have not yet been recognised by courts in this country. Following the practice of the Strasbourg Court may require further development of the law by courts in this country.

Subject to these points the implementation of the Human Rights Act will not require major changes to the law on damages. The Strasbourg Court seeks to compensate applicants under the Convention fully for any loss which they can prove resulted from a violation of the Convention. Where courts in this country have established appropriate levels of compensation for particular types of loss in relation to claims in tort or delict, it would seem appropriate for the same rules to be used in relation to a claim under the Human Rights Act 1998.

**THE LAW COMMISSION**

**THE SCOTTISH LAW COMMISSION**

**DAMAGES UNDER THE HUMAN RIGHTS ACT  
1998**

**CONTENTS**

	<i>Paragraph</i>	<i>Page</i>
<b>PART I: INTRODUCTION</b>	<b>1.1-1.12</b>	<b>1</b>
1. THE TERMS OF REFERENCE	1.1-1.2	1
2. NATURE OF THE REPORT	1.3-1.5	1
3. COMPARATIVE WORK	1.6	2
4. THE STRUCTURE OF THE REPORT	1.7-1.10	3
5. FOREIGN CURRENCY CONVERSIONS	1.11	4
6. ACKNOWLEDGEMENTS	1.12	4
<b>SECTION A: GENERAL PRINCIPLES</b>	<b>2.1 - 5.7</b>	<b>5</b>
<b>PART II: REMEDIES UNDER THE HUMAN RIGHTS ACT 1998</b>	<b>2.1 - 2.33</b>	<b>5</b>
1. INTRODUCTION TO THE HUMAN RIGHTS ACT 1998	2.1	5
2. THE RIGHTS PROTECTED BY THE HUMAN RIGHTS ACT 1998	2.2-2.3	5
3. OUTLINE OF THE MAIN PROVISIONS OF THE ACT	2.4-2.7	6
4. DAMAGES UNDER SECTION 8	2.8-2.9	8
(1) The statutory provision	2.8	8
(2) Principal features	2.9	8
5. PRELIMINARY MATTERS	2.10-2.25	9
(1) Public authorities	2.11-2.14	9
(2) Who may bring proceedings under section 6?	2.15	10
(3) The court must have power to award damages in civil proceedings	2.16-2.18	13
(4) "Just and appropriate" remedies	2.19-2.21	14
(5) Relationship of claims under section 6 to other causes of action	2.22-2.25	14

	<i>Paragraph</i>	<i>Page</i>
6. SECTION 9(3): LIABILITY IN RESPECT OF JUDICIAL ACTS	2.26-2.27	15
7. SCOTLAND, WALES AND NORTHERN IRELAND	2.28-2.33	16
(1) Scotland	2.29-2.31	16
(2) Wales	2.32	17
(3) Northern Ireland	2.33	18
 <b>PART III: JUST SATISFACTION IN STRASBOURG</b>	 <b>3.1 - 3.78</b>	 <b>19</b>
1. INTRODUCTION	3.1-3.3	19
2. GENERAL POINTS ON STRASBOURG PRACTICE	3.4-3.30	19
(1) Absence of clear principles	3.4-3.15	19
(2) The pre-conditions imposed by Article 41	3.16-3.18	23
(3) General aim of <i>restitutio in integrum</i>	3.19-3.21	24
(4) The heads of damages recoverable	3.22	25
(a) Introduction	3.22	25
(b) Pecuniary loss	3.23-3.25	26
(c) Non-pecuniary loss	3.26-3.28	27
(d) Costs and expenses	3.29-3.30	28
3. EXERCISE OF DISCRETION UNDER ARTICLE 41	3.31-3.57	29
(1) Other measures in response to a violation	3.31-3.37	29
(2) Just satisfaction by a finding of violation	3.38-3.43	32
(3) Degree of loss	3.44	35
(4) Seriousness of the violation	3.45-3.46	36
(5) Conduct of the respondent	3.47-3.48	36
(a) Offensive conduct of the State	3.49-3.51	37
(b) Record of previous violations by the State	3.52-3.53	38
(6) Conduct of the applicant	3.54-3.57	38
4 CAUSATION	3.58-3.69	40
(1) Need for clear causal link	3.58	40
(2) Speculative losses	3.59	41
(a) Strict causation	3.60-3.61	41
(b) Loss of opportunities	3.62-3.65	41
(c) Attempts to reconcile the two approaches	3.66-3.69	44
5 INTEREST	3.70-3.75	45
(1) Interest as a pecuniary loss	3.70-3.74	45
(2) Default interest	3.75	47
6. CONCLUSION	3.76-3.78	47

	<i>Paragraph</i>	<i>Page</i>
<b>PART IV: JUST SATISFACTION UNDER THE COMMON LAW</b>	<b>4.1 - 4.97</b>	<b>49</b>
1. INTRODUCTION	4.1-4.2	49
2. TAKING INTO ACCOUNT THE STRASBOURG PRINCIPLES	4.3-4.11	49
(1) Must the principles be followed?	4.4-4.5	49
(2) Principles not practice	4.6-4.11	50
3. COMMON LAW ANALOGIES	4.12-4.26	51
(1) Comparisons with claims in tort	4.12-4.15	51
(2) Constitutional rights in the Commonwealth	4.16-4.20	52
(3) Use of common law analogies	4.21-4.26	55
4. PRINCIPLES FOR THE DOMESTIC COURTS	4.27-4.32	56
5. THE STRASBOURG PRINCIPLES AND THE APPLICATION OF SECTION 8	4.33-4.58	59
(1) The court's discretion to make an award	4.33	59
(2) No damages if other remedy provides just satisfaction	4.36-4.39	59
(3) The consequences of the decision	4.40-4.42	61
(4) Exercise of the general discretion	4.43-4.45	62
(a) Where there is an equivalent rule in English law	4.46-4.49	63
(b) Cases with no obvious equivalent	4.50-4.53	64
(c) Analogies to the European Court of Justice	4.54-4.58	65
6. HEADS OF LOSS	4.59-4.77	67
(1) Pecuniary and non-pecuniary loss	4.59-4.60	67
(2) Pecuniary loss	4.61-4.62	67
(3) Non-pecuniary loss	4.63-4.68	68
(4) Anxiety, distress and frustration	4.69-4.70	71
(5) Exemplary or punitive damages	4.71-4.73	72
(6) Nominal damages	4.74	73
(7) Restitutionary damages	4.75-4.77	73
7. CAUSATION	4.78-4.87	75
(1) Causal link	4.78-4.81	75
(2) Apportioning responsibility where judicial acts are involved	4.82-4.84	76
(3) Speculative losses	4.85-4.87	77
8. OTHER ISSUES	4.88-4.91	78
(1) Concurrent liability	4.88	78
(2) Interest	4.89-4.91	79
9. CONCLUSION	4.92-4.97	80

	<i>Paragraph</i>	<i>Page</i>
<b>PART V: JUST SATISFACTION UNDER SCOTS LAW</b>	<b>5.1 - 5.7</b>	<b>82</b>
1. INTRODUCTION	5.1-5.2	82
2. THE DISCRETION TO AWARD DAMAGES	5.3-5.4	82
3. HOW QUANTUM SHOULD BE ASSESSED	5.5	83
4. CONCLUSION	5.6-5.7	86
<b>SECTION B: JUST SATISFACTION UNDER INDIVIDUAL ARTICLES OF THE CONVENTION</b>	<b>6.1 - 6.240</b>	<b>88</b>
<b>PART VI: ARTICLE BY ARTICLE ANALYSIS</b>	<b>6.1 - 6.240</b>	<b>88</b>
1. INTRODUCTION	6.1-6.2	88
2. ARTICLE 2	6.3-6.14	88
3. ARTICLE 3	6.15-6.25	92
(1) Threatened violations	6.16-6.19	92
(2) Actual violations	6.20-6.25	93
4. ARTICLE 4	6.26	96
5. ARTICLE 5	6.27-6.80	96
(1) Article 5(1)	6.29-6.42	97
(a) Pecuniary loss	6.29-6.30	97
(b) Non-pecuniary loss	6.31-6.42	98
(2) Article 5(2)	6.43	102
(3) Article 5(3)	6.44-6.64	102
(a) The right to be brought promptly before a judge	6.45-6.51	103
(i) Pecuniary loss	6.45-6.46	103
(ii) Non-pecuniary loss	6.47-6.51	103
(b) The right to release pending trial	6.52-6.58	105
(i) Pecuniary loss	6.52-6.53	105
(ii) Non-pecuniary loss	6.54-6.58	106
(c) The right to trial within a reasonable time	6.59-6.64	108
(4) Article 5(4)	6.65-6.77	110
(a) Pecuniary loss	6.66-6.71	110
(b) Non-pecuniary loss	6.72-6.77	112
(5) Article 5(5)	6.78-6.80	114
6. ARTICLE 6	6.81-6.146	115
(1) Access to a court	6.84-6.93	116
(a) Pecuniary loss	6.85-6.87	116
(b) Non-pecuniary loss	6.88-6.93	117



	<i>Paragraph</i>	<i>Page</i>
(2) Independence and impartiality	6.94-6.99	119
(a) Pecuniary loss	6.95-6.97	119
(b) Non-pecuniary loss	6.98-6.99	120
(3) Public hearing	6.100-6.101	121
(4) Equality of arms	6.102-6.106	122
(5) Duty to give reasons	6.107-6.109	123
(6) Self-incrimination	6.110-6.112	124
(7) Unreasonable length of proceedings	6.113-6.128	125
(a) Civil proceedings	6.114-6.124	125
(b) Criminal proceedings	6.125-6.128	129
(8) Presumption of innocence	6.129-6.131	130
(9) Right to be informed of criminal charges	6.132-6.134	132
(10) Right to a defence	6.135-6.140	132
(a) Pecuniary loss	6.136	132
(b) Non-pecuniary loss	6.137-6.140	133
(11) Examination of witnesses	6.141-6.144	134
(12) Right to an interpreter	6.145-6.146	135
7. ARTICLE 7	6.147-6.151	136
8. ARTICLE 8	6.152-6.189	137
(1) Interference with correspondence	6.154-6.158	137
(2) Children in public care	6.159-6.164	139
(3) Adoption and custody disputes	6.165-6.166	141
(4) Telephone tapping and searching of premises	6.167-6.171	142
(5) Immigration cases	6.172-6.174	144
(6) Article 8 and sexual orientation and identity	6.175-6.182	145
(7) Environmental claims	6.183-6.184	148
(8) Miscellaneous cases	6.185-6.189	149
9. ARTICLE 9	6.190-6.192	151
10. ARTICLE 10	6.193-6.203	152
(1) Pecuniary loss	6.194-6.201	153
(2) Non-pecuniary loss	6.202-6.203	155
11. ARTICLE 11	6.204-6.210	156
12. ARTICLE 12	6.211-6.212	158
13. ARTICLE 14	6.213-6.222	159
(1) Discriminatory taxation regimes	6.215-6.216	160
(2) Discriminatory social security regimes	6.217	160
(3) Discriminatory immigration regimes	6.218	161
(4) Discriminatory application of retrospective laws	6.219-6.221	162
(5) Discriminatory civil procedure rules	6.222	163

	<i>Paragraph</i>	<i>Page</i>
14. ARTICLE 1 OF PROTOCOL NO 1	6.223-6.235	163
(1) Expropriation	6.225-6.227	164
(2) Frustrated Court judgments	6.228-6.230	166
(3) Delayed proceedings	6.231-6.234	167
(4) Destruction of property	6.235	168
15. ARTICLE 2 OF PROTOCOL 1	6.236-6.238	169
16. ARTICLE 3 OF PROTOCOL 1	6.239-6.240	170
<b>APPENDIX A: DAMAGES FOR JUDICIAL ACTS</b>	<b>A.1 - A.31</b>	<b>171</b>
1. INTRODUCTION	A.1-A.3	171
2. JUDICIAL IMMUNITY IN THE UNITED KINGDOM	A.4-A.8	172
3. STRASBOURG CASE-LAW	A.9-A.22	175
(1) <i>Benham v United Kingdom</i>	A.10-A.12	175
(2) Void/voidable	A.13-A.15	178
(3) <i>Perks and others v United Kingdom</i>	A.16-A.22	179
4. COMMENTARY	A.23-A.30	181
5. CONCLUSION	A.31	183
<b>APPENDIX B: SELECT BIBLIOGRAPHY</b>		<b>185</b>

# TABLE OF CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

In this Report, wherever possible we give references to judgments of the European Court of Human Rights in both the official series of reports and the European Human Rights Reports, a commercial English series (published by Sweet and Maxwell). Up to 1996, the relevant official publication was called “Series A (Judgments and Decisions)”. This we cite in the form: *Brogan v United Kingdom* A 145-B (1988); that is Series A (Judgments and Decisions), volume 145, case B (ie the second case reported in that volume; if there is no letter, the volume contains a single judgment). The year is that of judgment. After 1996, the official series became “Reports of Judgments and Decisions”. Reports in this series are cited in the form: *Assenov v Bulgaria* 1998-VIII p 3264; that is the 1998 volume, part VIII, at page 3264. Reports in the European Human Rights Reports are in the usual form for English law Reports published in consecutively numbered annual volumes (but we do not give a date).

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<i>A and others v Denmark</i> 1996-I p 3264, 22 EHRR 458	6.122 n 188;
<i>A v France</i> A 277-B (1993), 17 EHRR 462	6.168 n 274;
<i>A v United Kingdom</i> 1998-VI p 2692, 27 EHRR 611	6.24
<i>Abdoella v Netherlands</i> A 248-A (1992), 20 EHRR 585	6.128 n 201;
	6.128 n 202
<i>Abdulaziz, Cabales and Balkandali v United Kingdom</i> A 94 (1985), 7 EHRR 471	3.26 n 53;
	6.172 n 283;
	6.218
<i>ADT v United Kingdom</i> Application no 35765/97, 31 July 2000	3.37 n 76;
	4.40 n 67;
	6.177-178
<i>AGOSI v United Kingdom</i> A 108 (1986), 9 EHRR 1	2.15 n 35
<i>Ahmed v Austria</i> 1996-VI p 2195, 24 EHRR 278	6.19
<i>Ahmet Sadik v Greece</i> 1996-V p 1652, 24 EHRR 323	6.41 n 64
<i>Airey v Ireland</i> A 32 (1981), 2 EHRR 305 (merits); A 41 (1981) 3 EHRR 592 (just satisfaction)	6.85
<i>Akdivar v Turkey</i> 1996-IV p 1192, 23 EHRR 143 (merits); 1998-II p 711 (just satisfaction)	3.47; 6.235
<i>Aksoy v Turkey</i> 1996-VI p 2260, 23 EHRR 553	3.23 n 37;
	3.45; 6.22
<i>Albert and Le Compte v Belgium</i> A 68 (1983), 13 EHRR 415 (just satisfaction)	3.31 n 61;
	4.74 n 139;
	6.100 n 161
<i>Allan Jacobsson v Sweden</i> A 163 (1989), 12 EHRR 56	6.87 n 138

<i>Allenet de Ribemont v France</i> A 308 (1995), 20 EHRR 557	3.49 n 99; 4.18 n 30; 6.131
<i>Amuur v France</i> 1996-III p 826, 22 EHRR 533	6.33
<i>AO v Italy</i> Application 22534/93, 30 May 2000	6.224 n 374; 6.224 n 376
<i>Artico v Italy</i> A 37 (1980), 3 EHRR 1	6.138
<i>Assenov v Bulgaria</i> 1998-VIII p 3264, 28 EHRR 652	3.46 n 93; 6.25
<i>Averill v United Kingdom</i> Application no 36408/97, 6 June 2000	6.137 n 219
<i>Aydin v Turkey</i> 1997-VI p 1866, 25 EHRR 251	3.26 n 46; 3.46 n 93; 5.6 n 30; 6.20
<i>Ayuntamiento de M v Spain</i> (1991) 68 DR 209	2.15 n 36
<i>B v Austria</i> A 175 (1990), 13 EHRR 20,	6.126
<i>B v France</i> A 232-C (1992), 16 EHRR 1	6.182
<i>Baggetta v Italy</i> A 119 (1987), 10 EHRR 325	6.127 n 200
<i>Barberà, Messegué and Jabardo v Spain</i> A 285-C (1994)	3.19 n 30; 3.33 n 67; 4.39 n 65; 6.101
<i>Barthold v Germany</i> A 90 (1985), 7 EHRR 383	6.202 n 332
<i>Baskaya and Okçuoglu v Turkey</i> Application nos 23536/94 and 24408/94, 8 July 1999	3.23 n 39; 5.6 n 30; 6.151; 6.198; 6.203
<i>Beaumartin v France</i> A 296-B (1994), 19 EHRR 485	6.98 n 157
<i>Beldjoudi v France</i> A 234-A (1992), 14 EHRR 801	6.172 n 283
<i>Belilos v Switzerland</i> A 132 (1988), 10 EHRR 466	3.31 n 61
<i>Benham v United Kingdom</i> 1996-III p 738, 22 EHRR 293	2.27 n 65, 6.137; 6.140; A.2 n 4; A.9- A.11, A.18, A.25; A.27.
<i>Bergens Tidende v Norway</i> Application no 26132/95, 2 May 2000	3.71 n 133; 6.199
<i>Berrehab v Netherlands</i> A 138 (1988), 11 EHRR 322	6.173
<i>Bezicheri v Italy</i> A 164 (1989), 12 EHRR 210	6.66 n 111
<i>Bodén v Sweden</i> A 125-B (1987), 10 EHRR 367	6.86
<i>Boner v United Kingdom</i> A 300-B (1994), 19 EHRR 246	6.137 n 217
<i>Bönisch v Austria</i> A 92 (1985), 9 EHRR 191 (merits); A 103 (1986), 13 EHRR 409 (just satisfaction)	3.22 n 34; 3.63; 6.97; 6.98
<i>Borgers v Belgium</i> A 214 (1991), 15 EHRR 92	6.104 n 167
<i>Bowman v United Kingdom</i> 1998-I p 105, 26 EHRR 1	6.202 n 332
<i>Bozano v France</i> A 111 (1986), 9 EHRR 297 (merits); A 124-F (1987), 13 EHRR 428 (just satisfaction)	3.49; 6.37 - 6.38
<i>Bricmont v Belgium</i> A 158 (1989), 12 EHRR 217	6.104 n 167
<i>Brincat v Italy</i> A 249-A (1992), 16 EHRR 591	6.46 n 74
<i>Brogan v United Kingdom</i> A 145-B (1989), 11 EHRR 117 (merits); A 152-B (1989), 13 EHRR 439 (just satisfaction)	6.48; 6.80 n 134

<i>Brozicek v Italy</i> A 167 (1989), 12 EHRR 371	3.31 n 61, 6.133
<i>Bulut v Austria</i> 1996-II p 346, 24 EHRR 84	6.104 n 167
<i>Caballero v United Kingdom</i> Application no 32819/96, 8 February 2000	3.17 n 23, 3.41 n 85, 6.58, 6.80 n 134
<i>Campbell and Cosans v United Kingdom</i> A 48 (1982), 4 EHRR 293	2.15 n 38, 6.237 - 6.238
<i>Campbell and Fell v United Kingdom</i> A 80 (1984), 7 EHRR 165	3.44 n 89, 6.100 n 161, 6.156 n 248
<i>Campbell v United Kingdom</i> A 233-A (1992), 15 EHRR 137	6.156 n 248
<i>Canea Catholic Church v Greece</i> 1997-VIII p 2843, 27 EHRR 521	6.222
<i>Castells v Spain</i> A 236 (1992), 14 EHRR 445	6.200 n 323, 6.202
<i>Cesky v Czech Republic</i> Application no 33644/96, 6 June 2000	3.41 n 85, 6.62 - 6.63
<i>Chahal v United Kingdom</i> 1996-V p 1831, 23 EHRR 413	6.18, 6.76
<i>Ciulla v Italy</i> A 148 (1989), 13 EHRR 346	6.35
<i>Comingersoll SA v Portugal</i> Application no 35382/97, 6 April 2000	3.28, 6.123
<i>Confédération des Syndicats Médicaux Français v France</i> (1986) 47 DR 225	2.15 n 46
<i>Crémieux v France</i> A 256-B (1993), 16 EHRR 357	6.170
<i>Curley v United Kingdom</i> Application no 32340/96, 28 March 2000	3.41 n 85, 6.73
<i>Darby v Sweden</i> A 187 (1990), 13 EHRR 774	3.71, 6.215 n 357
<i>Darnell v United Kingdom</i> A 272 (1993), 18 EHRR 205	6.117
<i>De Cubber v Belgium</i> A 124-B (1987), 13 EHRR 422 (just satisfaction)	3.60, 6.96 n 150, 6.98
<i>De Haan v Netherlands</i> 1997-IV p 1379, 26 EHRR 417	6.99 n 159, 6.99 n 160
<i>De Haes and Gijssels v Belgium</i> 1997-I p 198, 25 EHRR 1	6.202
<i>De Jong, Baijet and Van den Brink v Netherlands</i> A 77 (1984), 8 EHRR 20	6.47 n 75
<i>De Moor v Belgium</i> A 292-A (1994), 18 EHRR 372	6.98 n 157
<i>De Wilde, Ooms and Versyp v Belgium (No 1)</i> A 12 (1971), 1 EHRR 373	3.21 n 32, 6.67
<i>De Wilde, Ooms and Versyp v Belgium (No 2)</i> A 14 (1972), 1 EHRR 438	3.17 n 25, 3.17 n 29, 6.67
<i>Delta v France</i> A 191-A (1990), 16 EHRR 574	3.63 n 121, 6.105, 6.144
<i>Deumeland v Germany</i> A 100 (1986), 8 EHRR 448	2.15 n 45, 6.121
<i>Diennet v France</i> A 315-B (1995), 21 EHRR 554	6.100 n 161
<i>Dombo Beheer BV v Netherlands</i> A 274-A (1993), 18 EHRR 213	6.103 - 6.104,

<i>Drozd and Janousek v France and Spain</i> A 240 (1992), 14 EHRR 745	A.28 n 62
<i>Dudgeon v United Kingdom</i> A 45 (1981), 4 EHRR 149 (merits), A 59 (1983), 5 EHRR 573 (just satisfaction)	2.15 n 38, 3.37, 4.42 n 70, 4.51 n 89, 6.175, 6.176, 6.177 n 292
<i>Duinhof and Duijf v Netherlands</i> A 79 (1984), 13 EHRR 478	6.47
<i>Eckle v Germany</i> (Article 50) A 65 (1983), 13 EHRR 556	3.57 n 110, 3.58, 6.128
<i>EDC v United Kingdom</i> [1998] BCC 370	4.83, 4.84
<i>Engel and Others v Netherlands (No 2)</i> A 22 (1976), 1 EHRR 706	4.74 n 139, 6.36 n 55, 6.100 n 161
<i>Eriksson v Sweden</i> A 156 (1989), 12 EHRR 183	6.162
<i>Erkalo v Netherlands</i> 1998-VI p 2464, 28 EHRR 509	6.29 n 42, 6.32
<i>Ezelin v France</i> A 202 (1991), 14 EHRR 362	6.207
<i>F v Switzerland</i> A 128 (1987), 10 EHRR 411	3.31 n 62, 6.212
<i>FCB v Italy</i> A 208-B (1991), 14 EHRR 909	6.137 n 217
<i>Findlay v United Kingdom</i> 1997-I p 263, 24 EHRR 221	6.96 n 150, 6.99
<i>Fischer v Austria</i> A 312 (1995), 20 EHRR 349	6.100 n 161
<i>Foti v Italy</i> (Article 50) A 69 (1983), 13 EHRR 568	6.126 n 198
<i>Fox, Campbell and Hartley v United Kingdom</i> A 182 (1990), 13 EHRR 157 (merits); A 202 (1991), 14 EHRR 108 (just satisfaction)	3.38 n 78, 6.35, 6.80 n 134
<i>Fredin v Sweden</i> A 192 (1991), 13 EHRR 784	6.93 n 147
<i>Frydlender v France</i> Application no 30979/96, 27 June 2000	6.119 n 184
<i>Funke v France</i> A 256-A (1993), 16 EHRR 297	6.111, 6.170
<i>Gaskin v United Kingdom</i> A 160 (1989), 12 EHRR 36	6.163
<i>Gautrin v France</i> 1998-III p 1009, 28 EHRR 196	6.99 n 159, 6.99 n 160
<i>Gaygusuz v Austria</i> 1996-IV p 1129, 23 EHRR 364	4.72 n 135, 6.217
<i>Georgiadis v Greece</i> 1997-III p 949, 24 EHRR 606	6.109
<i>Gillow v United Kingdom</i> A 109 (1986), 11 EHRR 335 (merits); A124-C (1987) (just satisfaction)	6.188
<i>Goddi v Italy</i> A 76 (1984), 6 EHRR 457	6.139
<i>Golder v United Kingdom</i> A 18 (1975), 1 EHRR 524	3.38, 3.39 n 83, 5.4 n 5, 6.155
<i>Granger v United Kingdom</i> A 174 (1990), 12 EHRR 469	6.136 n 215
<i>Grigoriades v Greece</i> 1997-VII p 2575, 27 EHRR 464	6.200 n 323
<i>Guerra v Italy</i> 1998-I p 210, 26 EHRR 357	6.184
<i>Guillemin v France</i> 1997-I p 149, 25 EHRR 435 (merits), 1998-VI p 2544 (just satisfaction)	3.32 n 64, 6.124, 6.234

<i>Guincho v Portugal</i> A 81 (1984), 7 EHRR 223	6.233 n 396
<i>Güleç v Turkey</i> 1998-IV p 1698, 28 EHRR 121	5.6 n 30, 6.4 n 3, 6.10
<i>H v Belgium</i> A 127-B (1987), 10 EHRR 339	6.108
<i>H v France</i> A 162 (1989), 12 EHRR 74	3.26 n 47, 6.118
<i>H v United Kingdom</i> A 120 (1987), 10 EHRR 95 (merits); A 136-B (1988), 13 EHRR 449 (just satisfaction)	3.27 n 54, 3.65, 4.83, 4.84, 6.91 n 141, 6.159 n 252, 6.160 n 256
<i>Håkansson and Sturesson v Sweden</i> A 171 (1990), 13 EHRR 1	2.15 n 43
<i>Halford v United Kingdom</i> 1997-III p 1004, 24 EHRR 523	3.38 n 77, 3.50, 6.169
<i>Hauschildt v Denmark</i> A 154 (1989), 12 EHRR 266	3.31 n 61, 6.96
<i>Hentrich v France</i> A 296-A (1994), 18 EHRR 440 (merits); A 322 (1995), 21 EHRR 199	3.75 n 143, 6.225 n 379
<i>Herczegfalvy v Austria</i> A 244 (1992), 15 EHRR 437	6.158 n 250
<i>Hertel v Switzerland</i> 1998-VI p 2298, 28 EHRR 534	6.200 n 323
<i>Hilton v United Kingdom</i> (1988) 57 DR 108	2.15 n 39
<i>Hokkanen v Finland</i> A 299-A (1994), 19 EHRR 139	6.165
<i>Hussain v United Kingdom</i> 1996-I p 252, 22 EHRR 1	6.75
<i>Ilhan v Turkey</i> Application no 22277/93, 27 June 2000	3.23 n 37, 3.25 n 44, 4.61 n 109, 6.23
<i>Incal v Turkey</i> 1998-IV p 1547	6.200 n 323, 6.203
<i>Informationsverein Lentia v Austria</i> A 276 (1993), 17 EHRR 93	3.61 n 117, 6.201
<i>Inze v Austria</i> A 126 (1987), 10 EHRR 394	6.214 n 355
<i>Ireland v United Kingdom</i> A 25 (1978), 2 EHRR 25	3.31 n 59
<i>Jamil v France</i> A 320 (1995), 21 EHRR 65	6.150
<i>Jersild v Denmark</i> A 298 (1994), 19 EHRR 1	6.202
<i>John Murray v United Kingdom</i> 1996-I p 30, 22 EHRR 29	6.137 n 217
<i>Johnson v United Kingdom</i> 1997-VII p 2391, 27 EHRR 296	3.54 n 108, 6.42
<i>Jordan v United Kingdom</i> Application no 30280, 14 March 2000	3.41 n 85, 6.50
<i>Kampanis v Greece</i> A 325 (1995), 21 EHRR 43	6.66 n 111, 6.74
<i>Kaya v Turkey</i> 1998-I p 297, 28 EHRR 1	2.15 n 42, 3.46 n 93, 5.6 n 30, 6.4 n 3, 6.8, 6.9, 6.14 n 19
<i>Keegan v Ireland</i> A 290 (1994), 18 EHRR 342	6.166
<i>K-F v Germany</i> 1997-VII p 2657, 26 EHRR 390	6.35
<i>Khan v United Kingdom</i> Application no 35394/97, 12 May 2000	6.167 n 272

<i>Kiliç v Turkey</i> Application no 22492/93, 28 March 2000	2.15, 6.4 n 3, 6.13 - 6.14
<i>Klass v Germany</i> A 28 (1978), 2 EHRR 214	2.15 n 39, 2.15 n 43
<i>Koendjbiharie v Netherlands</i> A 185-B (1990), 13 EHRR 820	3.44 n 89
<i>Kokkinakis v Greece</i> A 260-A (1993), 17 EHRR 397	6.191
<i>König v Germany</i> A 36 (1980), 2 EHRR 469 (just satisfaction)	3.17 n 26, 3.20, 6.116
<i>Kopp v Switzerland</i> 1998-II p 524, 27 EHRR 91	6.168 n 274
<i>Kruslin v France</i> A 176-B (1990), 12 EHRR 547	5.4 n 5, 6.168
<i>Kuopila v Finland</i> Application no 27752/95, 27 April 2000	6.106
<i>Kurt v Turkey</i> 1998-III p 1152, 27 EHRR 373	5.6 n 30, 6.21
<i>Labita v Italy</i> Application no 26772/95, 6 April 2000	6.57, 6.240
<i>Lala v Netherlands</i> A 297-A (1994), 18 EHRR 586	6.137 n 217
<i>Lamy v Belgium</i> A 151 (1989), 11 EHRR 529	6.66 n 111
<i>Langborger v Sweden</i> A 155 (1989), 12 EHRR 416	6.96 n 150
<i>Larissis v Greece</i> 1998-I p 362, 27 EHRR 329	6.191
<i>Le Compte, van Leuven and de Meyere v Belgium</i> A 54 (1982), 5 EHRR 183	3.29 n 57, 6.100 n 161
<i>Lechner and Hess v Austria</i> A 118 (1987), 9 EHRR 490	6.233 n 396
<i>Letellier v France</i> A 207 (1991), 14 EHRR 83	6.53, 6.55 n 88
<i>Lingens v Austria</i> A 103 (1986), 8 EHRR 407	3.63 n 121, 6.195, 6.196
<i>Litwa v Poland</i> Application no 26629/95, 4 April 2000	6.36 n 55
<i>Lobo Machado v Portugal</i> 1996-I p 195, 23 EHRR 79	6.100 n 161
<i>Loizidou v Turkey</i> 1996-VI p 2216, 23 EHRR 513 (merits); 1998-IV p 1807, 26 EHRR CD5 (just satisfaction)	6.235 n 403
<i>Lopez Ostra v Spain</i> A 303-C, 20 EHRR 277	3.26 n 51, 6.183
<i>Luberti v Italy</i> A 75 (1984), 6 EHRR 440	3.54, 6.66 n 111, 6.122 n 188
<i>Luedicke, Belkacem and Koç v Germany</i> A 29 (1978), 2 EHRR 149	6.146
<i>Lukanov v Bulgaria</i> 1997-II p 529, 24 EHRR 121	6.41, 6.42 n 68
<i>Magee v United Kingdom</i> Application no 28135/95, 6 June 2000	6.137 n 219
<i>Manoussakis v Greece</i> 1996-IV p 1346, 23 EHRR 387	6.192
<i>Mansur v Turkey</i> A 321 (1995), 20 EHRR 535	6.53 n 84, 6.56, 6.127 n 200
<i>Mantovanelli v France</i> 1997-II p 424, 24 EHRR 370	6.104 n 167
<i>Marckx v Belgium</i> A 31 (1979), 2 EHRR 330	4.74 n 139, 6.176, 6.187, 6.214 n 355
<i>Margareta and Roger Andersson v Sweden</i> A 226 (1992), 14 EHRR 615	6.162
<i>Martins Moreira v Portugal</i> A 143 (1988), 13 EHRR 517	3.62, 6.233 n 396
<i>Massa v Italy</i> A 265-B (1993), 18 EHRR 266	4.84 n 162, 6.119



<i>Matos e Silva Lda v Portugal</i> 1996-IV p 1092, 24 EHRR 573	6.233 n 396
<i>Matthews v United Kingdom</i> Application no 24833/94, 18 February 1999, 28 EHRR 361	6.240 n 412
<i>Maxwell v United Kingdom</i> A 300-C (1994), 19 EHRR 97	6.136, 6.137 n 217
<i>McCallum v United Kingdom</i> A 183 (1990), 13 EHRR 597	6.156 n 248
<i>McCann v United Kingdom</i> A 324 (1995), 21 EHRR 97	2.15 n 45, 3.56, 4.47, 5.5 n 24, 5.5 n 28, 6.4 n 2, 6.5, 6.6
<i>McMichael v United Kingdom</i> A 307-B (1995), 20 EHRR 205	6.164
<i>Megyeri v Germany</i> A 237-A (1992), 15 EHRR 584	6.72
<i>Mentes v Turkey</i> 1998-IV p 1686, 26 EHRR CD, CD1	3.46 n 93, 3.47
<i>Messina v Italy</i> A 257-H (1993)	6.158
<i>Miailhe v France</i> A 256-C (1993), 16 EHRR 332 (merits); A 277-C (1993) (just satisfaction)	6.170
<i>Milasi v Italy</i> A 119 (1987), 10 EHRR 333	6.127
<i>Minelli v Switzerland</i> A 62 (1983), 5 EHRR 554	6.130 n 203
<i>Mitap and Müftüoğlu v Turkey</i> 1996-II p 402, 22 EHRR 209	6.127 n 200
<i>Moustaquim v Belgium</i> A 193 (1991), 13 EHRR 802	6.174
<i>Neumeister v Austria (No 1)</i> A 8 (1968), 1 EHRR 91	6.79 n 130, 6.102 n 164
<i>Neumeister v Austria (No 2)</i> A 17 (1974), 1 EHRR 136	3.34, 6.79 n 130
<i>News Verlags GmbH &amp; CoKG v Austria</i> Application no 31457/96, 11 January 2000	6.200 n 323, 6.202 n 332
<i>Nideröst-Huber v Switzerland</i> 1997-I p 101, 25 EHRR 709	6.104 n 167
<i>Niedbala v Poland</i> Application no 27915/95, 4 July 2000	6.49 n 77
<i>Niemietz v Germany</i> A 251-B (1992), 16 EHRR 97	6.171
<i>Nikolova v Bulgaria</i> Application No 31195/96, 25 March 1999	3.14 n 21, 3.38 n 78, 3.39 - 3.41, 6.49 n 77, 6.54, 6.55, 6.58, 6.67 n 113, 6.72, 6.79 n 132
<i>Norris v Ireland</i> A 142 (1988), 13 EHRR 186	2.15 n 38, 3.37 n 76, 4.40 n 67, 6.176
<i>O v United Kingdom</i> A 136-A (1988), 13 EHRR 578	6.91 n 141
<i>Oberschlick v Austria</i> A 204 (1991), 19 EHRR 389	3.31 n 61, 6.99 n 159, 6.202 n 332
<i>Olsson v Sweden (No 2)</i> A 250 (1992), 17 EHRR 134	3.26 n 49, 6.91 n 141
<i>Olsson v Sweden</i> A 130 (1988), 11 EHRR 259	6.162

<i>Open Door and Dublin Well Woman v Ireland</i> A 246 (1992), 15 EHRR 244	2.15 n 38, 6.197
<i>Pakelli v Germany</i> A 64 (1983), 6 EHRR 1	3.31 n 61, 6.137 n 217
<i>Papamichalopoulos v Greece</i> A 260-B (1993), 16 EHRR 440 (merits); A 330-B (1995), 21 EHRR 439 (article 50)	3.23 n 38, 3.32, 4.77 n 147, 5.6 n 30, 6.225 - 6.226
<i>Pauwels v Belgium</i> A 135 (1988), 11 EHRR 238	3.31 n 62, 6.46
<i>Pélissier and Sassi v France</i> Application no 25444/94, 25 March 1999	6.134
<i>Pelladoah v Netherlands</i> A 297-B (1994), 19 EHRR 81	3.31 n 61, 6.137 n 217
<i>Perks v United Kingdom</i> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33	3.10 n 15, 3.66 - 3.67, 4.68 n 125, 4.86 n 165, 6.140. A.9, A.16 - A.22, A.27
<i>Pfeiffer and Plankl v Austria</i> A 227 (1992), 14 EHRR 692	6.156 n 248
<i>Philis v Greece</i> A 209 (1991), 13 EHRR 741	6.93 n 147
<i>Piermont v France</i> A 314 (1995), 20 EHRR 301	6.202 n 332
<i>Piersack v Belgium</i> A 53 (1982), 5 EHRR 169 (merits), A 85 (1984), 7 EHRR 251 (just satisfaction)	3.33 n 67, 6.95
<i>Pine Valley Developments Ltd v Ireland</i> A 222 (1991), 14 EHRR 319 (merits); A 246-B (1993), 16 EHRR 379 (just satisfaction)	3.71, 4.61, 4.89 n 172, 6.219 - 6.221, 6.224 n 375
<i>Plattform 'Ärzte für das Leben' v Austria</i> A 139 (1988), 13 EHRR 204	2.15 n 35
<i>Poitrimol v France</i> A 277-A (1993), 18 EHRR 130	6.136 n 215
<i>Pressos Compania Naviera SA v Belgium</i> A 332 (1995), 21 EHRR 301 (merits); 1997-IV p 1292, 24 EHRR CD 16 (just satisfaction)	3.68, 4.86 n 165, 6.229 - 6.230
<i>Pudas v Sweden</i> A 125-A (1987), 10 EHRR 380	6.92, 6.93
<i>Punzelt v Czech Republic</i> Application no 31315/96, 25 April 2000	3.41 n 85, 6.64
<i>Quinn v France</i> A 311 (1995), 21 EHRR 529	6.40
<i>R (B) v United Kingdom</i> A 136-D (1988), 13 EHRR 588 (just satisfaction)	6.91 n 141
<i>R v United Kingdom</i> A 136-E (1988), 13 EHRR 457 (just satisfaction)	6.91 n 141
<i>Radio ABC v Austria</i> 1997-VI p 2188, 25 EHRR 185	6.201
<i>Raimondo v Italy</i> A 281-A (1994), 18 EHRR 237	6.224 n 376
<i>Raninen v Finland</i> 1997-VIII p 2804, 26 EHRR 563	6.36 n 57
<i>Ribitsch v Austria</i> A 336 (1995), 21 EHRR 573	6.24

<i>Ringeisen v Austria (No 2)</i> A 15 (1972), 1 EHRR 504	3.19 n 30, 3.35, 6.61 n 104
<i>RMD v Switzerland</i> 1997-VI p 2003, 28 EHRR 224	6.77
<i>Rotaru v Romania</i> Application no 28341/95, 4 May 2000	6.189
<i>Ruiz Torija v Spain</i> A 303-A (1994), 19 EHRR 553	6.109
<i>Ruiz-Mateos v Spain</i> A 262 (1993), 16 EHRR 505	3.61, 6.104 n 167
<i>S v Switzerland</i> A 220 (1991), 14 EHRR 670	6.138 n 220
<i>Saidi v France</i> A 261-C (1993), 17 EHRR 251	3.31 n 61, 6.104 n 167, 6.144
<i>Sakik v Turkey</i> 1997-VII p 2609, 26 EHRR 662	3.26 n 52, 6.51, 6.80 n 134
<i>Salesi v Italy</i> A 257-E (1993), 26 EHRR 187	6.233 n 396
<i>Salman v Turkey</i> Application no 21986/93, 27 June 2000	3.25 n 44, 4.61 n 109, 6.4 n 3, 6.11, 6.23 n 34
<i>Saunders v United Kingdom</i> 1996-VI p 2044, 23 EHRR 313	3.57 n 110, 6.112
<i>Schmidt v Germany</i> A 291-B (1994), 18 EHRR 513	6.215, 6.216 n 360
<i>Schönenberger and Durmaz v Switzerland</i> A 137 (1988), 11 EHRR 202	3.44 n 89, 6.156 n 248, 6.158 n 251
<i>Schuler-Zraggen v Switzerland</i> A 263 (1993), 16 EHRR 405 (merits); A 305-A (1995), 21 EHRR 404 (just satisfaction)	3.73, 6.214 n 355
<i>Scollo v Italy</i> A 315-C (1995), 22 EHRR 514	6.114, 6.233
<i>Scopelliti v Italy</i> A 278 (1993), 17 EHRR 493	6.120
<i>Scott v Spain</i> 1996-VI p 2382, 24 EHRR 391	6.60 n 100
<i>SP, DP and T v United Kingdom</i> Application no 23715/94 (1996), 22 EHRR CD 148	2.15 n 44
<i>Sekanina v Austria</i> A 266-A (1993), 17 EHRR 221	6.130
<i>Selçuk and Asker v Turkey</i> 1998-II p 891, 26 EHRR 477	3.46 n 94, 3.47, 6.22, 6.235 n 402
<i>Sevtap Veznedaroglu v Turkey</i> Application no 32357/96, 11 April 2000	6.25
<i>Sidiropoulos v Greece</i> 1998-IV p 1594, 27 EHRR 633	6.209 n 345
<i>Sigurjonsson v Iceland</i> A 264 (1993), 16 EHRR 462	6.206 n 336
<i>Silva Pontes v Portugal</i> A 286-A (1994), 18 EHRR 156	6.233 n 396
<i>Silver v United Kingdom</i> A 61 (1983), 5 EHRR 347 (merits), A 67 (1983), 6 EHRR 62 (just satisfaction)	3.44, 3.56 n 109, 4.52 n 90, 6.156, 6.157

<i>Smith and Grady v United Kingdom</i> Application nos 33985/96 and 33986/96, 25 July 2000	1.5 n 4, 3.14 n 22, 3.21, 3.23 n 35, 3.23 n 36, 3.25 n 45, 3.51, 3.74, 4.41 n 68, 4.57, 4.61 n 108, 6.179 - 6.181
<i>Socialist Party v Turkey</i> 1998-III p 1233, 27 EHRR 51	5.6 n 30, 6.210
<i>Soering v United Kingdom</i> A 161 (1989), 11 EHRR 439	2.15 n 40, 6.17
<i>Sporrong and Lönnroth v Sweden</i> A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction)	3.11 n 17, 3.24, 4.22 n 39, 4.61, 4.68 n 127, 4.79 n 150, 6.114, 6.231 - 6.232
<i>Sramek v Austria</i> A 84 (1984), 7 EHRR 351	6.96 n 150
<i>Stallinger and Kuso v Austria</i> 1997-II p 666, 26 EHRR 81	6.100 n 161
<i>Steel v United Kingdom</i> 1998-VII p 2719, 28 EHRR 603	6.36, 6.203 n 333
<i>Stran Greek Refineries and Stratis Andreadis v Greece</i> A 301-B (1994), 19 EHRR 293	3.70, 3.72, 5.6 n 30, 6.228
<i>Thlimmenos v Greece</i> Application no 34369/97	6.214 n 355
<i>Thorgeir Thorgeirson v Iceland</i> A 239 (1992), 14 EHRR 843	6.200 n 323
<i>Timurtas v Turkey</i> Application no 23531/94, 13 June 2000	6.4 n 3
<i>Tomasi v France</i> A 241-A (1992), 15 EHRR 1	3.22 n 34, 6.61
<i>Toth v Austria</i> A 224 (1991), 14 EHRR 551	6.60
<i>Tre Traktörer AB v Sweden</i> A 159 (1989), 13 EHRR 309	2.15 n 35
<i>Tsirlis and Kouloumpas v Greece</i> 1997-III p 909, 25 EHRR 198	3.22 n 34, 6.30, 6.79 n 131, 6.80 n 133, 6.80 n 134, A.2 n 4
<i>TW v Malta</i> Application nos 25644/94 and 25642/94, 29 April 1999, 29 EHRR 185	3.38 n 78, 3.41 n 85, 6.49
<i>Unión Alimentaria Sanders SA v Spain</i> A 157 (1989), 12 EHRR 24	6.233 n 396
<i>United Communist Party of Turkey v Turkey</i> 1998-I p 1, 26 EHRR 121	6.208 - 6.209

<i>Unterpertinger v Austria</i> A 110 (1986), 13 EHRR 175	6.144 n 231
<i>Valenzuela Contreras v Spain</i> 1998-V p 1909, 28 EHRR 483	6.168 n 274
<i>Valikova v Bulgaria</i> Application no 41488/98, 18 May 2000	6.4 n 3, 6.12
<i>Vallee v France</i> A 289 (1994), 18 EHRR 549	6.119 n 184
<i>Valsamis v Greece</i> 1996-VI p 2312, 24 EHRR 294	6.192
<i>Van der Leer v Netherlands</i> A 170 (1990), 12 EHRR 567	3.26 n 48, 6.43
<i>Van der Sluijs, Zuiderveld and Klappe v Netherlands</i> A 78 (1984), 13 EHRR 461	6.47 n 75
<i>Van Droogenbroeck v Belgium</i> A 63 (1983), 13 EHRR 546 (just satisfaction)	6.67 n 113
<i>Van Mechelen v Netherlands</i> 1997-III p 691, 25 EHRR 647 (merits); 1997-VII p 2426 (just satisfaction)	6.144 n 231
<i>Van Orshoven v Belgium</i> 1997-III p 1039, 26 EHRR 55	6.104 n 167
<i>Van Raalte v Netherlands</i> 1997-I p 173, 24 EHRR 503	6.216
<i>Vasilescu v Romania</i> 1998-III p 1064, 28 EHRR 241	6.227
<i>Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria</i> A 302 (1994), 20 EHRR 55	6.200
<i>Vidal v Belgium</i> A 235-B (1992) (merits); A 235-E (1992) (just satisfaction)	6.144
<i>W v United Kingdom</i> (1983) 32 DR 190	2.15 n 42
<i>W v United Kingdom</i> A 121 (1987), 10 EHRR 29 (merits); A 136-C (1988), 13 EHRR 453 (just satisfaction)	3.27 n 54, 5.5 n 14, 6.90 - 6.91, 6.159 n 253, 6.161
<i>Weber v Switzerland</i> A 177 (1990), 12 EHRR 508	6.100 n 161, 6.202 n 332
<i>Weeks v United Kingdom</i> A 114 (1987), 10 EHRR 293 (merits), A 143-A (1988), 13 EHRR 435 (just satisfaction)	3.64, 6.68 - 6.71, 6.75 n 126
<i>Welch v United Kingdom</i> A 307-A (1995), 20 EHRR 247 (merits); 1996-II p 386, 21 EHRR CD1 (just satisfaction)	3.57 n 110, 6.149
<i>Werner v Austria, Szücs v Austria</i> 1997-VII p 2468, 26 EHRR 310	6.100 n 161
<i>Windisch v Austria</i> A 186 (1990), 13 EHRR 281 (merits); A 255-D (1993) (just satisfaction)	3.33 n 67, 6.142 n 227
<i>X and Church of Scientology v Sweden</i> (1979) 16 DR 68	2.15 n 35
<i>X v France</i> A 234-C (1991), 14 EHRR 483	2.15 n 45
<i>X v Germany</i> Yearbook 1 (1955-1957)	2.15 n 44
<i>X v Norway</i> Yearbook of the European Convention on Human Rights, vol 4, p 270	2.15 n 37
<i>X v United Kingdom</i> A 55 (1982), 5 EHRR 192	3.31 n 62
<i>Yagci and Sargin v Turkey</i> A 319 (1995), 20 EHRR 505	6.56 n 93
<i>Yasa v Turkey</i> 1998-VI p 2411, 28 EHRR 408	5.6 n 30, 6.4 n 3, 6.9
<i>Young, James and Webster v United Kingdom</i> A 44 (1981) 4 EHRR 38 (merits); A 55 (1982), 5 EHRR 201 (just satisfaction)	3.23 n 35, 3.23 n 36, 3.26 n 50, 3.29 n 57, 6.206
<i>Z v Finland</i> 1997-I p 323, 25 EHRR 371	6.186
<i>Zana v Turkey</i> 1997-VII p 2533, 27 EHRR 667	6.136 n 215, 6.138 n 220

## TABLE OF OTHER CASES

<i>AB v South West Water Services Ltd</i> [1993] QB 507	4.71 n 133, 4.72 n 136
<i>Allan v Barclay</i> (1864) 2M 873	5.5 n 20
<i>Alliance &amp; Leicester Building Society v Edgestop Ltd</i> [1993] 1 WLR 1462	4.24 n 43, 4.49 n 81, 4.49 n 84
<i>Allied Maples Group Ltd v Simmons &amp; Simmons</i> [1995] 4 All ER 907, C.A	4.85 n 164
<i>Andrews v Grand &amp; Toy Alberta Ltd</i> (1978) 83 DLR (3rd) 452	4.66
<i>Anisminic Ltd v Foreign Compensation Commission</i> [1969] 2 AC 147	A.5, A.14 n 39, A.14 n 42
<i>Associated Provincial Picture Houses Ltd v Wednesbury Corp</i> [1948] 1 KB 223	A.3
<i>Attorney-General v Blake</i> [1998] Ch 439	4.75 n 141, 4.75 n 143, 4.76
<i>Baigent v British Broadcasting Corporation</i> 1999 GWD 10-474.	5.5 n 16
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<i>Bradley v Menley &amp; James Ltd</i> 1913 SC 923	4.74 n 138
<i>Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd</i> [1996] ECR I-1029	4.54
<i>Carey v Phipus</i> (1978) 435 US 247	4.14 n 20
<i>Chaplin v Hicks</i> [1911] 2 KB 786	4.85 n 164
<i>Clunis v Camden and Islington Health Authority</i> [1998] QB 978	4.47 n 80
<i>Downie v Chief Constable of Strathclyde Police</i> 1997 SCLR 603	5.5 n 10
<i>Doyle v Olby (Ironmongers) Ltd</i> [1969] 2 QB 158	4.24 n 42
<i>Duncan v Ross Harper &amp; Murphy</i> 1993 SLT 105	5.5 n 27
<i>Forsikringsaktielskapet Vesta v Butcher (No. 1)</i> [1989] 2 AC 852	4.49 n 84
<i>Fose v Minister of Safety and Security</i> 1997 (3) SA 786	3.38 n 77, 4.29 n 51, 4.72 n 137
<i>Frankovitch v Italy</i> [1991] ECR I\5357	4.30 n 52
<i>Gilbert v Yorston</i> 1997 SLT 879	5.5 n 15
<i>Halifax Building Society v Thomas</i> [1996] Ch 217	4.76 n 145
<i>Heil v Rankin</i> [2000] 2 WLR 1173	3.6 n 6, 4.7 - 4.9, 4.27, 4.29 n 51, 4.41, 4.59, 4.66, 4.67, 4.94
<i>Henderson v Chief Constable, Fife Police</i> 1988 SLT 361	5.5 n 11
<i>Hotson v East Berkshire Area Health Authority</i> [1987] AC 750	4.85 n 163
<i>Hughes v Lord Advocate</i> [1963] AC 837	4.80 n 151
<i>John v MGN Ltd</i> [1997] QB 586	3.6 n 5
<i>Kenyon v Bell</i> 1953 SC 125	5.5 n 22
<i>Kuwait Airways Corp v Iraqi Airways Co (No 5), The Times</i> 7 April 2000	4.80 n 152
<i>Kyle v P &amp; J Stormonth Darling WS</i> 1993 SC 57	5.5 n 22
<i>Livingstone v Rawyards Coal Co</i> (1880) 5 App Cas 25	4.8 n 11, 4.14
<i>Lord v Allison</i> (1986) 3 BCLR (2d) 300	4.72 n 137
<i>Lunt v Liverpool City Justices</i> (CA unreported) 5 March 1991	3.10 n 15

<i>Maharaj v Attorney-General of Trinidad and Tobago</i> (No 2) [1979] AC 385	4.16 - 4.17, 4.19, A.28, A.29
<i>McCreadie v Thomson</i> 1907 SC 1176	A.4 n 10
<i>McKeen v Chief Constable, Lothian and Borders Police</i> 1994 SLT 93	5.5 n 14
<i>Mediana, The</i> [1900] AC 113	4.74 n 138
<i>Ministry of Defence v Ashman</i> (1993) 66 P & CR 195	4.75 n 142
<i>O'Connor v Isaacs</i> [1956] 2 QB 288	A.5 n 22, A.30 n 69
<i>O'Reilly v Mackman</i> [1983] 2 AC 237	A.5 n 20
<i>Overseas Tankship (UK) Ltd v Morts Dock &amp; Engineering Co, The Wagon Mound</i> [1961] AC 388, PC	4.24 n 41, 4.80 n 151
<i>Penarth Dock Engineering Co Ltd v Pounds</i> [1963] 1 Lloyd's Rep 359	4.75 n 142
<i>Quinn v Burch Bros (Builders) Ltd</i> [1966] 2 QB 370	4.49 n 83
<i>R v East Berks HA ex p Walsh</i> [1985] QB 152	2.12 n 26
<i>R v Governor of H M Brockhill Prison ex p Evans No.2</i> [1999] 2 WLR 103 (CA)	4.68 n 126
<i>R v Governor of H M Prison Brockhill ex p Evans</i> , HL, unreported, 27 July 2000	A.2 n 4, A.13 n 39
<i>R v Home Secretary ex p Cheblak</i> [1991] 1 WLR 890	A.14 n 40
<i>R v Hull University Visitor ex p Page</i> [1993] AC 682	A.14 n 42
<i>R v Manchester City Magistrates' Court ex p Davies</i> [1989] QB 631	A.5, A.7, A.10, A.11, A.12, A.18, A.30, A.31, 4.25
<i>R v McGilivray</i> (1990) 56 CCC (3d) 304	4.25
<i>R v Oldham Justices ex p Cawley</i> [1996] 1 All ER 464	A.13 n 40
<i>R v Poole Justices ex p Benham</i> [1991] 4 Admin LR 161	A.10
<i>R v Secretary of State for Transport, ex p Factortame Ltd (No 3)</i> [1992] QB 680.	4.56
<i>R v Secretary of State for Transport, ex p Factortame Ltd and others (No 5)</i> [2000] AC 524	4.30 n 52, 4.56 n 97
<i>R v Waltham Forest Justices ex p Solanke</i> [1986] QB 983	A.4 n 12, A.26 n 58
<i>Re McC(A Minor)</i> [1985] 1 AC 528	A.4 n 10, A.5, A.6, A.8, A.18, A.23, A.25, A.30
<i>Reeves v Commissioner of Police of the Metropolis</i> [2000] 1 AC 360	4.53 n 92, 5.5 n 23, 5.5 n 25
<i>Rookes v Barnard</i> [1964] AC 1129	4.69, 4.71 n 133, 4.72
<i>Russell v Dickson</i> 1998 SLT 96	A.4 n 10
<i>Russell v Wilson</i> 1994 SLT 660	A.4 n 10
<i>Schachter v Canada</i> [1992] 2 SCR 679	4.14 n 20
<i>Simpson v Attorney General, Baigent's case</i> [1994] 3 NZLR 667	4.19, 4.31 n 57, 4.72 n 137, 4.88 n 170
<i>Smith New Court Securities v Citibank NA</i> [1997] AC 254 (HL)	4.24 n 42
<i>Smith v Leech Brain &amp; Co Ltd</i> [1962] 2 QB 405	4.80 n 151
<i>Smith v Wade</i> (1983) 461 US 30	4.72 n 137

<i>Standard Chartered Bank v Pakistan National Shipping Corporation</i> [2000] 1 Lloyd's Rep 218 (CA)	4.47 n 80
<i>Thompson v Commissioner of Police of the Metropolis</i> [1998] QB 498	3.6 n 5, 3.10 n 15, 4.9 n 15, 4.68
<i>Wallace v Manchester City Council</i> (1998) 30 HLR 1111 CA	4.68 n 127
<i>Weir v Wyper</i> 1992 SLT 579	5.5 n 27
<i>Wells v Wells</i> [1999] 1 AC 345	4.8 n 13, 4.9 n 14, 4.90 n 176
<i>Wright v British Railways Board</i> [1983] 2 AC 773	4.90 n 177
<i>X v Bedfordshire County Council</i> [1995] 2 AC 633	4.40 n 66



# **THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION**

**Report on a reference under Section 3(1)(e) of the Law Commissions Act 1965**

## **DAMAGES UNDER THE HUMAN RIGHTS ACT 1998**

*To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain,  
and the Scottish Ministers*

### **PART I INTRODUCTION**

#### **1. THE TERMS OF REFERENCE**

1.1 In February of this year the Lord Chancellor and the Scottish Ministers respectively requested the Law Commission and the Scottish Law Commission to undertake a joint project in accordance with the following terms of reference:

- (1) To carry out a review of the case-law of the European Court of Human Rights in relation to the award of compensation and the level of compensation awarded under Article 41 of the Convention and its predecessor Article 50;
- (2) In light of that case-law, to consider the principles of Strasbourg jurisprudence which the courts should take into account when determining whether to award damages, or the amount of the award, under section 8 of the Human Rights Act 1998;
- (3) As part of the review at paragraph (1), to identify the Strasbourg jurisprudence in relation to the award of damages that have been granted in respect of the enforceable right to compensation under Article 5(5).

1.2 In the letter enclosing the terms of reference the Lord Chancellor advised us that

“The aim of the review would be to inform the judiciary, practitioners and public bodies of the Strasbourg jurisprudence and the compensation levels awarded, in readiness for implementation of the Human Rights Act”.<sup>1</sup>

#### **2. NATURE OF THE REPORT**

1.3 This is not a typical Law Commission report, in that the purpose is information, rather than law reform. For this reason, and because of the limited time scale

<sup>1</sup> Letter from Lord Chancellor to Chairman 14 February 2000.

involved, we have not issued a formal consultation paper. However, as will appear below, we have been advised by expert consultants in England and Scotland, and have benefited from informal discussions with other practitioners and academics. The period of our work has also coincided with a stream of new publications on the European Convention on Human Rights (the “Convention”) and the Human Rights Act 1998 (the “HRA”), some of which contain valuable discussions of the subject matter of the terms of reference.<sup>2</sup>

- 1.4 Notwithstanding this wealth of material, we have been satisfied, both from our own work and discussions with others, that an independent study by the Law Commission would be of assistance. The apparently simple exercise required by Section 8<sup>3</sup> is, on analysis, an unfamiliar one to English and Scottish courts. We have attempted to draw together the threads of existing case-law, and to relate them to practice in this country. It is our purpose to provide a framework for a continuing debate, as the jurisprudence in this country develops.
- 1.5 We have seen the main emphasis of the terms of reference as being the review of existing Strasbourg case-law. The second paragraph invites us to give some consideration to the principles which should guide the domestic courts, and accordingly we suggest how we think the courts might apply their discretion under the HRA. However, we do not see it as part of our function to pre-empt the formulation and development of principles through the case-law in the normal way. As we point out in Part IV, there are some fundamental issues to be resolved about the scope of damages remedies under the HRA, and their relationship with existing remedies. It has also become apparent from our review of recent cases in the European Court of Human Rights at Strasbourg (the “Strasbourg Court”) that their own practices in relation to the award of just satisfaction are under review, and development may be expected there also.<sup>4</sup>

### **3. COMPARATIVE WORK**

- 1.6 Our terms of reference direct attention specifically to the Strasbourg case-law. We have not been asked to carry out a comparative study of the extensive case-law relating to compensation for breaches of human rights provisions in common law and other jurisdictions. We have, however, referred to certain common law

<sup>2</sup> See bibliography at Appendix B. On the issue of damages, we would particularly mention *A Practitioner’s Guide to the European Convention on Human Rights* (1998) by Karen Reid (a unit leader in the registry at the Strasbourg Court), which includes a comprehensive table of the Strasbourg case-law; and *Remedies in International Human Rights Law* (1999), by Dinah Shelton, in which she sets the European case-law within the context of the jurisprudence of international human rights courts and institutions.

<sup>3</sup> In essence to award damages where it is “just and appropriate” and “necessary” to do so: see Part II paras 2.19 - 2.21 below.

<sup>4</sup> See, for example, the detailed discussion in *Smith and Grady v United Kingdom* Application nos 33985/96 and 33986/96, 25 July 2000 (considered in paras 6.179 - 6.181 below).

cases which seem to be of particular significance in relating the Strasbourg case-law to a common law context.<sup>5</sup>

#### **4. THE STRUCTURE OF THE REPORT**

- 1.7 The purpose of this report is not to detail the circumstances in which liability may arise under the HRA, but rather to examine the consequences of such liability in terms of remedies in damages. The report is divided into two Sections, the first concerned with general principles, and the second with a review of the Strasbourg case-law, article by article.
- 1.8 Although it was our original intention to deal with English and Scottish law together, discussions between the two Law Commissions have led us to the view that this may be misleading. Although there is much common ground, there are some significant differences between the two systems in their approaches to the award of damages. Since we are concerned with the relationship of the HRA with the existing practices in the Courts in England and Wales, we have thought it more useful to maintain some separation. Part IV therefore considers the application of Strasbourg principles in the context of the common law in England and Wales. Part V is a view from a Scottish perspective.
- 1.9 This report does not deal with particular issues arising out of the application of the HRA in Northern Ireland. However, the Law Reform Advisory Committee for Northern Ireland have been consulted, and we are grateful for their consideration. It is hoped that the review of the Strasbourg case-law will also be of value in that jurisdiction.
- 1.10 The report contains the following parts:-

##### **Section A: General Principles**

Part I: Introduction

Part II: Remedies Under The Human Rights Act 1998

This part sets out a brief outline of the main provisions of the HRA, and describes the provisions relevant to the award of remedies in general.

Part III: Just Satisfaction in Strasbourg

This part seeks to identify general principles from the Strasbourg case-law, and discusses some of the difficulties involved in that exercise.

Part IV: Just Satisfaction and the Common Law.

<sup>5</sup> For a wider international review, readers are referred to Dinah Shelton's comparative study, *Remedies in International Human Rights Law* (1999).

This Part seeks to relate the principles derived from the Strasbourg case-law to the practice of the common law of England and Wales.

Part V: Just Satisfaction and Scots Law.

This Part looks at the same issues from the perspective of Scots Law.

## **Section B: Just Satisfaction under individual articles of the Convention**

Part VI: An article by article analysis.

This Part reviews cases in which damages have been awarded for breaches of individual articles, and seeks to illustrate the principles by reference to such cases.

## **Appendix A: Judicial Acts**

This Appendix is directly related to the third paragraph of the terms of reference. It examines the circumstances in which damages may be awarded for violations of Article 5 by judicial acts.

## **Appendix B: Select Bibliography**

### **5. FOREIGN CURRENCY CONVERSIONS**

- 1.11 Throughout the Report, where reference is made to an award by the Strasbourg Court in a currency other than pounds sterling, we have given the approximate sterling equivalent. This is calculated by reference to the monthly average exchange rate for the currency in question for December of the year in which the award was made. For awards made in 2000, we have used the monthly average exchange rate of the month in which the award was made.

### **6. ACKNOWLEDGEMENTS**

- 1.12 We gratefully acknowledge the invaluable assistance of Dr Jeremy McBride of the University of Birmingham and Professor Christopher Gane of the University of Aberdeen who have acted as consultants in the preparation of this report. We are also grateful for informal discussions we have had with other experts. In particular we would mention Sir Nicholas Bratza, judge of the Strasbourg Court, and other members of the Registry at the Strasbourg Court, who have offered comments on Part III in particular. The responsibility for the contents of the report is of course entirely our own.

# **SECTION A: GENERAL PRINCIPLES**

## **PART II REMEDIES UNDER THE HUMAN RIGHTS ACT 1998**

### **1. INTRODUCTION TO THE HUMAN RIGHTS ACT 1998**

- 2.1 The HRA received Royal Assent on 9 November 1998. The greater part of the Act will come into force on 2 October 2000.<sup>1</sup> The Act extends to Scotland, Wales and Northern Ireland. It already has limited effect in Scotland, Wales and Northern Ireland as a result of the Scotland Act 1998 and the Government of Wales Act 1998, both of which came into force on 1 July 1999, and the Northern Ireland Act 1998, the relevant provisions of which came into force on 2 December 1999.<sup>2</sup>

### **2. THE RIGHTS PROTECTED BY THE HUMAN RIGHTS ACT 1998**

- 2.2 The Convention rights which the HRA serves to protect are the rights set out in Articles 2-12 and 14 of the Convention, together with Articles 1-3 of the first Protocol and Articles 1 and 2 of the sixth Protocol.<sup>3</sup> In summary the protected rights are as follows:<sup>4</sup>

- (1) Article 2: Right to life (for the text see paragraph 6.3)
- (2) Article 3: Prohibition of torture (see paragraph 6.15)
- (3) Article 4: Prohibition of slavery and forced labour
- (4) Article 5: Right to liberty and security (see paragraph 6.27)
- (5) Article 6: Right to a fair trial (see paragraphs 6.81 - 6.82)
- (6) Article 7: No punishment without law (see paragraph 6.147)

<sup>1</sup> The first part of the Act to come into force, on 24 November 1998, was s 19, which requires a statement of compatibility with the rights contained in the Convention in respect of every Bill before Parliament.

<sup>2</sup> See paras 2.28 - 2.33 below.

<sup>3</sup> These are defined as “the Convention rights”: HRA s 1(1). Under Article 15 there is limited scope for derogation from the Convention rights in times of war or where there is some other public emergency which threatens the life of the nation. The United Kingdom has one such derogation in place which deals with the pre-trial detention of suspected terrorists (see Schedule 3 to the HRA).

<sup>4</sup> We set out the full text of the relevant Articles as indicated at the beginning of the discussion of each Article in Part VI. The text of Article 4 and Protocol No 6, Articles 1 and 2 are not given, as there no cases relevant to the award of damages under these Articles.

- (7) Article 8: Right to respect for private and family life (see paragraph 6.152)
- (8) Article 9: Freedom of thought, conscience and religion (see paragraph 6.190)
- (9) Article 10: Freedom of expression (see paragraph 6.193)
- (10) Article 11: Freedom of association and assembly (see paragraph 6.204)
- (11) Article 12: Right to marry (see paragraph 6.211)
- (12) Article 14: Prohibition of discrimination (see paragraphs 6.213)
- (13) Protocol No 1, Article 1: Protection of property (see paragraph 6.223)
- (14) Protocol No 1, Article 2: Right to education (see paragraph 6.236)
- (15) Protocol No 1, Article 3: Right to free elections (see paragraph 6.239)
- (16) Protocol 6, Articles 1 & 2: Abolition of death penalty save in times of war.

2.3 It is to be noted that Article 1, which obliges contracting States to secure the rights and freedoms of the Convention to everyone within their jurisdiction, and Article 13, which guarantees an effective remedy for violations of the Convention, are omitted from this list.<sup>5</sup> The Government's view was that specific reference to these Articles was unnecessary, because the Act -

gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention. It gives effect to Article 13 by establishing a scheme under which Convention rights can be raised before our domestic courts.... [it] provides an exhaustive code of remedies for those whose Convention rights have been violated... nothing more is needed.<sup>6</sup>

### **3. OUTLINE OF THE MAIN PROVISIONS OF THE ACT<sup>7</sup>**

2.4 The Act does not incorporate the Convention rights fully into domestic law. It gives effect to Convention rights by two principal methods.

<sup>5</sup> Article 16 (permitting restrictions on the political activity of aliens), Article 17 (prohibiting the abuse of rights) and Article 18 (limiting the use of restrictions on rights) of the Convention have been included within Schedule 1 to the HRA.

<sup>6</sup> Lord Irvine of Lairg (Lord Chancellor): *Hansard* (HL) 18 November 1997, vol 583, col 475. As will be seen, the exclusion of remedies in respect of judicial acts (s 9) may cause complications in this respect: see Part IV paras 4.82 - 4.84 below.

<sup>7</sup> This outline is intended to do no more than provide the essential background. For a fuller treatment, see for example Lord Lester of Herne Hill and D Pannick (eds), *Human Rights Law and Practice* (1999); S Grosz, J Beatson and P Duffy, *Human Rights: The 1998 Act and The European Convention* (2000); K Starmer, *European Human Rights Law* (1999) and J Wadham and H Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (1999).

- 2.5 First, it requires that all primary and secondary legislation, whether enacted before or since the HRA, be interpreted in a manner which is compatible with Convention rights, “so far as it is possible to do so”.<sup>8</sup> Secondary legislation which cannot be so interpreted will be invalid, unless the removal of the incompatibility is prevented by primary legislation.<sup>9</sup>
- 2.6 Incompatible primary legislation cannot be invalidated by the Courts. Instead, the higher courts may make a “declaration of incompatibility”.<sup>10</sup> Where such a declaration has been made, the HRA provides a procedure whereby the relevant Minister may make a “remedial order”, by statutory instrument, subject to approval of both Houses of Parliament.<sup>11</sup>
- 2.7 Secondly, the Act makes it unlawful for any “public authority” to act<sup>12</sup> in a way incompatible with the Convention rights.<sup>13</sup> The HRA enables the “victim”<sup>14</sup> of a breach to bring proceedings against the authority in respect of such acts (or proposed acts).<sup>15</sup> The proceedings must be brought within a year of the act complained of, subject to the court’s power to extend the period if it is considered “equitable” to do so.<sup>16</sup> A victim may also rely on the Convention rights in any other legal proceedings.<sup>17</sup> Where the Court finds a breach it may give such relief, and make such orders, within its powers “as it considers just and appropriate”.<sup>18</sup> The remedy may include an award of damages. The provisions of section 8 relating to such awards are the main subject of this report and are dealt with in detail in the following parts of this report.

<sup>8</sup> HRA s 3(1).

<sup>9</sup> HRA s 3(2)(c).

<sup>10</sup> Section 4(2). The Scottish Parliament, Northern Ireland Assembly and Welsh Assembly have no power to legislate in a manner incompatible with Convention rights and, accordingly, any measures passed by these bodies which conflict with Convention rights can have no legal force. See further paras 2.28 - 2.33 below.

<sup>11</sup> Section 10 and sched 2.

<sup>12</sup> “Act” includes a failure to act: s 6(6).

<sup>13</sup> Section 6(1). Section 6(2) provides that a public authority is not acting unlawfully if it could not have acted differently because of the provisions of primary legislation, or in the case of provisions of, or made under, primary legislation which cannot be read compatibly with Convention rights, if it was acting so as to give effect to or enforce those provisions.

<sup>14</sup> See para 2.15 below.

<sup>15</sup> Section 7(1)(a). The appropriate court for such proceedings is determined in accordance with the rules: s 7(2). In England and Wales, by CPR rule 7(11) (inserted by Civil Procedure (Amendment No 4) Rules SI 2000 No 2092) claims under s 7(1)(a) can be brought in any court (save for claims in respect of judicial acts which must be brought in the High Court.)

<sup>16</sup> HRA s 7(5).

<sup>17</sup> Section 7(1)(b).

<sup>18</sup> Section 8(1). See further paras 2.19 - 2.21 below.

#### **4. DAMAGES UNDER SECTION 8**

##### **(1) The statutory provision**

2.8 Sections 8(1) to (4) of the HRA are central to the issues under consideration in this Report, and are therefore set out in full:

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful,<sup>19</sup> 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 power to award damages, or to order the payment of compensation, in civil proceedings.<sup>20</sup>

(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

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

##### **(2) Principal features**

2.9 The aspects of this provision relevant to the award of damages in courts in England and Wales will be discussed in more detail in Part IV, and in courts in Scotland in Part V. At this stage, we draw attention to the main points:

(1) Section 8(2) of the Act states that damages may only be awarded by a court which has power to award damages or to order the payment of compensation in civil proceedings.

(2) Section 8(3) states that damages cannot be awarded unless it is 'necessary to afford just satisfaction' to the applicant. Accordingly,

<sup>19</sup> That is, unlawful under s 6(1): see s 8(6).

<sup>20</sup> For the purposes of s 8, "damages" means "damages for an unlawful act of a public authority": s 8(6).



if another remedy or exercise of the court's power can achieve this effect then damages should not be awarded.

- (3) Section 8(3) requires the court, in determining whether an award is necessary to afford just satisfaction to the person in whose favour it is to be made, to take into account "any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court)..." and "the consequences of any decision ... in respect of that act".
- (4) Section 8(5) of the HRA enables a public authority which has been held liable in damages under the Act to claim contribution from any other person who would be liable in respect of the same damage. This might happen were another public authority also to have been involved in the violation or were another person to be liable to the applicant in tort.

## **5. PRELIMINARY MATTERS**

2.10 It is convenient to deal in this Part with five points which arise from section 8, and in most cases relate not just to awards of damages under the Act but to remedies under the Act in general. They are:-

- (1) What is a "public authority"?
- (2) Who is a "victim"?
- (3) Which courts have the power to award damages?
- (4) The requirement that any remedy granted be "just and appropriate".
- (5) The relationship of claims under section 6 to other causes of action.

### **(1) Public authorities**

2.11 The definition of "public authority"<sup>21</sup> is not exhaustive. The definition specifically excludes both Houses of Parliament, and persons exercising functions in connection with Parliamentary proceedings.<sup>22</sup> It includes any court or tribunal and "any person certain of whose functions are functions of a public nature", unless the nature of the act in question is private.<sup>23</sup>

[Section 6] is designed to apply not only to obvious public authorities such as government departments and the police, but also to bodies which are public in certain respects but not others.<sup>24</sup>

<sup>21</sup> Section 6(3).

<sup>22</sup> Section 6(3)(b). Similarly, there is no remedy under s 6 for a failure to introduce legislation before Parliament, or to make primary legislation or a remedial order: s 6(6).

<sup>23</sup> Section 6(3)(a), s 6(3)(b), (5).

<sup>24</sup> Lord Irvine of Lairg (Lord Chancellor): *Hansard* (HL) 3 November 1997, vol 582, col 1232.

- 2.12 “Obvious public authorities”<sup>25</sup> will be subject to the Act in relation to any of their activities, even those which have not hitherto been regarded as “public” for the purposes of judicial review, such as employment contracts.<sup>26</sup> A body which has some public functions will also be a ‘public authority’ for the purpose of the HRA, but only in respect of those functions. For example, Railtrack might be regarded as a public authority in respect of its safety regulation function, but not when acting as a commercial property developer.<sup>27</sup> A private security company might qualify in relation to the function of managing a contracted out prison, but not in relation to other private commercial activities.
- 2.13 Although the definition of “public authority” for these purposes includes a “court or tribunal”,<sup>28</sup> remedies in damages in respect of “judicial acts” done in good faith are excluded, save to the extent required by Article 5(5) of the Convention.<sup>29</sup> We will see later that this exclusion may cause complications in certain cases.<sup>30</sup>
- 2.14 Article 5(5) exceptionally provides a specific guarantee of “an enforceable right to compensation” to victims of breaches of that Article (right to liberty and security).<sup>31</sup> This exception is the subject of the third issue in our Terms of Reference, and is discussed further below.<sup>32</sup>

## **(2) Who may bring proceedings under section 6?**

- 2.15 A claim under section 7 may only be made by someone who is a “victim” of the unlawful act.<sup>33</sup> “Victim” is defined in section 7(7) as a person who would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the Strasbourg Court. Although the term “victim” is not defined in Article 34, the following guidance can be derived from that article and the case-

<sup>25</sup> The Core Guidance for Public Authorities, issued by the Government’s Human Rights Task Force, refers to “obvious public authorities such as a Minister, a Government Department or agency, local authorities, health authorities and trusts, the Armed Forces and the police” (para 19).

<sup>26</sup> Cf *R v East Berks Health Authority ex p Walsh* [1985] QB 152, 162, per Sir John Donaldson MR: “Employment by a public authority does not *per se* inject any element of public law...”

<sup>27</sup> This was the example given by Lord Williams of Mostyn (Parliamentary Under-Secretary): *Hansard* (HL) 24 November 1997, vol 583, col 758.

<sup>28</sup> Section 6(3). “Tribunal” is defined as meaning “any tribunal in which legal proceedings may be brought”: s 21(1).

<sup>29</sup> Section 9(3). Proceedings in respect of judicial acts must normally be brought by exercising a right of appeal, or by judicial review: s 9(1).

<sup>30</sup> See below, paras 4.82 - 4.84.

<sup>31</sup> The right to a remedy in domestic law for breaches of other Articles depends on the right to an effective remedy under Article 13 (which is not one of the Convention rights incorporated under the HRA. See para 2.3 above).

<sup>32</sup> See paras 2.26 - 2.27 below.

<sup>33</sup> Section 7(1), (3).

law of the European Commission on Human Rights (the “Commission”) and the Strasbourg Court.

- (1) Article 34 itself provides that an application may be made by “any person, non-governmental organisation or group of individuals claiming to be the victim of a violation”. Anyone who is subject to the jurisdiction of the state and claims to be a victim of a violation may bring an application under the Convention. The nationality of that individual is irrelevant.<sup>34</sup> Bodies with legal personality fall within Article 34.<sup>35</sup> However, governmental bodies may not bring proceedings.<sup>36</sup>
- (2) Generally the ‘victim’ must be able to show that he or she has been directly affected by the alleged violation of the Convention,<sup>37</sup> or is ‘at risk’ of being affected.<sup>38</sup> However, where the nature of the violation means that the applicant cannot be sure that it has been or will be applied to him or her, the court has adopted a wider approach to the question “who constitutes a ‘victim?’”<sup>39</sup>
- (3) The violation alleged by the applicant must usually exist when the application is made. However, the court has in some cases been prepared to rule that a future act by a contracting state would be a violation of the

<sup>34</sup> See Article 1 of the Convention.

<sup>35</sup> Applications have been brought, for example, by companies (*AGOSI v United Kingdom* A 108 (1986), 9 EHRR 1, *Tre Traktörer AB v Sweden* A 159 (1989), 13 EHRR 309); churches (*X and Church of Scientology v Sweden* (1979) 16 DR 68), and associations (*Plattform ‘Ärzte für das Leben’ v Austria* A 139 (1988), 13 EHRR 204 where the application was brought by an association of doctors campaigning against abortion). If the body in question has not been established according to the law of the state concerned, the application must be signed by all the members of the group. See report of the first session of the Commission proceedings, cited in P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998), p 46.

<sup>36</sup> *Ayuntamiento de M v Spain* (1991) 68 DR 209.

<sup>37</sup> See for example *X v Norway*, (1961) Yearbook of the European Convention of Human Rights, vol 4, 270, where a petition concerning abortion was declared inadmissible because the applicant had not claimed to be a victim of the disputed legislation himself.

<sup>38</sup> In *Campbell and Cosans v United Kingdom* (1980) 3 EHRR 531, children attending a school where corporal punishment was practised were held to be sufficiently ‘at risk’ to qualify as victims although they had not themselves received such punishment (see paras 6.237 - 6.238 below). See also *Dudgeon v United Kingdom* A 45 (1981), 4 EHRR 149 (see para 6.175 below); *Norris v Ireland* A 142 (1988), 13 EHRR 186 (see para 6.176 below), *Open Door Counselling and Dublin Well Woman v Ireland* A 246 (1992), 15 EHRR 244 (see para 6.197 below).

<sup>39</sup> In *Klass v Germany* A 28 (1978), 2 EHRR 214 the applicants challenged legislation permitting secret surveillance of mail and telecommunications without notifying the individuals concerned or allowing any challenge to decisions made under it. The Court accepted that the legislation directly affected all users or potential users of post and telecommunications in Germany. In *Hilton v United Kingdom* (1986) 57 DR 108 (which also concerned security checks applied by the state) this test was qualified: the Commission held that it must be shown that there is a reasonable likelihood that the relevant measure has been taken with regard to the applicant.

Convention where this is necessary to ensure that the rights under the Convention are safeguarded.<sup>40</sup> Section 7(1) of the HRA has made it clearer that action can be taken in respect of a future violation.

- (4) The Court has recognised that in some cases an individual may suffer some injury where there has been a violation of a Convention right affecting another person. This has led to the development of the concept of the ‘indirect victim’: where for example a close relative of the victim can show some form of prejudice as a result of the violation, or a personal interest in the termination of the violation, that person will be able to bring a claim. For example in *Kiliç v Turkey*<sup>41</sup> the applicant, the brother of a murdered Kurdish journalist, was able to claim, *inter alia*, for the loss he had suffered as a result of his brother’s death, and the failure of the Turkish authorities to investigate it.<sup>42</sup>
- (5) It is not possible to bring an action to obtain a ruling on whether a provision of domestic law is contrary to the Convention. The Court will not examine the law of a State in the abstract.<sup>43</sup>
- (6) Claims can be brought on behalf of victims who are unable to act on their own behalf provided that there is evidence of the representative’s authority to act as such.<sup>44</sup> This will include cases where the victim has died.<sup>45</sup> In addition, an association such as a trade union can act on behalf of its

<sup>40</sup> In *Soering v United Kingdom* A 161 (1989), 11 EHRR 439 the Strasbourg Court found that a decision to extradite the applicant to the United States where the applicant faced being placed on death row would be a violation of Article 3. The departure from the general rule was justified by reference to “the serious and irreparable nature of the alleged suffering risked” (para 90). See further para 6.17 below.

<sup>41</sup> Application no 22492/93, 28 March 2000.

<sup>42</sup> See further paras 6.13 - 6.14 below. For other examples of indirect claims brought by those affected by the death of another, see *W v United Kingdom* (1983) 32 DR 190 and *Kaya v Turkey* 1998-I p 297, 28 EHRR 1 (discussed at para 6.8 below).

<sup>43</sup> See *Klass v Germany* A 28 (1978), 2 EHRR 214, para 33; *Håkansson and Sturesson v Sweden* A 171 (1990), 13 EHRR 1, para 46. The Court has refused to recognise any form of *actio popularis* for the interpretation of the Convention, or any abstract attack on the laws of a Contracting State.

<sup>44</sup> If possible the victim must be shown to have consented to the application (*X v Germany* Yearbook 1 (1955-1957) p 163). Where the victim is not of an age or capacity to authorise such action, the Court will consider “whether other or more appropriate representation exists or is available, the nature of the links between the applicant and the victim, the object and scope of the application introduced on the victim’s behalf and whether there are any conflicts of interest”: See *SP, DP and T v United Kingdom* Application no 23715/94 (1996), 22 EHRR CD 148.

<sup>45</sup> See *X v France* A 234-C (1991), 14 EHRR 483. The applicant died shortly after the referral of his case to the Court. It was recognised that his parents were entitled to take his place in the proceedings. See also *McCann v United Kingdom* A 324 (1995), 21 EHRR 97 (discussed at paras 6.5 - 6.6 below), where the claim was brought by representatives of the estate of the deceased, and *Deumeland v Germany* A 100 (1986), 8 EHRR 448 (para 6.121 below).

members provided that it can identify those of its members who are directly affected, and demonstrate that it has received specific instructions from each of them.<sup>46</sup>

**(3) The court must have power to award damages in civil proceedings**

- 2.16 Section 8(2) of the Act states that damages may only be awarded by a court which has power to award damages or to order the payment of compensation in civil proceedings. Accordingly criminal courts will not have the power to award damages where, for example, it is found during a criminal trial that an individual's Convention rights have been violated. Any claim for damages arising out of such a breach will have to be the subject of a separate claim in the county court or High Court.
- 2.17 An unresolved issue concerns the position of the Court of Appeal (in England and Wales) when exercising its criminal jurisdiction.<sup>47</sup> The apparent intention of the section is to confine claims for damages to civil proceedings. However, the language focuses on the powers of the court, rather than the nature of the particular proceedings. Criminal appeals are heard by a separate division of the Court of Appeal, rather than by a separate court.<sup>48</sup> Accordingly, on a literal reading of the section, it is a court which, in civil proceedings, would have power to award damages. On this view, it would have power to award damages under the HRA, for example where it quashes a conviction reached in breach of the Convention.<sup>49</sup>
- 2.18 Turning to Scotland, it is clear that neither the High Court of Justiciary, nor the District Court, may make an award of damages under section 8, since neither has any civil jurisdiction (although both can make compensation orders in criminal proceedings). On the other hand, the Sheriff court exercises both civil and criminal jurisdiction, and undoubtedly has the power to make an award of damages in civil proceedings. Accordingly, adopting a literal approach, it could be argued that, even in criminal cases, the sheriff may make an award of damages under the HRA.

<sup>46</sup> *Confédération des Syndicats Médicaux Français v France* (1986) 47 DR 225.

<sup>47</sup> In Parliament, the Lord Chancellor referred specifically to the intention that awards of damages should not be made in the Crown Court or Magistrates' Courts, and stated generally that such awards should only be made by "the civil courts, which traditionally make awards of damages". He did not refer to the Court of Appeal. See *Hansard* (HL) 24 November 1997, vol 583, col 844.

<sup>48</sup> See Criminal Appeals Act 1968.

<sup>49</sup> See Lester & Pannick *op cit* p 40. The Civil Procedure Rules provide that a claim under s 7(1)(a) of the HRA may be brought in any court (unless the claim is in respect of a judicial act, in which case it must be brought in the High Court). See Rule 7.11, inserted by the Civil Procedure (Amendment No 4) Rules, SI 2000 No 2092.

**(4) “Just and appropriate” remedies.**

- 2.19 Section 8(1) of the HRA gives the court power to “grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”. This is obviously wide ranging. The White Paper which launched the Human Rights Bill<sup>50</sup> stated that the appropriate remedy in a case brought under the Act will depend upon the facts of each particular case and achieving ‘a proper balance between the rights of the individual and the public interest’.<sup>51</sup> In deciding what constitutes a ‘just and appropriate’ remedy, regard must be had, not just to the range of substantive remedies available to the courts but also to the other powers of the courts which may be used to remedial effect.
- 2.20 It must also be noted that the definition of “Court” includes “tribunal”.<sup>52</sup> Section 7(11) of the HRA allows the remedial powers of a tribunal to be extended by the Minister responsible for that tribunal, either in respect of the actual remedies the tribunal is able to grant or the grounds upon which an existing remedy may be granted. The power has not yet been exercised.
- 2.21 We will argue later that the range of remedies available to the court under section 8(1) may mean that it will often be unnecessary for the court to award damages, which under section 8(3) are to be awarded only if an award is necessary to provide just satisfaction to the victim.<sup>53</sup>

**(5) Relationship of claims under section 6 to other causes of action.**

- 2.22 It will happen frequently that the facts may give rise to both a claim under section 6 of the HRA and under another statute or at common law (typically in tort).<sup>54</sup> Under the Convention, the Strasbourg Court may only deal with a matter “after all domestic remedies have been exhausted.”<sup>55</sup> It might be suggested that a similar principle should apply in domestic law, so that a remedy under the Act will only be granted where the existing law has been shown to be inadequate.
- 2.23 However, no requirement of exhaustion of other remedies has been included in the HRA. Section 11 states specifically:

A person’s reliance on a Convention right does not restrict-

- (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or
- (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

<sup>50</sup> *Rights Brought Home: The Human Rights Bill* (1997) Cm 3782.

<sup>51</sup> *Ibid* para 2.6.

<sup>52</sup> Section 9(5). See para 2.13 n 28 above for the definition of ‘tribunal’.

<sup>53</sup> See paras 4.36 - 4.39 below.

<sup>54</sup> See the examples at para 4.15 below.

<sup>55</sup> Article 35.1.

This suggests that the action under the HRA is not intended to be an action of “last resort” in the same way as an application to the Strasbourg Court. Where the same facts give rise to claims both under the Act and on some other common law or statutory basis, there appears to be nothing to prevent the claimant from giving priority to either, or proceeding on both in the same action.

- 2.24 It is possible that a court faced with a claim under the Act on facts which clearly also give rise to a claim in, say, tort, but where no claim in tort has been made, might decide that it is not “just and appropriate” to do more than issue a declaration that the applicant’s Convention rights have been infringed and leave the applicant to claim any substantive remedy in a subsequent action at common law. However, it can be argued that this would not be consistent with other sections of the Act. Section 8(3), as set out above, requires the court, in determining whether an award is necessary to afford just satisfaction to the person in whose favour it is to be made, to take into account:

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court)...

This requires the court to take into account any relief previously “granted” on another claim brought in the same action. By implication, where no such relief has yet been granted, the mere possibility of such relief should not lead the court to deprive the applicant of a remedy under the Act.<sup>56</sup>

- 2.25 The view that a claimant need not exhaust his or her remedies at common law before bringing a claim under section 6 seems to be confirmed by section 7(5) of the HRA. This provides that proceedings under the HRA must be brought within 12 months of the date on which the act complained of took place,<sup>57</sup> compared to the normal limitation periods for actions in tort of three or six years<sup>58</sup> and of three or five for actions in delict.<sup>59</sup> This suggests that an application under the HRA may need to be pursued before an action in, for example, tort, arising out of the same facts.

## **6. SECTION 9(3): LIABILITY IN RESPECT OF JUDICIAL ACTS**

- 2.26 Proceedings in respect of judicial acts<sup>60</sup> are normally confined to appeal or judicial review, and there is no remedy in damages in respect of any judicial act

<sup>56</sup> See further the discussion of the court’s discretion to make an award in Part IV paras 4.33 - 4.42.

<sup>57</sup> Though it should be noted that the court has a discretion to permit proceedings “within such longer period as the court considers equitable having regard to all the circumstances.”

<sup>58</sup> Limitation Act 1980, ss 2, 11 and 14A.

<sup>59</sup> Prescription and Limitation Act 1973, ss 6 and 17.

<sup>60</sup> A judicial act is defined as “a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge”. This definition includes tribunals, magistrates and clerks exercising the jurisdiction of a court: s 9(5).

done in good faith except “to the extent required by Article 5(5)...”.<sup>61</sup> Article 5 deals with the “right to liberty and security”, and, inter alia, provides protection against “unlawful detention”. Article 5(5) provides:

Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Awards of damages permitted by section 9(3) are to be made against the Crown,<sup>62</sup> and the appropriate Minister,<sup>63</sup> if not a party to the proceedings, is required to be joined in the proceedings.<sup>64</sup>

- 2.27 This limited exception to the general immunity for judicial acts raises an issue which is addressed in paragraph 3 of the Terms of Reference. Under the Strasbourg jurisprudence a judicial act is not to be regarded as “unlawful” for the purposes of Article 5 unless the court has exceeded its jurisdiction.<sup>65</sup> Applying this test in the domestic courts, for example in relation to committal orders by magistrates, raises some difficult questions. Since these relate more to the issue of liability than that of damages, which is the main subject-matter of this Report, the subject is dealt with separately in Appendix A.

## **7. SCOTLAND, WALES AND NORTHERN IRELAND**

- 2.28 Although the HRA as a whole will only come into effect throughout the United Kingdom on 2 October 2000, it is to be noted that in Scotland, Wales and Northern Ireland it already has limited effect in connection with devolution legislation.

### **(1) Scotland**

- 2.29 Under the Scotland Act 1998, the legislative competence of the Parliament, and the powers of the Scottish Executive are limited by reference to “the Convention rights”, a term which has the same meaning as in the Human Rights Act.<sup>66</sup> An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament, and an Act is outside such competence if it is incompatible with any of the Convention rights.<sup>67</sup> By virtue of

<sup>61</sup> Section 9(3).

<sup>62</sup> Section 9(4).

<sup>63</sup> Or a person or government department nominated by that Minister: s 9(5).

<sup>64</sup> Section 9(4) refers to joining “the appropriate person” who is defined, as indicated, in s 9(5). Such proceedings must be begun in the High Court. See para 2.7 n 15 above.

<sup>65</sup> See *Benham v United Kingdom* 1996-III p 738, 22 EHRR 293.

<sup>66</sup> Scotland Act 1998, s 126(1).

<sup>67</sup> Scotland Act 1998, s 29(1) and (2)(d).



section 57(2) of the Scotland Act a member of the Scottish Executive<sup>68</sup> has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.<sup>69</sup>

2.30 Section 129(2) of the Scotland Act provides that if certain provisions of the Scotland Act come into force before the HRA, those provisions are to have effect, until such time as the HRA is fully in force, as they will have when the HRA is fully in force. The provisions in question are:

- (1) those which define the legislative competence of the Parliament and the powers of the Executive by reference to the Convention rights (sections 29(2)(d) and 57(2) and (3));
- (2) section 100, which applies the “victim” requirement of Article 34 of the Convention to persons bringing proceedings in a domestic court or tribunal on the ground that an act is incompatible with Convention rights, or relying on Convention rights in such proceedings;
- (3) section 126(1) (which defines the Convention rights);
- (4) schedule 6 (which sets out the procedures relating to “devolution issues”).

2.31 The effect of these provisions may be summarised as follows: The Scotland Act limits the legislative powers of the Scottish Parliament and the powers of the Scottish Executive by reference, *inter alia*, to the Convention rights. Until such time as the HRA comes into force, this limitation is to have effect as if that Act were already in force.

## **(2) Wales**

2.32 Under section 107(1) of the Government of Wales Act 1998, the Assembly has no power to make, confirm or approve any subordinate legislation, or to do any other act, so far as the subordinate legislation or act is incompatible with any of “the Convention rights”.<sup>70</sup> Section 153(2) of that Act provides that if section 107 comes into force before the HRA, that section is to have the same effect until such time as that Act is fully in force, as it will have after that time.

<sup>68</sup> Defined by s 44 of the Scotland Act 1998 as the First Minister, such Ministers as the First Minister may appoint under s 47 of the Act, the Lord Advocate and the Solicitor-General for Scotland.

<sup>69</sup> Section 57(3) of the Scotland Act provides that subsection 57(2) does not apply to an act of the Lord Advocate in prosecuting an offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland which, because of s 6(2) of the HRA 1998, would not be unlawful under s 6(1) of that Act.

<sup>70</sup> Which have the same meaning as in the HRA 1998: Government of Wales Act 1998, s 107(5).

### **(3) Northern Ireland**

- 2.33 Under section 6(2)(c) of the Northern Ireland Act 1998, an Act of the Northern Ireland Assembly which is incompatible with any of the Convention rights is outside the legislative competence of the Assembly. It is, therefore, not law.<sup>71</sup> Section 24(1)(a) further provides that a Minister or a Northern Ireland department does not have the power to make, confirm or approve any subordinate legislation, or do any act, which is incompatible with Convention rights.<sup>72</sup> As with Scotland and Wales, these sections are to have effect as if the HRA were fully in force.<sup>73</sup>

<sup>71</sup> Northern Ireland Act 1998, s 6(2). The Northern Ireland Act provides a number of means whereby the compatibility of proposed legislation with the Convention can be checked. See, for example, ss 11 and 69. See further Lord Lester of Herne Hill and D Pannick (eds), *Human Rights Law and Practice* (1999), paras 6.23 - 6.31.

<sup>72</sup> Section 98(1) states that Convention rights within the Northern Ireland Act 1998 have the same meaning as in the Human Rights Act 1998.

<sup>73</sup> Schedule 14, para 1.

# **PART III**

## **JUST SATISFACTION IN STRASBOURG**

### **1. INTRODUCTION**

- 3.1 As already noted, section 8(4) requires the domestic court, in deciding whether to award damages or the amount of an award, to take into account the principles applied by the Strasbourg Court in exercising its power to afford just satisfaction to the victims of Convention breaches. This power is set out in Article 41 (formerly Article 50)<sup>1</sup> of the Convention which states:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

- 3.2 In this Part, we consider the general practices of the Strasbourg Court in relation to the grant of just satisfaction, and ask what, if any, principles can be extracted from those practices. In the next two Parts, we shall consider how those principles may be applied in the domestic framework within which the United Kingdom courts will be operating under the HRA.
- 3.3 The following discussion is directed to the two main categories of financial award made by way of just satisfaction by the Strasbourg Court: pecuniary and non-pecuniary loss. For reasons explained below,<sup>2</sup> we have not dealt in detail with awards for costs and expenses.

### **2. GENERAL POINTS ON STRASBOURG PRACTICE**

#### **(1) Absence of clear principles**

- 3.4 Perhaps the most striking feature of the Strasbourg case-law, to lawyers from the United Kingdom, is the lack of clear principles as to when damages should be awarded and how they should be measured. There seem to be several reasons for this.
- 3.5 The first is that the Strasbourg Court does not apply a strict doctrine of precedent (though as a matter of practice the Court will generally regard itself as bound by its case-law).<sup>3</sup> This may contribute to the fact that the Strasbourg

<sup>1</sup> The wording of Article 41, although slightly different from that of former Article 50, is treated in practice as bearing the same meaning. In this discussion we shall refer only to Article 41, and shall assume that the reference (in HRA s 8(4)) to Art 41 is to be read as including a reference to Article 50: see S Grosz, J Beatson and P Duffy, *Human Rights: The 1998 Act and The European Convention* (2000) p 143 note 74).

<sup>2</sup> Paras 3.29 - 3.30 below.

<sup>3</sup> Decisions of the Court are normally followed in the interests of “legal certainty” and “orderly development”, but may be departed from for good reason: see Feldman, “Precedent and the European Court of Human Rights”, *Bail and the Human Rights Act*

Court treats questions of ‘just satisfaction’ as requiring an equitable case-by-case assessment rather than the application of binding principles. The Court has placed emphasis on the facts of individual cases, often without considering or distinguishing cases involving similar facts. Apparently irreconcilable inconsistencies sometimes result.<sup>4</sup>

- 3.6 The second point is closely related. Within Europe there are diverse traditions as to the calculation of damages. The courts in the United Kingdom have developed relatively detailed rules on the assessment of damages, particularly in relation to instructions to juries<sup>5</sup> and non-pecuniary loss from personal injuries.<sup>6</sup> The law relating to damages has not been developed to the same extent in all of the continental legal systems.
- 3.7 On the one hand, the German and Dutch systems have rules as detailed as the English.<sup>7</sup> Their theories of causation are highly developed, and pecuniary and non-pecuniary loss are dealt with under clearly separated headings. In contrast, French and Belgian courts proceed “empirically” in matters of causation, with a minimum of theorising and “swayed by considerations of fairness as much as causal potency”.<sup>8</sup>
- 3.8 Thus, in French private law, for example, the measure of damages is regarded as a matter for the ‘sovereign power of assessment’<sup>9</sup> of the judge of first instance. The comparative lack of structure is most evident in relation to the assessment of

1998 (2000) Law Commission Consultation Paper No 157, Appendix C para C.11. Under the rules in force before Protocol 11 came into effect, a Chamber was obliged to relinquish jurisdiction in favour of the Grand Chamber in the event of a possible departure from previous case law (Rule 51 § 1 of the Rules of the Court A of the former Court). Under the new system a Chamber is merely empowered to relinquish jurisdiction in that situation (Article 30 as amended by Protocol No 11).

<sup>4</sup> See, for example, the discussion of speculative losses: paras 3.59 - 3.69 below.

<sup>5</sup> See *John v MGN Ltd* [1997] QB 586; *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498.

<sup>6</sup> *Heil v Rankin* [2000] 2 WLR 1173, where the existing case-law and the role and status of the JSB Guidelines for the Assessment of General Damages in Personal Injury cases is discussed (at p 1186). The case is referred to in more detail at paras 4.7 - 4.9 and 4.66 - 4.67 below. It followed the Law Commission’s report: *Damages for Personal Injury: Non-Pecuniary Loss* (1999) Law Com No 257, in which the common law approach to this subject is reviewed. The history and status of the JSB guidelines are explained at para 1.4 n 3 of that report.

<sup>7</sup> See Markesinis, *The German Law of Obligations, Vol II The Law of Torts: A Comparative Introduction* (3rd ed 1997) pp 95-108 and 907-931; J M J Chorus, P H M Gerver and E H Hondius, *Introduction to Dutch Law* (3rd ed 1999) Chapter 8; A S Hartkamp and M M Tillema, *Contract Law in the Netherlands* (1995) §§ 200-217.

<sup>8</sup> J Bell, S Boyron and S Whittaker, *Principles of French Law* (1998) p 392 and J J Herbots, *Contract Law in Belgium* (1995) § 415.

<sup>9</sup> ‘Pouvoir souverain’.

the relevant damage.<sup>10</sup> This is always treated as a question of fact, thus leaving the judge in the lower court with a degree of unstructured discretion to adjust the award as he or she sees fit. As long as the award is framed properly in law, the appeal courts will not interfere with it. Conventional scales are sometimes used, but must not be treated as rules of law. In particular, French judges do not draw clear distinctions between different heads of loss.<sup>11</sup> The Strasbourg practice appears to be close to the French tradition.

3.9 Thirdly, the Strasbourg Court is an international court responsible for interpreting the provisions of the Convention and for ensuring that the Member States abide by the obligations set out in that treaty. The Strasbourg Court itself is composed of judges from the Member States, and therefore represents a mix of different legal systems. As David Feldman has said, the Court has to

strike a balance between exercising moral leadership in the field of human-rights law and ensuring that it does not...alienate the support for the ECHR in particular States, particularly in relation to issues...which affect deeply felt and widely varied moral and social sensibilities.<sup>12</sup>

Karen Reid also emphasises the Strasbourg Court's international role:

The Court has not been unduly generous in its approach to awarding compensation under any of the heads. The emphasis is not on providing a mechanism for enriching successful applicants but rather on its role in making public and binding findings of applicable human rights standards.<sup>13</sup>

3.10 At a more practical level, the character and size of the Court inevitably affects its ability to deal with detailed issues of damages in a consistent way. It is a large body, sitting in a number of different constitutions.<sup>14</sup> The judges are drawn from different backgrounds and diverse jurisdictions, and will have varied experiences of awarding damages. It is inevitable that their views as to the proper level of

<sup>10</sup> See eg B Nicholas, *The French Law of Contract* (2nd ed 1992), p 225: "What principally strikes the English lawyer is that the French analysis is relatively undeveloped". Belgian law takes a similar approach: see J J Herbots, *Contract Law in Belgium* (1995).

<sup>11</sup> See generally J Bell, S Boyron and S Whittaker, *Principles of French Law* (1998) pp 349-351 and 395-397.

<sup>12</sup> D Feldman, "Precedent and the European Court of Human Rights" in Bail and the Human Rights Act 1998, Law Commission Consultation Paper No 157, para C.6.

<sup>13</sup> Karen Reid, *A Practitioner's Guide to the European Convention of Human Rights* (1998) p 398. Since the award of just satisfaction is not seen as the main business of the Strasbourg Court, the judges may be reluctant to embark on the time-consuming business of assessing compensation on a detailed basis.

<sup>14</sup> See A Mowbray "The composition and operation of the new European Court of Human Rights" [1999] PL 219. Following the 1998 reorganisation, the Strasbourg Court consisted of 41 judges, one from each of the member states. Individual cases are normally heard by a Chamber of 7 judges, but important cases may be referred to a Grand Chamber of 17 judges.

compensation, and the basis on which it should be assessed, will differ. Furthermore, the Court is highly dependent on the information and arguments put before them by the parties, which may vary considerably from case to case.<sup>15</sup>

3.11 In those circumstances, at least in relation to non-pecuniary loss, the assessment of damages is “inevitably something of a jury exercise”.<sup>16</sup> It would in any event be impossible to draw direct comparisons between the actual figures for particular types of injury or loss in different countries, since the relative value of money (say, between Turkey and Germany) is so different. In relation to pecuniary loss, the problem is exacerbated by a structure which is not well-suited to the resolution of conflicting valuation evidence.<sup>17</sup>

3.12 Against this background, the absence of clear principle in the Strasbourg jurisprudence on damages is understandable. Nonetheless, the Strasbourg Court has been strongly criticised for its approach to Article 41 and several commentators have cast doubt on the feasibility of establishing solid principles from the Court’s case-law on just satisfaction. As Dinah Shelton says:

It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the European Court of Human Rights privately states: ‘We have no principles’. Another judge responds, ‘We have principles, we just do not apply them’.<sup>18</sup>

3.13 Lester and Pannick regard any principles emanating from the Court’s approach to Article 41 as “little more than equitable assessments of the facts of the individual case.” They urge that there is a “danger of spending time attempting to identify principles that do not exist.”<sup>19</sup> Similar views have been expressed by Grosz, Beatson and Duffy, who state that “[c]ourts and tribunals are...likely to be

<sup>15</sup> Even where the Strasbourg Court has been given specific assistance on the level of damages it may not be evident from the judgment. For example, in *Perks v United Kingdom* Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33 (see paras 6.140 and A.16 - A.22 below), the Court made an award of £5,500 for unlawful detention for 6 days (in breach of Art 6). No reason for this figure is given in the judgment. It is of interest, however, that the applicant’s counsel had submitted a graph, showing amounts for detention by reference to numbers of days, based on guidance in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 and *Lunt v Liverpool City Justices* (CA unreported) 5 March 1991. On the graph £5,500 was shown as the amount for 6 days detention (information supplied by Ben Emmerson QC).

<sup>16</sup> Robert Carnwath, “ECHR Remedies from a Common Law Perspective” (2000) 49 ICLQ 517.

<sup>17</sup> *Ibid*, p 2. See for example *Sporrong and Lönnroth v Sweden* A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction) noted below at paras 3.24 and 6.231 - 6.232. This was particularly true under the former system, where the Commission, which had the principal responsibility of gathering evidence, was separate from the Court: see G Dannemann, *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention* (1993), p 455. In theory, the new structure gives the Court more direct powers in this respect: see Mowbray, *op cit* p 228.

<sup>18</sup> D Shelton, *Remedies in International Human Rights Law* (1999) p 1.

<sup>19</sup> Lord Lester of Herne Hill and D Pannick (eds), *Human Rights Law and Practice* (1999) para 2.8.4, note 3.

largely frustrated in their search for those principles applied by the E Ct HR.” They attribute this to the fact that the Court treats its powers under Article 41 as a “broad discretionary exercise, to be considered in the circumstances of each case.”<sup>20</sup>

- 3.14 There is evidence that this weakness of the Strasbourg jurisprudence is recognised within the Court itself. Indeed, this is apparent from the vigour of the language in some recent dissenting judgments,<sup>21</sup> and the more detailed treatment of the issue of damages in some recent decisions.<sup>22</sup>
- 3.15 This presents the United Kingdom courts with a problem. On the one hand, there is no doubt that the Strasbourg Court’s explanations of its awards for just satisfaction are often perfunctory or non-existent. In such cases, one can only speculate why a certain result was reached. On the other hand, the United Kingdom courts will be under a statutory obligation to have regard to the Strasbourg principles. The Strasbourg case-law cannot simply be dismissed. In the ensuing discussion, we have therefore attempted to highlight those points of principle or practice which may be of guidance to United Kingdom courts, and also to draw attention to some of the inconsistencies which will need to be resolved.

## **(2) The pre-conditions imposed by Article 41**

- 3.16 Article 41 sets down three pre-conditions to the recovery of an award of damages:
- (1) that the Court has found a violation;
  - (2) that the domestic law of the respondent State allows only “partial reparation”; and
  - (3) that the award is “necessary” to afford just satisfaction.
- 3.17 The first pre-condition is straightforward.<sup>23</sup> The second is of no more than historical significance for the Strasbourg Court.<sup>24</sup> In some of the early cases,

<sup>20</sup> Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention* (2000) p 144, para 6-20. Dannemann attributes the lack of principle to the fact that assessment of damages carries a low priority in Strasbourg, and the lack of exchange of ideas between Strasbourg and the national courts. See “Haftung für die Verletzung von Verfahrensgarantien nach Article 41 EMRK” in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, December 1999 pp 452 - 470 at p 463.

<sup>21</sup> See, for example, the dissenting judgment of Judge Bonello in *Nikolova v Bulgaria* Application no 31195/96, 25 March 1999 (quoted below at para 3.39 n 83).

<sup>22</sup> For example, *Smith and Grady v United Kingdom* Application nos 33985/96 and 33986/96, 25 July 2000, discussed at paras 6.179 - 6.181 below.

<sup>23</sup> But see *Caballero v United Kingdom* Application no 32819/96, 8 February 2000 (discussed in para 6.58 below) for the application of Article 41 where liability is conceded, so that there is no actual “finding” of a violation.

there were suggestions that, even after a finding of violation, these words imposed a limit on the Strasbourg Court's jurisdiction to consider just satisfaction until the extent of reparation under the domestic law had been fully explored.<sup>25</sup> In practice, however, the "partial reparation" test is easily satisfied, and the Court has reserved for itself jurisdiction to consider the question of just satisfaction in virtually all cases where a violation is found.<sup>26</sup> Nor has the rule on the exhaustion of domestic remedies<sup>27</sup> been a material obstacle to this aspect of the Strasbourg Court's jurisdiction.<sup>28</sup> Having found a violation, the Strasbourg Court has been willing to grant a remedy without requiring the applicant to return to the domestic system.<sup>29</sup>

- 3.18 Even when the first two pre-conditions are met, an award of damages will not be made unless the Court considers that it is "necessary" to afford just satisfaction to the injured party. This final requirement gives the Strasbourg Court a wide discretion to determine when an award of damages should be made. Damages are not available as of right. The factors taken into account by the Strasbourg Court in exercising its discretion are discussed below.

### **(3) General aim of *restitutio in integrum***

- 3.19 When the Strasbourg Court awards damages as just satisfaction under Article 41, the award aims to compensate the victim for the losses suffered as a result of the breach. Damages awarded by the Court seek to return the applicant to the

<sup>24</sup> Though it helps to emphasise that the domestic courts should themselves be seeking to make 'full reparation' for the violation found.

<sup>25</sup> See for example the argument of the Belgian government in *De Wilde, Ooms and Versyp v Belgium (No 2)* A 14 (1972), 1 EHRR 438 (noted in para 6.67 below), para 20.

<sup>26</sup> This extends even to cases under Article 5, which contains a separate compensation provision (Art 5(5): see Part VI paras 6.78 - 6.80 below. The argument often used by the Strasbourg Court is that the kind of harm suffered by a victim of a human rights violation is by its nature irreparable. See for example *König v Germany* A 36 (1980), 2 EHRR 469 (just satisfaction).

<sup>27</sup> Article 35 of the Convention provides that the Court "may only deal with the matter after all domestic remedies have been exhausted...". It also requires that applications are made within a period of six months from the date on which the final decision was taken.

<sup>28</sup> A claim for just satisfaction is viewed, not as an independent procedure, but as a part of an entire claim, of which the question of liability forms the first part: see P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention of Human Rights* (3rd ed 1998), p 241.

<sup>29</sup> See *De Wilde, Ooms and Versyp v Belgium (No 2)* A 14 (1972), 1 EHRR 438, para 16, where the court noted that obliging the applicant to return to the domestic courts would mean that "...the total length of the procedure... would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention...". Formerly, the Strasbourg Court did sometimes defer a decision on just satisfaction to enable the domestic court to take remedial measures: see para 3.32 n 64 below.



position that he or she would have been in had there not been a breach of Convention rights; in other words, *restitutio in integrum*.<sup>30</sup>

- 3.20 However, it recognises that the nature of the injury suffered as a result of the breach may make it impossible to return to the situation existing prior to the breach. For example, in *König v Germany*, the breach in question (exceeding the “reasonable time” required by Article 6(1) in proceedings before the Frankfurt Administrative Court) was one that necessarily rendered *restitutio* impossible:

...when proceedings are continued beyond the ‘reasonable time’ laid down in Article 6(1), the intrinsic nature of the wrong prevents complete reparation (*restitutio in integrum*). This being so, the only claim the applicant can make is for just satisfaction.<sup>31</sup>

- 3.21 The Court awarded 30,000 German marks (£6,490) damages as just satisfaction for non-pecuniary loss.<sup>32</sup> Similarly, in *Smith and Grady v United Kingdom*<sup>33</sup> (concerning homosexuals banned from military service) the Strasbourg Court noted that it was not possible to make a precise calculation of the amount necessary to make complete reparation for the applicants’ loss of future earnings because of “the inherently uncertain character of the damage flowing from the violations”. Again, however, substantial awards (£19,000 to each applicant) were made for non-pecuniary loss.

#### **(4) The heads of damages recoverable**

##### **(a) Introduction**

- 3.22 The Strasbourg Court awards damages as just satisfaction under three heads: pecuniary loss, non-pecuniary loss, and costs and expenses. In practice, the Court does not always separate its awards into these respective heads of damage, and it has often awarded global sums which combine all of the applicant’s losses into a single figure.<sup>34</sup>

<sup>30</sup> “... *restitutio in integrum* or complete reparation for damage derived from their detention”: *Barberà, Messegué and Jabardo v Spain* A 285-C (1994) (just satisfaction), para 16, following *Ringeisen v Austria* A 15 (1972), 1 EHRR 504 (just satisfaction), para 21.

<sup>31</sup> A 36 (1980), 2 EHRR 469 (just satisfaction), para 15. See further para 6.116 below.

<sup>32</sup> In *De Wilde, Ooms and Versyp v Belgium* A 14 (1972), 1 EHRR 438, para 20, the Court acknowledged that no “conceivable system of law” could wipe out entirely the consequences of a breach which by its nature rendered literal *restitutio* impossible. See further para 6.67.

<sup>33</sup> Application no 33985/96 and 33986/96, 25 July 2000. See paras 6.179 - 6.181 below.

<sup>34</sup> See *Bönisch v Austria* A 92 (1985), 9 EHRR 191 (merits); A 103 (1995), 13 EHRR 409 (just satisfaction) (noted in para 6.97 below); *Tsirlis and Kouloumpas v Greece* 1997-III p 909, 25 EHRR 198 (noted in para 6.30 below); *Tomasi v France* A 241-A (1992), 15 EHRR 1 (para 6.61 below).

**(b) Pecuniary loss**

- 3.23 Damages under Article 41 have been awarded by the Strasbourg Court for a variety of pecuniary losses. For instance, awards have been made to compensate for loss of earnings,<sup>35</sup> loss of pension rights,<sup>36</sup> medical expenses,<sup>37</sup> unlawfully expropriated property<sup>38</sup> and to reimburse fines paid.<sup>39</sup>
- 3.24 The Strasbourg Court's assessment of pecuniary losses is often imprecise. For example, in *Sporrong and Lönnroth v Sweden*,<sup>40</sup> the Court found violations of Article 6(1) and of Article 1 of Protocol No 1. In the hearing on Article 50, the applicants put forward one method of assessing their loss; the government proposed an alternative method. The Court rejected both methods of assessment, and under the label of "loss of opportunities",<sup>41</sup> made its own "equitable assessment", explained as follows:

The assessment of the damage suffered presents particular difficulties on this occasion and is thus very problematical. The difficulties turn in part on the technical nature of real-estate matters, the complexity of the calculations made by the experts acting for the applicants and for the Government and the intervening changes in the claims put forward by the injured parties; they arise above all from the virtual impossibility of quantifying, even approximately, the loss of opportunities.

In this connection, neither of the methods suggested by those appearing before the Court seems capable of providing a satisfactory answer....The Court thus finds the methods proposed to be inadequate, but it does not consider that it has to establish another. This is because the circumstances of the case prompt the Court to confine itself to, and make an overall assessment of, the factors which it has found to be relevant...<sup>42</sup>

<sup>35</sup> *Young, James and Webster v United Kingdom* A 55 (1982), 5 EHRR 201 (just satisfaction) (see 6.206 below); *Smith and Grady v United Kingdom* Application nos 33985/96 and 33986/96, 25 July 2000 (just satisfaction) (see paras 6.179 - 6.181 below).

<sup>36</sup> *Young, James and Webster v United Kingdom* A 55 (1982), 5 EHRR 201 (just satisfaction); *Smith and Grady v United Kingdom* Application nos 33985/96 and 33986/96, 25 July 2000 (just satisfaction).

<sup>37</sup> *Aksoy v Turkey* 1996-VI p 2260, 23 EHRR 553 (see para 6.22 below); *Ilhan v Turkey* Application no 22277/93, 27 June 2000 (see para 6.23 below).

<sup>38</sup> *Papamichalopoulos v Greece* A 260-B (1993), 16 EHRR 440 (merits); A 330-B (1995), 21 EHRR 439 (article 50) (see paras 6.225 - 6.226 below).

<sup>39</sup> See, for example, *Baskaya and Okçuoglu v Turkey* Application nos 23536/94 and 24408/94, 8 July 1999 (see para 6.198 below).

<sup>40</sup> A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction). See paras 6.231 - 6.232 below.

<sup>41</sup> See the discussion of "loss of opportunities" as a head of claim: paras 3.62 - 3.65 below.

<sup>42</sup> A 85 (1984), 7 EHRR 256, paras 27-31.

3.25 These problems arise largely because the Court is not geared to determining issues of valuation or hearing expert evidence.<sup>43</sup> Where the Court is presented with clear evidence of substantial pecuniary loss, it may award the full amount claimed.<sup>44</sup> If it does not accept the full figures presented, it may still make substantial awards on an equitable basis.<sup>45</sup>

**(c) Non-pecuniary loss**

3.26 The Strasbourg Court has made awards for non-pecuniary loss in respect of a wide range of intangible injuries. Non-pecuniary awards have included compensation for pain, suffering and psychological harm,<sup>46</sup> distress,<sup>47</sup> frustration,<sup>48</sup> inconvenience,<sup>49</sup> humiliation,<sup>50</sup> anxiety<sup>51</sup> and loss of reputation.<sup>52</sup> There appears to be no conceptual limit on the categories of loss which may be taken into account, and the Strasbourg Court is often prepared to assume such loss, without direct proof, as illustrated by the following comment:

By reason of its very nature, non-pecuniary damage of the kind alleged cannot always be the object of concrete proof. However, it is reasonable to assume that persons who, like the applicants, find themselves with problems relating to the continuation or inception of their married life may suffer distress and anxiety.<sup>53</sup>

3.27 Another form of intangible injuries which has been recognised by the Strasbourg Court is 'loss of relationship', that is the loss of love, companionship and support which occurs when a relationship between, for example, parent and child, is disrupted in consequence of a violation of Article 6 or 8.<sup>54</sup>

<sup>43</sup> See para 3.11 above. The same problems should not arise in courts in England and Wales: see para 4.61 below.

<sup>44</sup> See *Ilhan v Turkey* Application no 22277/93, 27 June 2000 (see para 6.23 below), *Salman v Turkey* Application no 21986/93, 27 June 2000 (see para 6.11 below).

<sup>45</sup> See *Smith and Grady v United Kingdom* Application nos 33985/96 and 33986/96, 25 July 2000 (see paras 6.179 - 6.181 below).

<sup>46</sup> *Aydin v Turkey* 1997-VI p 1866, 25 EHRR 251 (see para 6.20 below).

<sup>47</sup> *H v France* A 162 (1989), 12 EHRR 74 (see para 6.118 below).

<sup>48</sup> *Van der Leer v Netherlands* A 170 (1990), 12 EHRR 567 (see para 6.43 below).

<sup>49</sup> *Olsson v Sweden (No 2)* A 250 (1992), 17 EHRR 134 (see para 6.162 below).

<sup>50</sup> *Young, James and Webster v United Kingdom* A 44 (1981) 4 EHRR 38 (merits); A 55 (1982), 5 EHRR 201 (just satisfaction) (see para 6.206 below).

<sup>51</sup> See *Lopez Ostra v Spain* A 303-C, 20 EHRR 277 (see para 6.183 below).

<sup>52</sup> See *Sakik v Turkey* 1997-VII p 2609, 26 EHRR 662 (see para 6.51 below).

<sup>53</sup> *Abdulaziz, Cabales and Balkandali v United Kingdom* A 94 (1985), 7 EHRR 471, para 96 (see para 6.218 below). On the facts of that case, the Strasbourg Court felt that its finding of a violation amounted to sufficient just satisfaction for the loss suffered by the applicants.

<sup>54</sup> See for example *H v United Kingdom* A 136-B (1988), 13 EHRR 449 (see para 3.65 below), *W v United Kingdom* A 121 (1987), 10 EHRR 29 (merits); A 136-C (1988), 13 EHRR 453 (just satisfaction) discussed at paras 6.90 - 6.91 below.

3.28 In addition, the Strasbourg Court has recognised that corporate entities may suffer non-pecuniary loss. In *Comingersoll SA v Portugal* the Court noted that:

Non-pecuniary damage suffered by such companies may include heads of claim that are to a greater or lesser extent ‘objective’ or ‘subjective’. Among these, account should be taken of the company’s reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team.<sup>55</sup>

**(d) Costs and expenses**

3.29 This head covers not only the costs of proceedings before the Commission and the Strasbourg Court, but also expenses incurred in domestic proceedings in order to prevent the violation or obtain redress.<sup>56</sup> The rules applied are straightforward. Costs and expenses will only be awarded where they were incurred to prevent or obtain redress, through the domestic system or in Strasbourg, for a violation of the Convention; and they must have been actually and necessarily incurred, and be reasonable in amount.<sup>57</sup>

3.30 Although the costs and expenses are treated as an element of just satisfaction in the Strasbourg Court, we have not dealt with them in detail in this report. The Strasbourg “principles”, to which the HRA section 8(4) requires the courts to have regard, are those relating to “damages”, which under domestic law are distinguished from costs and expenses of litigation. We would expect the issue of costs to be dealt with by the domestic courts without regard to section 8, in accordance with the normal rules.<sup>58</sup> In any event, the rules of the Strasbourg Court relating to costs and expenses present little difficulty in practice, and are not dissimilar to United Kingdom practice.

<sup>55</sup> Application no 35382/97, 6 April 2000, para 35. See para 6.123 below.

<sup>56</sup> See K Reid, *A Practitioner’s Guide to the European Convention on Human Rights* (1998), p 420.

<sup>57</sup> See for example *Le Compte, van Leuven and de Meyere v Belgium* A 54 (1982), 5 EHRR 183. The Court has been responsive to objections to the level of fees, or the number of representatives: see for example *Young, James and Webster v United Kingdom* A 55 (1982), 5 EHRR 201 (just satisfaction); K Reid *op cit* p 421.

<sup>58</sup> “... our domestic rules as to costs will probably cover any costs or expenses incurred by the complainant”: Lord Woolf’s 8th Principle: see part IV para 4.31 below. It must be noted, however, that courts in England and Wales dealing with an HRA claim may be concerned not only with costs in the instant proceedings, but also with costs thrown away in earlier proceedings found to be in violation.

### 3. EXERCISE OF DISCRETION UNDER ARTICLE 41

#### (1) Other measures in response to a violation

3.31 The only remedies available in the Strasbourg Court are declaratory judgments and awards of damages. It is not empowered to grant other forms of relief.<sup>59</sup> It does not even possess the ability to supervise its own judgments, as this responsibility rests with the Committee of Ministers.<sup>60</sup> In several cases, applicants have requested that the Court order a retrial, quash a conviction or annul a domestic judgment.<sup>61</sup> Applicants have also tried to secure reform of domestic law through claims under Article 41.<sup>62</sup> All of these requests have been rejected because the Court lacks the power to grant such remedies.<sup>63</sup>

<sup>59</sup> See *Ireland v United Kingdom* A 25 (1978), 2 EHRR 25, where the Court refused the request of the Irish Government to order the British Government to prosecute or discipline those members of the security forces who were found to have used interrogation techniques conflicting with Article 3. It was originally proposed that the powers of the Strasbourg Court should include the power to annul, suspend or modify a contested decision, and to request the respondent State to institute criminal, administrative or civil proceedings against those found responsible for violations. However, these proposals were rejected by the Committee of Experts in favour of the general principles of international responsibility. See M E Mas "Right to Compensation under Article 50" in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (1993), p 777.

<sup>60</sup> See Article 46(2) of the Convention.

<sup>61</sup> See for example, *Albert and Le Compte v Belgium* A 68 (1983), 13 EHRR 415 (just satisfaction) (a request for the removal of sanctions); *Pakelli v Germany* A 64 (1983), 6 EHRR 1 (a request for the annulment of a domestic judgment); *Belilos v Switzerland* A 132 (1988), 10 EHRR 466 (a request for a direction to cancel a conviction and reimburse the fine); *Hauschildt v Denmark* A 154 (1989), 12 EHRR 266 (a request that a conviction be quashed - see para 6.96 below); *Brozicek v Italy* A 167 (1989), 12 EHRR 371 (a request that a conviction be declared void - see para 6.133 below); *Saidi v France* A 261-C (1993), 17 EHRR 251 (request for retrial); *Pelladoah v Netherlands* A 297-B (1994), 19 EHRR 81 (request that sentence not be executed and proceedings reopened); *Oberschlick v Austria* A 204 (1991), 19 EHRR 389 (request for rehabilitation and for setting aside of domestic judgment).

<sup>62</sup> See for example, *X v United Kingdom* A 55 (1982), 5 EHRR 192; *F v Switzerland* A 128 (1987), 10 EHRR 411 (see para 6.212 below); *Pauwels v Belgium* A 135 (1988), 11 EHRR 238 (see para 6.46 below).

<sup>63</sup> The Committee of Ministers has encouraged Contracting States to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examining the case (including reopening of proceedings) in instances where the Strasbourg Court has found a violation of the Convention and, in particular:

(a) where the injured party continues to suffer because of the outcome of the domestic decision at issue,

(b) where the consequences cannot be rectified except by re-examination or reopening, and

(c) where the domestic decision was on the merits contrary to the Convention or procedurally severely flawed.

See Recommendation No R (2000) 2 of the Committee of Ministers, 19 January 2000.

3.32 However, just satisfaction may be provided by measures taken by the respondent State. The Court has taken the position that in principle the primary duty to remedy the breach rests on the respondent State.<sup>64</sup> A passage from the Court's judgment in *Papamichalopoulos and Others v Greece*<sup>65</sup> explains the relationship between the national obligation and Article 50:

It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach....If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow - or allows only partial - reparation to be made for the consequences of the breach, Article 50 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.<sup>66</sup>

3.33 Measures taken by the State will form part of the Court's assessment of what constitutes just satisfaction. Where, for example, the Strasbourg Court has found that there has been a violation of Article 6 in the original proceedings, the Court may consider that the grant to the applicant of a retrial which complies with the requirements of the Convention amounts to sufficient just satisfaction (at least if the same conclusion is reached on the retrial).<sup>67</sup>

<sup>64</sup> It appears that in its early days the Strasbourg Court frequently deferred any hearing on damages to see what would be the response of the State to the finding that a violation had occurred (L-E Pettiti, E Dacaux and P-H Imbert (eds), *La Convention Européenne des Droits de L'Homme* (2nd ed 1995), p 824). Now the question of damages is more usually dealt with as part of the same decision as the question of a violation (though it may still be reserved, to allow, for example, for the possibility of an agreement between the parties. See *Guillemin v France* 1997-I p 149, 25 EHRR 435 (merits), 1998-VI p 2544 (just satisfaction). See para 6.234 below).

<sup>65</sup> A 330-B (1995), 21 EHRR 439 (article 50), para 34. The case involved a violation of Article 1 of Protocol No 1, in that the Government had failed to compensate the applicants for property which they had unlawfully seized.

<sup>66</sup> A 330-B (1995), 21 EHRR 439, para 34. See paras 6.225 - 6.226 below. The Court held that *restitutio* would be effected if the Government returned the land in question, but that if it failed to do so, damages should be awarded to compensate the applicants for their losses, both pecuniary and non-pecuniary, resulting from the breach established. Cf Dinah Shelton, *Remedies in International Human Rights Law* (1999) p 203, where she criticises the Court's general failure to determine in individual cases what would constitute *restitutio*. This may make it difficult for the Committee of Ministers to determine whether or not the state has remedied a breach.

<sup>67</sup> See for example *Piersack v Belgium (Article 50)* A 85 (1984), 7 EHRR 251 (noted at para 6.95 below). There had been a breach of Article 6, because of doubts as to the impartiality of the Court. Following adjournment of the just satisfaction proceedings pending the retrial, the same verdict and sentence were arrived at. See also *Windisch v Austria* A 186 (1990), 13 EHRR 281 (merits); A 255-D (1993) (just satisfaction) where a retrial given by the state in response to a violation of Article 6(3)(d) found by the Court was held to amount to just satisfaction. Compare *Barberà, Messegué and Jabardo v Spain* A 285-C (1994) where the retrial resulted in acquittal; the Court then made awards of between 4

3.34 Similarly, the deduction of a period of detention from the ultimate sentence, or the grant of a pardon, may remove the need for any further award. As the Strasbourg Court said in *Neumeister v Austria (No 2)*:<sup>68</sup>

While remission of sentence, like the reckoning of detention as part of a sentence, does not constitute real *restitutio in integrum*, it comes as close to it as is possible in the nature of things.

In that case there had been a violation of Article 5(3), on account of the applicant's detention on remand which extended beyond a reasonable time. He was eventually convicted, and the time spent in detention was deducted from his sentence. Following the principal judgment of the Court, the Austrian Government granted him a pardon in respect of the remainder of his sentence. The Court made no monetary award.<sup>69</sup>

3.35 This case can be contrasted with the Court's decision in *Ringeisen v Austria (No 2)*.<sup>70</sup> In this case there had been a violation of Article 5(3) in that the applicant's detention on remand had extended beyond a reasonable time. The Government argued that full reparation had already been afforded by the deduction of the time spent in detention from the sentence imposed. The Court disagreed:

The fact of deducting the time spent in detention on remand from the prison sentence imposed on a person must no doubt be taken into consideration in assessing the extent of the damage flowing from the excessive duration of that detention; but it does not in any way thus acquire the character of *restitutio in integrum*, for no freedom is given in place of the freedom unlawfully taken away.

The consequence of the Government's reasoning would be to deprive Article 5(3) of much of its effectiveness, at least in cases where the person detained on remand for more than a reasonable time is found guilty afterwards: in such cases it would suffice, in order to avoid the application of Article 50, that the time spent in detention on remand should be less than the term of the prison sentence pronounced later and should be deducted from it.<sup>71</sup>

The Court accepted that the deduction of time from the applicant's sentence afforded him partial compensation. However, it also took into account the fact that the detention had made it more difficult for the applicant to conclude a

million and 8 million pesetas (£19,410 and £38,810) to cover pecuniary and non-pecuniary loss (see para 6.101 below).

<sup>68</sup> A 17 (1974), 1 EHRR 136.

<sup>69</sup> It was influenced by his own statement, in his request for a pardon, that remission of the remainder of his sentence would be "the best possible form of reparation", and an apparent offer to waive, in return, all his claims for compensation. The Court observed that this opinion "retains its value; it confirms the just character of the measure taken...".

<sup>70</sup> A 15 (1972), 1 EHRR 504.

<sup>71</sup> A 15 (1972), 1 EHRR 504 para 21.

composition for the termination of his bankruptcy. The Court awarded the applicant 20,000 German marks (£6,250) in damages.

3.36 The Court has not always regarded even the grant of a full pardon as sufficient redress for a violation of Article 6. For example, in *Bönisch v Austria*,<sup>72</sup> where the applicant was convicted in proceedings in breach of Article 6(1), the Court rejected the Government's argument that complete reparation had already been afforded through the granting of a pardon and other measures.<sup>73</sup> The Court considered that there had been a "loss of opportunities", which justified an award.<sup>74</sup>

3.37 Another form of measure by the State which may be regarded as amounting to just satisfaction is a change in the law. In *Dudgeon v United Kingdom (Article 50)*,<sup>75</sup> the Court considered what 'just satisfaction' was appropriate for a violation of Article 8 on account of the laws in Northern Ireland which rendered homosexual acts by consenting adults a criminal offence. The Court acknowledged that the existing laws must have caused the applicant some distress but considered that the principal judgment provided sufficient just satisfaction. This view was taken in light of the Government's introduction of legislation which decriminalised homosexual acts in private by consenting male adults. The Court considered that the applicant:

should be regarded as having achieved his objective of securing a change in the law of Northern Ireland. This being so and having regard to the nature of the breach found, the Court considers that in relation to this head of claim the judgment of 22 October 1981 constitutes in itself adequate just satisfaction for the purposes of Article 50, without it being 'necessary' to afford financial compensation.<sup>76</sup>

## **(2) Just satisfaction by a finding of violation**

3.38 The Court regularly holds that the finding of a violation is sufficient satisfaction without any further monetary award. The Strasbourg Court does not treat the mere fact of violation as in itself justifying some form of award.<sup>77</sup> On the

<sup>72</sup> A 103 (1985), 13 EHRR 409.

<sup>73</sup> In addition to the pardon, the Government expunged the sentences imposed on the applicant, removed his name from the criminal record and discontinued the enforcement procedure.

<sup>74</sup> The Court awarded the applicant 700,000 schillings (£25,190). See para 6.97 and the discussion of the "loss of opportunities" cases, at paras 3.62 - 3.65.

<sup>75</sup> A 59 (1983), 5 EHRR 573.

<sup>76</sup> A 59 (1983), 5 EHRR 573, para 14. It may be noted that though Mr Dudgeon had been investigated, he had not been subjected to prosecution under the relevant laws; had he been, the court might well have come to a different conclusion. Cf *Norris v Ireland* A 142 (1988), 13 EHRR 186; *ADT v United Kingdom* Application no 35765/97, 31 July 2000. See paras 6.175 - 6.178 below.

<sup>77</sup> A similar approach has been taken in South Africa. In the leading South African case of *Fose v Minister of Safety and Security* 1997 (3) SA 786, 826, Ackerman J argued against an



contrary, the Court has regularly held that its own finding of a violation is sufficient just satisfaction. Indeed, these words have become an established formula.<sup>78</sup> The first case in which it was used appears to have been *Golder v United Kingdom*.<sup>79</sup> The applicant, a prisoner, was not permitted to contact a solicitor with a view to bringing libel proceedings against a prison officer. The Court found violations of Article 6(1) (access to court) and Article 8 (respect for correspondence), but made no award of damages, saying simply:

The Court is of opinion that in the circumstances of the case it is not necessary to afford to the applicant any just satisfaction other than that resulting from the finding of a violation of his rights.<sup>80</sup>

Since then, a large number of claims for non-pecuniary damage have failed for this reason.<sup>81</sup>

- 3.39 However, the practice has not been consistent. This has been recognised by the Court itself in a recent case under Article 5, *Nikolova v Bulgaria*.<sup>82</sup> The differences within the Court itself are apparent from the fact that the decision on this point was by a majority of eleven to six. All the dissenting judges considered that an award was necessary to provide just satisfaction for the victim's non-pecuniary damage.<sup>83</sup>

award of "constitutional damages" where no actual damage had been caused by the violation of rights; in such a case a declaration combined with a costs order would be "a sufficiently appropriate remedy to vindicate the plaintiff's right." However, *Halford v United Kingdom* 1997-III p 1004, 24 EHRR 523, discussed at para 6.169 below, may indicate an alternative approach.

<sup>78</sup> Shortened conveniently to "FOVJS" in Karen Reid's comprehensive table of cases: Reid *op cit* p 403. Its use has been strongly criticised in dissenting judgments: see for example Judge Bonello, in *Nikolova v Bulgaria* Application no 31195/96, 25 March 1999 (quoted at para 3.39 n 83 below). See also *Fox, Campbell and Hartley v United Kingdom* A 202 (1991), 14 EHRR 108, 112, dissenting opinion of Judge Pinheiro Farinha and *TW v Malta* Application nos 25644/94 and 25642/94, 29 April 1999, 29 EHRR 185, 209, partly dissenting opinion of Judges Tulkens and Casadevall.

<sup>79</sup> A 18 (1975), 1 EHRR 524. See para 6.155.

<sup>80</sup> A 18 (1975), 1 EHRR 524 para 46.

<sup>81</sup> Dinah Shelton, *Remedies for International Human Rights Law* (1999) p 204 - 208 provides figures on the number of cases in which the judgment was held to be sufficient just satisfaction. Between 1972 and 1981, the Court rejected damages because the judgment was adequate in three cases. Between 1982 and 1991, this practice was used to deny moral damages to applicants in 51 cases. And between 1992 and 1998, moral damages were denied on this ground in 79 cases.

<sup>82</sup> Application no 31195/96, 25 March 1999. The applicant had been refused bail without proper consideration of the merits: see the discussion in *Bail and the Human Rights Act 1998* (2000) Law Commission Consultation Paper No 157, paras 9.10 - 9.14. See paras 6.54 - 6.55 below.

<sup>83</sup> Partly dissenting opinions of Judge Bonello (joined by Judge Maruste), Judge Fischbach (joined by Judges Kuris and Casadevall) and of Judge Greve. The latter called for at least a "token award". Judge Bonello's dissent was even more critical of the FOVJS formula: "I consider it wholly inadequate and unacceptable that a court of justice should 'satisfy' the

- 3.40 The majority took a different view. The judgment referred to earlier cases in which awards had been made, and continued:

However, in more recent cases concerning violations of either or both paragraphs 3 and 4 of Article 5, the Court has declined to accept such claims... In some of these judgments the Court noted that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of Article 5(3) and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered.

In the present case the Court sees no reason to depart from the above case-law. The Court cannot speculate as to whether or not the applicant would have been detained if there had been no violation of the Convention...<sup>84</sup>

- 3.41 This passage seems to confirm that the Court will not make awards of damages to reflect the mere fact of a violation. Indeed, it suggests that, in the current practice of the Court, at least under Article 5, awards for non-pecuniary loss of any kind are likely to be the exception, not the rule. However, even in the short period since *Nikolova* the Court's practice not been wholly consistent, and it is possible that this issue will be subject to further consideration by the Court.<sup>85</sup>
- 3.42 In general terms the Court's approach to damages appears to be more generous in cases of substantive breaches as opposed to procedural breaches. Thus, Dinah Shelton has shown that, in addition to other influencing factors, the Court is more likely to hold that a judgment provides just satisfaction where the breach in question is procedural:

During its second decade, from 1982 to the end of 1991, applicants claimed moral damages in 51 cases where the Court found that the judgment alone was 'just satisfaction' for the moral damage caused

victim of a breach of fundamental rights with a mere handout of legal idiom....The first time the Court appears to have resorted to this hapless formula was in the *Golder* case of 1975. Disregarding its own practice that full reasoning should be given for all decisions, the Court failed to suggest one single reason why the finding should also double up as a remedy. Since then, propelled by the irresistible force of inertia, that formula has resurfaced regularly..."

<sup>84</sup> *Nikolova v Bulgaria* Application no 31195/96, 25 March 1999, para 76.

<sup>85</sup> See further *TW v Malta* Application nos 25644/94 and 25642/94, 29 April 1999, 29 EHRR 185, discussed at para 6.49 below. In *Caballero v United Kingdom* Application no 32819/96, 8 February 2000 the Court referred to the reasoning of *Nikolova* but treated the facts as justifying an exception (see para 6.58 below). In the present year (2000) we have found four relevant cases under article 5; in two damages for non-pecuniary loss were denied (*Jordan v United Kingdom* Application no 30280/96 (see para 6.50 below), 14 March 2000; *Cesky v Czech Republic* Application no 33644/96, 6 June 2000 (see paras 6.62 - 6.63 below); in two they were granted (*Curley v United Kingdom* Application no 32340/96, 28 March 2000 (see para 6.73 below); *Punzelt v Czech Republic* Application no 31315/96, 25 April 2000 (see para 6.64 below).

by the violation. The cases where moral damages were denied share certain general characteristics. First, the Court was often highly divided on the merits....Secondly, the large majority of the cases denying compensation - 40 out of the 51 - concern persons accused or convicted of criminal conduct....In nearly all the cases, the applicants were asserting procedural errors in actions against them, in violation of Article 5 or 6 of the Convention. The most common provision invoked was Article 6(1).

The relatively few non-prisoner cases in which moral damages were denied also concerned procedural errors in civil or administrative hearings. In fact, only four cases of the 51 cases denying moral damages involved challenges to substantive law.<sup>86</sup>

- 3.43 It should be noted also that the cases in which a declaration or other measure was held to amount to just satisfaction were ones in which the losses for which damages were sought were non-pecuniary. It seems that a judgment is not thought to provide sufficient satisfaction in respect of pecuniary loss.<sup>87</sup>

### **(3) Degree of loss**

- 3.44 In a number of cases, the Court has held that, although the applicant has clearly suffered some non-pecuniary damage, the loss suffered is insufficient to render an award of damages necessary. An early example of the Court applying this reasoning can be found in *Silver v United Kingdom (Article 50)*,<sup>88</sup> in which there had been a breach of Articles 8 and 13 on account of interference with correspondence by prison authorities. The Court rejected claims for non-pecuniary damage:

It is true that those applicants who were in custody may have experienced some annoyance and sense of frustration as a result of the restrictions that were imposed on particular letters. It does not appear, however, that this was *of such intensity* that it would in itself justify an award of compensation for non-pecuniary damage.<sup>89</sup>  
(emphasis added)

<sup>86</sup> Dinah Shelton, *Remedies in International Human Rights Law* (1999) p 205.

<sup>87</sup> To date, there do not appear to be any cases where the Court has specifically rejected a claim for pecuniary damages on the basis that the judgment provided sufficient satisfaction in respect of that loss. However, such claims are more likely to fail on causation grounds: see para 3.58 below.

<sup>88</sup> A 67 (1983), 6 EHRR 62. See paras 6.156 - 6.157 below.

<sup>89</sup> A 67 (1983), 6 EHRR 62, para 10. See also *Campbell and Fell v United Kingdom* A 80 (1984), 7 EHRR 165; *Schönenberger and Durmaz v Switzerland* A 137 (1988), 11 EHRR 202. See further discussion of cases of interference with correspondence in breach of Article 8 in Part VI at paras 6.154 - 6.158 below. A similar view was taken in *Koendjiharie v Netherlands* A 185-B (1990), 13 EHRR 820, a case involving a breach of Article 5(4), at para 34. It may be relevant that in all these cases where the non-pecuniary damage sustained was insufficient to justify an award of compensation the applicants were convicted criminals: see discussion of "*Conduct of applicant*" below at paras 3.54 - 3.57 below.

#### **(4) Seriousness of the violation**

3.45 The seriousness of the violation may be an important factor justifying a generous award. For example, in *Aksoy v Turkey*,<sup>90</sup> the applicant had been detained by Turkish security forces on suspicion of terrorism; he was tortured in custody, but eventually released without charge. The Court found violations of Articles 3, 5 and 13, and allowed the claim for pecuniary and non-pecuniary loss in full:

In view of the extremely serious violations of the Convention suffered by Mr Zeki Aksoy and the anxiety and distress that these undoubtedly caused to his father, who continued with the application after his son's death,<sup>91</sup> the Court has decided to award the full amounts of compensation sought as regards pecuniary and non-pecuniary damage.<sup>92</sup>

3.46 Similar reasoning has been used by the Court in a number of cases involving grave violations carried out by the Turkish security forces.<sup>93</sup> Although there is an apparent analogy with aggravated damages in English law, the Strasbourg Court has not to date made an award expressly in those terms, and has on occasion rejected claims for aggravated damages.<sup>94</sup>

#### **(5) Conduct of the respondent**

3.47 Similarly, the Strasbourg Court has not in practice been willing to award extra sums by way of punitive damages.<sup>95</sup> Such claims have been specifically rejected

<sup>90</sup> 1996-VI p 2260, 23 EHRR 553. See para 6.22 below.

<sup>91</sup> The applicant was killed after lodging the complaint with the Court, apparently after having received death threats to make him withdraw his application.

<sup>92</sup> 1996-VI p 2260, 23 EHRR 553, para 113. The Court awarded 4,283,450,000 Turkish lira (£24,325) for pecuniary and non-pecuniary damages.

<sup>93</sup> See for example *Aydin v Turkey* 1997-VI p 1866, 25 EHRR 251 (see para 6.20 below); *Assenov v Bulgaria* 1998-VIII p 3264, 28 EHRR 652 (see para 6.25 below). In the latter case, the Court referred to "the gravity and number of violations" found (para 175); on "an equitable basis" it awarded damages for non-pecuniary loss of 6 million Bulgarian leva (£2,140). See also *Kaya v Turkey* 1998-I p 297, 28 EHRR 1 (see para 6.8 below); *Mentes v Turkey* 1998-IV p 1686, 26 EHRR CD, CD1. M Pellonpää has commented

Although compensation for non-pecuniary damage is not punitive in nature, it may in its practical effect come close to such 'punitive or exemplary' damages as are sometimes argued to constitute a specific, additional remedy for unlawful expropriation under general international law.

"Does the European Convention on Human Rights require 'Prompt, Adequate and Effective' compensation for deprivation of possessions", in M Tupamäki *Liber Amicorum Bengt Broms* (1999), pp 377-394 at p 385.

<sup>94</sup> See *Selçuk and Asker v Turkey* 1998-II p 891, 26 EHRR 477. See "aggravated damages" discussed in Part IV paras 4.69 - 4.70.

<sup>95</sup> M Amos, "Damages for Breach of the Human Rights Act 1998" [1999] EHRLR 178, 192. Cf para 6.196 note 176 below, in relation to *Halford v United Kingdom* 1997-III p 1004, 24 EHRR 523, and Judge Matscher's dissenting judgment in *Gaygusuz v Austria* 1996-IV p 1129, 23 EHRR 364, quoted at para 6.217 below.

in *Akdivar v Turkey*,<sup>96</sup> *Mentes v Turkey*,<sup>97</sup> and *Selçuk and Asker v Turkey*.<sup>98</sup> Unfortunately, no reasons were given for rejecting these claims. However, such an award seems inconsistent with the general principle established by the Court that damages are intended to achieve *restitutio in integrum*.

3.48 On the other hand, the conduct of the respondent State or its agent affects the Court's discretion to award damages under Article 41 in two ways. First the Court has been more inclined to award damages where the violation itself was particularly offensive. Secondly, it has been suggested that awards in certain cases can best be explained on the basis that the Court is more willing to award damages where the respondent State has allowed the continuation of practices which have previously been held by the Court to be violations of the Convention.

**(a) Offensive conduct of the State**

3.49 A clear example of the former is *Bozano v France*.<sup>99</sup> The case involved a violation of Article 5(1), in the Court's words:

... a violation of the right to liberty and to security of person, a disguised form of extradition designed to circumvent a negative ruling by the appropriate French court, and an abuse of deportation procedure for objects and purposes other than its normal ones.<sup>100</sup>

Although the period of unlawful detention was only twelve hours, the Court awarded 100,000 French francs (£9,880) for non-pecuniary loss resulting from the "unlawful and arbitrary deprivation of liberty".<sup>101</sup>

3.50 Another illustration is *Halford v United Kingdom*.<sup>102</sup> The applicant was a former Assistant Chief Constable, whose telephone had been tapped by the police in order to gain information about sex discrimination proceedings which the applicant was bringing against the police. The Strasbourg Court found violations of Articles 8 and 13. It described what occurred as "a serious infringement of her rights" having regard to the improper purpose of the police in carrying out the tapping, which was not subject to control by domestic law. It awarded £10,000 for non-pecuniary loss, even though it found "no evidence" that the stress which she had suffered was "directly attributable to the

<sup>96</sup> 1998-II p 711 (just satisfaction). See para 6.235 below.

<sup>97</sup> 1998-IV p 1686, 26 EHRR CD, CD1.

<sup>98</sup> 1998-II p 891, 26 EHRR 477.

<sup>99</sup> A 111 (1986), 9 EHRR 297 (merits); A 124-F (1987), 13 EHRR 428 (just satisfaction) See paras 6.37 - 6.38 below. See also *Alenet de Ribemont v France* A 308 (1995), 20 EHRR 557, discussed at para 6.131 below, and the discussion in Part IV at paras 4.69 - 4.73 below.

<sup>100</sup> A 124-F (1987), 13 EHRR 428, para 8.

<sup>101</sup> See further discussion of Article 5(1) in Part VI at paras 6.29 - 6.42 below.

<sup>102</sup> 1997-III p 1004, 24 EHRR 523, discussed in Part VI at para 6.169.

interception of her calls, rather than to her other conflicts with the Merseyside Police.”<sup>103</sup>

- 3.51 Similarly, in *Smith and Grady v United Kingdom (Article 41)*<sup>104</sup> the Court’s decision as to the appropriate level of just satisfaction to be given to the applicants was influenced by its view of the conduct of the respondent State. The applicants were members of the armed forces who were dismissed, despite exemplary service records, because of their sexual orientation. The Court noted that both the investigations and the subsequent discharges constituted “especially grave” interferences with the applicants’ private lives. The applicants received awards of £19,000 each for non-pecuniary loss and substantial awards for pecuniary loss.

**(b) Record of previous violations by the State**

- 3.52 Similarly, it has been suggested that a respondent State’s record of previous violations may be a factor to which the Strasbourg Court has regard. Dinah Shelton cites the Court’s treatment of violations of Article 6 in criminal cases by Italy:

Most cases involving accused or convicted criminals in which moral damages were awarded were cases against Italy for the excessive length of proceedings....It appears, then, that damages are more likely to be awarded for routine and non-controversial substantive violations or procedural violations where there is a pattern of non-compliance.<sup>105</sup>

- 3.53 She finds a similar picture in relation to claims for excessive delay in civil proceedings in Italy. She notes that in a number of these cases, the Court awarded the full amount claimed by the applicants, when in many cases against other States, applicants recovered only part of their claim or were denied damages altogether.<sup>106</sup> However, it does not appear that the Court itself has in terms relied on repetitive conduct to justify higher awards.

**(6) Conduct of the applicant**

- 3.54 The conduct of the applicant may be relevant to causation. To the extent that he has contributed to the loss for which he is claiming, the responsibility of the State

<sup>103</sup> 1997-III p 1004, 24 EHRR 523, para 76. This award may be contrasted with telephone tapping cases where the finding has been regarded as sufficient just satisfaction. It may be relevant that most of these decisions involved applicants who were criminals or suspected criminals. See discussion at Part VI at paras 6.167 - 6.171 below.

<sup>104</sup> Application nos 33985/96 and 33986/96, 25 July 2000. See paras 6.179 - 6.181 below.

<sup>105</sup> Dinah Shelton, *Remedies in International Human Rights Law* (1999) p 219.

<sup>106</sup> Dinah Shelton, *Remedies in International Human Rights Law* (1999) p 220. She comments: “It does seem clear that the Italian government thus far has chosen to pay damages rather than repair its legal system; perhaps larger awards are deemed necessary to exert pressure for change.”

is diminished. Thus, for example, in *Luberti v Italy*,<sup>107</sup> having found a violation of Article 5(4) on account of the lack of speed in proceedings, the Court took account of the fact that the applicant had contributed to part of the delays. It held that the judgment provided just satisfaction for any non-pecuniary injury suffered:

... it cannot be forgotten that he made, sometimes simultaneously, a series of applications several of which were addressed to a judicial authority that lacked jurisdiction; he was thus responsible for the fact that proceedings in regard to his case were pending at the time before different tribunals, a situation that did not enhance the prospects of a rapid solution. Above all, a considerable amount of time was lost as a result of his absconding...and going into hiding....<sup>108</sup>

3.55 However, even where not contributing directly to the loss, the applicant's conduct or character may be taken into account, in the same way as the conduct of the respondent State, in determining whether or not to award just satisfaction. This is most likely where the applicant has been engaged in reprehensible conduct at the time of the breach, though it has also been suggested that the criminal character or record of the claimant is more generally considered to be relevant by the Strasbourg Court.

3.56 The conduct of the applicant which contributes directly to the breach in question will be an important factor in the Strasbourg Court's assessment of just satisfaction. The clearest example is *McCann v United Kingdom* (which concerned the killing of three IRA terrorists suspected of planning a bomb attack in Gibraltar).<sup>109</sup> The Court found a violation of Article 2, but rejected the claim for compensation, having regard to the fact that the victims were intending a terrorist attack. In such circumstances, the Court made it clear that an award of damages was inappropriate.

3.57 Even where the applicant's conduct is not directly related to the breach in question, it has been argued that the Strasbourg Court seems to take into account the applicant's character in deciding whether or not to award damages. For example, the Court seems more willing to deny damages and hold that the judgment provides just satisfaction where the applicant is a criminal or a suspected criminal. This is suggested in some cases on Article 6.<sup>110</sup> Dinah

<sup>107</sup> A 75 (1984), 6 EHRR 440.

<sup>108</sup> A 75 (1984), 6 EHRR 440, para 41. See also *Johnson v United Kingdom* 1997-VII p 2391, 27 EHRR 296 (discussed at Part VI para 6.42 below), in which the Court made an award, but in assessing the amount took account of the applicant's "negative attitude" towards rehabilitation.

<sup>109</sup> A 324 (1995), 21 EHRR 97 (see paras 6.5 - 6.6 below). See also *Silver v United Kingdom* A 61 (1983), 5 EHRR 347 (merits), A 67 (1983), 6 EHRR 62 (just satisfaction), discussed at paras 6.156 - 6.157 below.

<sup>110</sup> See for example *Eckle v Germany (Article 50)* A 65 (1983), 13 EHRR 556 (discussed at paras 3.58 and 6.128 below), where the Strasbourg Court noted when considering whether to award the applicants damages for non-pecuniary loss "...it cannot be overlooked that [the applicants] were charged with serious acts of fraud committed to the detriment of,

Shelton argues that the applicant's character is a factor in the Court's assessment of just satisfaction,<sup>111</sup> and that the likelihood of recovering damages is greater in cases involving civil, rather than criminal proceedings.<sup>112</sup>

#### 4. CAUSATION

##### (1) Need for clear causal link

3.58 The Strasbourg Court normally applies a strict causation test which bars the majority of claims for damages, in particular those for pecuniary loss. An straightforward example is *Eckle v Germany (Article 50)*.<sup>113</sup> The applicants were convicted of fraud but the criminal proceedings were found to have extended beyond a reasonable length contrary to Article 6(1). The applicants claimed various pecuniary losses including loss of earnings resulting from the fact that their business collapsed whilst in prison and from being unable to engage in professional activities at an earlier date. The Court dismissed the claim for pecuniary damages because the losses were not caused by the violation:

The sole matter to be taken into consideration is thus the prejudice possibly entailed by the fact of the two proceedings in question having lasted beyond a 'reasonable time'. Yet, the alleged financial losses of Mr and Mrs Eckle result from the very existence and outcome of the prosecutions brought against them....<sup>114</sup>

amongst others, persons lacking substantial financial resources and that the Trier Court imposed heavy prison sentences on them" (see para 24). See also *Saunders v United Kingdom* 1996-VI p 2044, 23 EHRR 313 (see para 6.112 below); *Welch v United Kingdom* A 307-A (1995), 20 EHRR 247 (merits); 1996-II p 386, 21 EHRR CD1 (just satisfaction) (see para 6.149 below).

<sup>111</sup> See Dinah Shelton, *Remedies in International Human Rights Law* (1999) p 209:

The Court seems close to the view that those accused or convicted of crimes should receive no damages for procedural violations unless they can demonstrate actual innocence. The conduct of the government appears to be much less significant, although severe government misconduct sometimes can overcome the bias against prisoners.

Alistair Mowbray makes a similar point:

In practice the Court is very reluctant to provide financial compensation to convicted prisoners (many of whom have been imprisoned for serious crimes, such as drugs-smuggling, armed robbery, and incitement to murder) especially where the breach of the Convention is concerned with procedural guarantees.

A R Mowbray, "The European Court of Human Rights' Approach to Just Satisfaction" [1997] PL 647, 652. But see K Starmer, *European Human Rights Law* (1999), at pp 62-63, who notes that "The fact that the applicant has criminal convictions does not seem to be a determinative factor".

<sup>112</sup> *Ibid* p 219: "Those cases where applicants requested and were awarded moral damages involve civil proceedings approximately three times more frequently than criminal ones, although cases originating with detainees are filed more frequently."

<sup>113</sup> A 65 (1983), 13 EHRR 556. See also para 6.128 below.

<sup>114</sup> A 65 (1983), 13 EHRR 556, para 20.



## **(2) Speculative losses**

3.59 A more difficult issue is the question of speculative losses. The Strasbourg Court has not been consistent in its approach to cases where there is uncertainty whether or not the applicant would have suffered the loss if the violation had not occurred. In some cases, the Strasbourg Court has demonstrated an unwillingness to speculate, applying a *strict causation* test to deny the applicant damages. In other cases, the Strasbourg Court has been more generous and has awarded damages under the head of “*loss of opportunities*” despite the uncertainty. Once again, the Court has not made clear the reasons for the distinction. There follow examples of both strands of the Court’s case-law.

### **(a) Strict causation**

3.60 In *De Cubber v Belgium (Just Satisfaction)*<sup>115</sup> the applicant was convicted of forgery but complained that the tribunal was not impartial as one of the judges had previously performed the function of investigating judge. The Court found a violation of Article 6(1) but rejected the claim for pecuniary and non-pecuniary loss due to the absence of a clear causal link:

The Court cannot speculate as to what the outcome of the proceedings in question would have been had the violation of the Convention not occurred; there is nothing to show that the result would probably have been more favourable to the applicant....In short, no causal link between the violation of the Convention and the length of the detention has been established.<sup>116</sup>

3.61 Similarly, in *Ruiz-Mateos v Spain*,<sup>117</sup> the Strasbourg Court refused damages on the same basis. Proceedings instituted by the applicants to regain expropriated property were found by the Court to be in violation of Article 6(1) due to the unreasonable length and non-adversarial nature of the proceedings. Again, the Court rejected the claims for damages because it would not speculate as to the outcome of the national proceedings had the violations not occurred.<sup>118</sup>

### **(b) Loss of opportunities**

3.62 In the other line of cases, the Court has sometimes been willing to speculate about hypothetical events. Under the broad label of “loss of opportunities”, the Court has awarded substantial damages for losses which are speculative in nature. This is so even though the opportunity is described as “questionable” or

<sup>115</sup> A 124 (1987), 13 EHRR 422. See para 6.98 below.

<sup>116</sup> A 124 (1987), 13 EHRR 422, para 23. The Court did award a sum of 100,000 Belgian francs (£1,600) for non-pecuniary damages suffered, not as a result of the loss of liberty, but for the “legitimate misgivings” that the applicant had about the impartiality of the tribunal which convicted him.

<sup>117</sup> A 262 (1993), 16 EHRR 505. See also *Informationsverein Lentia v Austria* A 276 (1993), 17 EHRR 93 noted at para 6.201 below.

<sup>118</sup> A 262 (1993), 16 EHRR 505, para 70.

“unlikely”. In *Martins Moreira v Portugal*,<sup>119</sup> for example, the applicant complained that the proceedings in which he sought damages for personal injury were not completed within a reasonable time as required by Article 6(1). As a result of the delay, the defendant became insolvent. The court noted:

though it is not certain that the applicant would have recovered the entirety of his debt if the main proceedings had been terminated earlier, it is, in the Court’s view, reasonable to conclude that, as a result of the long delay, ... he suffered a loss of opportunities which warrants an award of just satisfaction in respect of pecuniary damage.<sup>120</sup>

3.63 *Bönisch v Austria*<sup>121</sup> provides another example. The applicant was convicted in national proceedings which did not adhere to the principle of equality of arms in breach of the applicant’s right to a fair trial under Article 6(1). The applicant claimed damages for pecuniary and non-pecuniary loss, including financial losses to his business. The Court addressed the pecuniary claim as follows:

... the evidence available does not establish the existence of a causal link between the violation of the Convention and the deterioration in Mr Bönisch’s financial situation. Admittedly, the Court cannot speculate as to what the outcome of the two sets of proceedings would have been had the breach not occurred. Nevertheless, the Court does not exclude the possibility that the applicant suffered, as a result of the potential effects of the violation found, a *loss of opportunities* of which account must be taken, even if the prospects of realising them were *questionable*.<sup>122</sup> (emphasis added)

A global award of 700,000 Austrian schillings (£27,420) was made for pecuniary and non-pecuniary loss.

3.64 This approach appears to be in direct conflict with the requirement for a clear causal link. Further cases on loss of opportunities do not help to resolve the conflict. In *Weeks v United Kingdom*,<sup>123</sup> the applicant argued that had he been given the opportunity to challenge his detention, he would have been released earlier and he therefore sought damages for loss of earnings and non-pecuniary damage. The Court made it clear that “no compensation [was] payable in respect of the harmful consequences attributable to the contested deprivation of liberty as such.” Rather, damages could only be awarded in respect for the lack

<sup>119</sup> A 143 (1988), 13 EHRR 517.

<sup>120</sup> A 143 (1988), 13 EHRR 517, para 65.

<sup>121</sup> A 103 (1985), 13 EHRR 409. Referred to at paras 3.36 and 6.97. See also *Delta v France* A 191-A (1990), 16 EHRR 574, at paras 6.105 and 6.144 below, and *Lingens v Austria* A 103 (1986), 8 EHRR 407, at paras 6.195 - 6.196 below.

<sup>122</sup> A 103 (1985), 13 EHRR 409, para 11.

<sup>123</sup> A 143-A (1988), 13 EHRR 435. For a discussion of the facts of the case, see paras 6.68 - 6.71 below.

of an opportunity to challenge the detention in court (as required by Article 5(4)). The Court justified its award of damages as follows:

The Court finds it impossible to state that the applicant would definitely have been released had such proceedings been available to him. On the other hand, it *cannot be entirely excluded* that he might have been released earlier and, in view of his age, might have obtained some practical benefit. Consequently, Mr Weeks may be said to have suffered *a loss of opportunities* by reason of the absence of such proceedings, even if in the light of the recurrence of his behavioural problems the prospect of his realising them fully was questionable. The claim for pecuniary loss *cannot therefore be completely discounted*.<sup>124</sup> (emphasis added)

3.65 The same reasoning has frequently been employed in cases involving children taken into public care. For example, in *H v United Kingdom (Just Satisfaction)*,<sup>125</sup> proceedings regarding access to the applicant's child who was in public care and subsequently adopted were found to have extended beyond a reasonable time in breach of Articles 6(1) and 8. The applicant claimed damages for the loss of relationship with her daughter as well as other non-pecuniary damages. The Court awarded £12,000 on an equitable basis, explained as follows:

As regards the applicant's loss of her relationship with her daughter and the deprivation of the latter's love, companionship and support, which she attributed to the breaches of the Convention, it *cannot be affirmed with certainty* that these matters would not have occurred if the relevant proceedings had been terminated more expeditiously. Indeed, it is noteworthy in this respect, as the Government pointed out, that in his report the Local Ombudsman expressed the opinion that it was 'very unlikely that the decision would have been different even if the [local authority] had acted more quickly.'

On the other hand, the Court does not feel able to conclude that, as the Government submitted, a speedier conclusion of the proceedings in question could not have genuinely benefited the applicant in practical terms....In these circumstances, *it cannot, in the Court's opinion, be excluded* that a prompter conclusion of the proceedings might have resulted in a different outcome. To this extent, the applicant may therefore be said to have suffered *some loss of real opportunities*, warranting monetary compensation. (emphasis added)<sup>126</sup>

<sup>124</sup> A 143-A (1988), 13 EHRR 435, para 13. Just satisfaction of £8,000 was awarded for the loss of opportunities and non-pecuniary damage suffered by the applicant. The Court did take note of "special features of the case, notably the severity of the indeterminate life sentence in relation to the crime committed."

<sup>125</sup> A 136-B (1988), 13 EHRR 449. See also paras 4.83 - 4.84 below. The Strasbourg case-law in relation to children being taken into care is also discussed at paras 6.90 - 6.91 (Article 6) and 6.159 - 6.162 (Article 8) below.

<sup>126</sup> A 136-B (1988), 13 EHRR 449 at paras 12-13.

**(c) Attempts to reconcile the two approaches**

3.66 The Court has not responded to attempts to bridge the gap. Recently, in *Perks v United Kingdom*,<sup>127</sup> (a claim for violations of Articles 5 and 6) the applicants discussed the basis upon which such losses should be assessed, by reference to the Court's reasoning in the loss of opportunities cases.<sup>128</sup> A passage from the Court's judgment sets out the applicants' argument:

While accepting that no just satisfaction is to be awarded where there is no causal link between the violation of Article 6 and the decisions of the national courts, the applicants contended that compensation is necessary where these decisions were shown to have been wrong and have resulted in an unjust deprivation of liberty. In the applicants' view they should not be expected to prove with certainty that the injustice would not have occurred but for the violation of Article 6. This would be asking the impossible. What matters, however, is that it is impossible to say that, if the applicant had benefited from legal representation, that would have made no difference.

The applicants considered, therefore, that it was necessary to strike a balance. While they did not ask the Court to assess compensation on the basis of the full recovery of loss, the applicants maintained that they should not be denied just satisfaction altogether.

3.67 However, the Court declined the chance to clarify its position on speculative losses. Without addressing the arguments, the Court simply stated that it could not speculate as to the outcome of the domestic proceedings and rejected the claim for damages.<sup>129</sup>

3.68 There are numerous cases falling on each side of the line. The position is further complicated by the fact that sometimes the court is prepared to make its own assessment of what the outcome of proceedings would have been. In *Pressos Compania Naviera SA v Belgium*,<sup>130</sup> the applicant had been deprived of a claim against the Belgian government in violation of Article 1 of Protocol No 1. The Belgian government's argument that the applicant should receive only damages for loss of opportunity was rejected and the court made its own equitable assessment of the apportionment and awarded 50 per cent of the sum claimed against the government.

<sup>127</sup> Application nos 25277/94 et al, 12 October 1999. This case is discussed in detail in Appendix A below at paras A.16 - A.22.

<sup>128</sup> The applicants, who were on low income, were not legally represented and did not have the benefit of legal aid in proceedings which led to their imprisonment for not paying community charges.

<sup>129</sup> All of the applicants except Mr Perks were denied damages on this basis. Mr Perks did successfully recover damages after the Government conceded that an exception should be made in his case. Due to his mental health problems, the Government accepted that it was unlikely that he would have been imprisoned had a legal representative been present to bring his particular circumstances to the attention of the court.

<sup>130</sup> A 332 (1995), 21 EHRR 301 (merits); 1997-IV p 1292, 24 EHRR CD 16 (just satisfaction). See paras 6.229 - 6.230 below for the full facts.

3.69 It is impossible to reconcile these decisions.<sup>131</sup> The approach taken certainly does not seem to be determined by the right in question nor the type of speculation required to make an award. One can only guess that in some cases the Court feels sympathy towards certain applicants based on the particular circumstances and will go out of its way to award damages despite the usual requirement of a clear causal link.

## 5. INTEREST

### (1) Interest as a pecuniary loss

3.70 The Strasbourg Court recognises interest as a pecuniary loss which may be compensated under Article 41. In line with the *restitutio* aim of just satisfaction, the Strasbourg Court has made it clear that

the adequacy of the compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as the fact that ten years have elapsed....<sup>132</sup>

3.71 In a number of cases the Strasbourg Court has awarded pecuniary damages which include interest. The Court appears to take account of the rates of interest which would be awarded by a domestic court.<sup>133</sup> In *Darby v Sweden*,<sup>134</sup> the applicant was awarded the tax ‘unduly paid’ together with interest “assessed in the light of the interest rates in Sweden at the time.” In *Pine Valley Developments v Ireland*,<sup>135</sup> the applicants were awarded a global sum which included interest. The Strasbourg Court considered

<sup>131</sup> G Dannemann notes that the Strasbourg Court awards damages for loss of opportunities in approximately one quarter of the cases, but “has given no reason why no similar award was made in the other three quarters of the cases”. See the discussion in *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention* (1993), summarised at p 464. It has been suggested that the difference in treatment by the Strasbourg depends on whether the breach in question concerns the procedural or substantive aspects of Article 6, and that where the breach in question is substantive, the Court is more likely to admit that the victim may have sustained a loss of opportunities warranting an award of just satisfaction. See M E Mas “Right to Compensation under Article 50” in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (1993), p 785.

<sup>132</sup> *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) Series A No 301-B, 19 EHRR 293, para 82. See also *Guillemin v France* 1997-I p 149, 25 EHRR 435 (merits), 1998-VI p 2544 (just satisfaction), discussed at paras 6.124 and 6.234 below.

<sup>133</sup> Though this is not always the case. See *Bergens Tidende v Norway* Application no 26132/95, 2 May 2000, discussed in para 6.199 below.

<sup>134</sup> A 87 (1990), 13 EHRR 774.

<sup>135</sup> A 246-B (1993), 16 EHRR 379 (discussed at paras 6.219 - 6.221 below).

that it should have regard to the rates applicable to Irish Court judgments; the commercial rates cited by the applicants appear to be more appropriate to a claim based on lost development profits.<sup>136</sup>

3.72 In *Stran Greek Refineries and Stratis Andreadis v Greece*,<sup>137</sup> the applicants were awarded damages calculated by reference to the arbitration award which they had been prevented from enforcing because of a law enacted by the State for that purpose. They claimed interest at six per cent from the date on which the original action was commenced against the State. The Strasbourg Court noted that the arbitration award, though recognising that the applicants had a claim (*inter alia*) for interest at six per cent, had not referred to interest in the operative part of the award. Nevertheless the Strasbourg Court awarded them interest at that rate, but from the date on which the award was made.<sup>138</sup>

3.73 It is sometimes less clear how the Strasbourg Court arrives at the amount of interest awarded. In *Schuler-Zraggen v Switzerland*,<sup>139</sup> the Strasbourg Court found a violation of Article 14 taken with Article 6(1) on account of an unjustifiable difference in treatment of a state invalidity pension. The Court reserved judgment in respect of the applicant's claim for pecuniary damages. Following the principal judgment, a rehearing took place at the national level and the applicant was granted a full invalidity pension with retrospective effect. The applicant went back to Strasbourg and claimed interest on the full invalidity pension which had been paid eight years late. The Government objected to the claim arguing that full reparation had already been made. The Court held that an award of interest was justified and accordingly awarded 25,000 Swiss francs (£13,960) in damages, amounting to approximately 60 per cent of the original claim. Though noting that it did not agree with the

imprecise method of calculation proposed by [the applicant] and in particular with the rate of five per cent<sup>140</sup>

the Court did not explain the calculation of the amount awarded.

3.74 It seems that awards of interest have only been made in relation to pecuniary claims. The Court is unlikely to award interest on non-pecuniary loss. In *Smith and Grady v United Kingdom*<sup>141</sup> the Strasbourg Court rejected a claim by the applicants for interest on non-pecuniary loss, noting that

<sup>136</sup> A 246-B (1993), 16 EHRR 379, para 14. The applicants' claim was based on the difference in value of their land as they received it by comparison with the value it would have had with the relevant permissions. It was not a claim for lost development profits.

<sup>137</sup> A 301-B (1994), 19 EHRR 293.

<sup>138</sup> Some six years after the initial action was started.

<sup>139</sup> A 305-A (1995), 21 EHRR 404.

<sup>140</sup> A 305-A (1995), 21 EHRR 404, para 15.

<sup>141</sup> Application nos 3985/96 and 33986/96, 25 July 2000, discussed at paras 6.179 - 6.181 below.

It does not consider an award of interest on this sum to be appropriate given the nature of the loss to which it relates.<sup>142</sup>

## **(2) Default interest**

- 3.75 More recently, the Strasbourg Court has begun to award default interest under Article 41.<sup>143</sup> Such interest is payable if the damages awarded by the Strasbourg Court under Article 41 are not paid to the applicant by the respondent State within three months of the date of judgment. In awarding default interest, the Strasbourg Court usually adopts the standard interest rate applicable in the relevant country.

## **6. CONCLUSION**

- 3.76 It is not easy to draw clear principles from the case-law. Many points are more matters of practice or evidence than principle. Compensation may be awarded for both pecuniary and non-pecuniary loss. Non-pecuniary loss includes feelings of distress, anxiety and humiliation, and may include the loss of a relationship. The Court may reject a claim where the applicant has not established a clear causal connection between the violation of the Convention and the damage claimed, but “speculative losses” are sometimes allowed.

- 3.77 In many cases, usually for reasons which are not clearly defined, the court holds that the finding of a violation will itself be sufficient just satisfaction and makes no award. Dinah Shelton suggests:

It ... seems that the most significant factors in determining whether or not damages will be awarded are the character of the applicant, the unanimity of the Court, and the procedural or substantive nature of the right violated.<sup>144</sup>

- 3.78 The only principle which is clearly stated in the Strasbourg case-law is that of *restitutio in integrum*. The aim of an award should be, so far as possible, to put an end to the breach and to make reparation for its consequences in such a way as

<sup>142</sup> Application nos 3985/96 and 33986/96, 25 July 2000, para 13.

<sup>143</sup> The practice of awarding default interest for delayed payment of just satisfaction was introduced by the Strasbourg Court in January 1996. Reference to this fact was made by the Court in its judgment in *Hentrich v France* (1997) 24 EHRR CD, CD19, para 15.

<sup>144</sup> Dinah Shelton, *Remedies in International Human Rights Law* (1999) p 209.

to restore the situation existing before the breach. However, in applying that principle, the Court will take account of the parties' conduct "on an equitable basis", a phrase which "it has never attempted to define, or reduce to a set of principles."<sup>145</sup>

<sup>145</sup> S Grosz, J Beatson and P Duffy, *Human Rights: The 1998 Act and The European Convention* (2000), p 145.



# **PART IV**

## **JUST SATISFACTION UNDER THE COMMON LAW**

### **1. INTRODUCTION**

- 4.1 In this Part we consider how the principle “*restitutio in integrum*” derived from the Strasbourg case-law on “just satisfaction” can be expected to be applied under section 8 of the HRA when a claim is made under section 7 by a victim<sup>1</sup> against a public authority,<sup>2</sup> and the court finds that the public authority has infringed or intends to infringe the victim’s Convention rights.<sup>3</sup>
- 4.2 As we shall show, the obligation in section 8 to consider the Strasbourg principles in assessing damages does not mean that the domestic courts are bound in every case to follow Strasbourg precedents. We expect that in the majority of cases under the HRA, the domestic courts will be able to apply the rules by which damages are normally assessed.

### **2. TAKING INTO ACCOUNT THE STRASBOURG PRINCIPLES**

- 4.3 In considering whether damages are to be awarded for a breach of a Convention right and the quantum of any such damages, section 8(4) of the HRA requires the courts to take account of the principles applied by the Strasbourg Court in relation to awards of compensation under Article 41 of the Convention.

#### **(1) Must the principles be followed?**

- 4.4 It may be asked whether section 8(4) imposes an obligation on the courts to apply the Strasbourg principles or merely to have regard to them. The Lord Chancellor has stated that the aim of section 8(4) is that “people should receive damages equivalent to what they would have obtained had they taken their case to Strasbourg”.<sup>4</sup> However, it does not seem that this statement should be taken too literally. The issue is one of interpretation of section 8(4); and this only requires the courts to “take into account” the principles applied by the Strasbourg Court.<sup>5</sup>

<sup>1</sup> See para 2.15 above.

<sup>2</sup> See paras 2.11 - 2.13 above.

<sup>3</sup> The court must be one that has the power to award damages. See s 8(2), discussed above in paras 2.16 - 2.18 above.

<sup>4</sup> *Hansard* (HL) 3 November 1997, vol 582, col 1232. See also the Government’s White Paper, *Rights Brought Home: The Human Rights Bill* (1997) Cm 3782 para 2.6.

<sup>5</sup> The view that the principles of the Strasbourg Court need only be taken into account and not applied by domestic courts is supported in the academic literature. See for example A Lester and D Pannick (eds), *Human Rights and Practice* (1999) para 2.8.4 n 1; S Nash and N Furse, *Essential Human Rights Cases* (1999) p 23. An analogous but more general obligation can be found in s 2 of the HRA which requires domestic courts to take into

4.5 As a general rule, however, in the light of section 8(4), it would not normally seem appropriate for a domestic Court under the HRA to award damages of a kind not awarded in Strasbourg,<sup>6</sup> nor to deny damages for a loss for which the Strasbourg Court would award damages.

**(2) Principles not practice**

4.6 It is only the “principles” applied by the Strasbourg Court in relation to just satisfaction which are referred to specifically in section 8(4). “Principles” are normally understood to refer to the basic objectives of the system, as opposed to the application of those principles to assessing damages in individual cases.

4.7 This understanding is well illustrated by the judgment of the Court of Appeal in *Heil v Rankin*.<sup>7</sup> The Court of Appeal was considering a number of test cases, selected to enable the Court to respond to a Law Commission report which proposed that damages for non-pecuniary loss, such as pain and suffering, should be increased substantially to take account of changes in the value of money and other factors.<sup>8</sup> Giving the judgment of the Court,<sup>9</sup> Lord Woolf MR distinguished between the underlying “principles” and “guidelines” for individual cases: the task of the court in that case was not

to depart from any existing legal principles as to the assessment of personal injury damages...[but] limited to providing fresh guidelines so as to give effect to well established principles as to the objective which should be achieved by an award of damages.<sup>10</sup>

4.8 The main underlying “principle”, as he saw it, was that “full compensation”<sup>11</sup> should be provided. This applied to pecuniary and non-pecuniary damage alike; but, in the latter case, was subject to the practical consideration that

[t]here is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an

account the Strasbourg jurisprudence in determining questions arising in connection with Convention rights.

<sup>6</sup> We will discuss below whether a court might use its power under s 8(1) to provide a “just and appropriate” remedy to award damages which go beyond the “just satisfaction” damages awarded in Strasbourg; see paras 4.75 - 4.77 on restitutionary damages.

<sup>7</sup> [2000] 2 WLR 1173.

<sup>8</sup> Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com No 257.

<sup>9</sup> A special Court of 5 judges (all with experience of personal injury litigation), led by Lord Woolf MR, had been arranged to respond to the Law Commission report and give guidance to the lower Courts: see [2000] 2 WLR 1173, 1180-1182.

<sup>10</sup> [2000] 2 WLR 1173, 1184 at para 20. See paras 4.66 - 4.67 below for further discussion of the case.

<sup>11</sup> Lord Woolf referred to the well-known words of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (quoted at para 4.14 below).

injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial.<sup>12</sup>

Another “principle” was that the use which the claimant will make of the money is irrelevant.<sup>13</sup>

- 4.9 The judgment contrasts these “principles” with the methods adopted for assessment individual cases. Here again, a contrast is drawn between pecuniary and non-pecuniary loss:

In the case of pecuniary loss, the courts have progressively been prepared to adopt ever more sophisticated calculations in order to establish the extent of a claimant’s loss<sup>14</sup>.... In the case of non-pecuniary damages, the scale of damages has remained a ‘jury question’.<sup>15</sup>

- 4.10 As we have seen, the principle of “full reparation” is also affirmed by Strasbourg case-law.<sup>16</sup> The measure of damages in individual cases is much less likely to be of direct value as guidance, in view of the variety of factors by which it may be influenced.<sup>17</sup>
- 4.11 Therefore, at least where the normal rules of domestic law are consistent with the results which would be reached by the Strasbourg Court, and with the terms of the HRA, the obligation of the domestic courts to have regard to Strasbourg “principles” should lead to little difficulty in practice and should leave the domestic courts reasonably free to follow their existing practices as to evidence, calculation and the measure of damages in individual cases.

### **3. COMMON LAW ANALOGIES**

#### **(1) Comparisons with claims in tort**

- 4.12 In assessing damages under the HRA, the courts will frequently be considering not only the principle applied in Strasbourg but also the principles applied to analogous claims in domestic law apart from the Act. Therefore one purpose of this Part of our Report is to compare and contrast the principles applied in

<sup>12</sup> *Heil v Rankin* [2000] 2 WLR 1173, 1185.

<sup>13</sup> [2000] 2 WLR 1173, 1185 citing *Wells v Wells* [1999] 1 AC 345, 394, per Lord Clyde.

<sup>14</sup> The “analytical approach” adopted in *Wells v Wells* [1999] 1 AC 345 is given as an example.

<sup>15</sup> *Heil v Rankin* [2000] 2 WLR 1173, 1185-1186. As the judgment explains, this “jury question” is normally decided by judges, consistency being achieved by reference to the Guidelines for the Assessment of General Damages in Personal Injury cases prepared by the Judicial Studies Board; or, where juries are still involved, by tariffs laid down by the courts (as in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, referred to at 3.10 note 15 above).

<sup>16</sup> Paras 3.19 - 3.21 above.

<sup>17</sup> See paras 3.31 - 3.57 above.

Strasbourg and in the domestic courts. However, the exercise is difficult and the comparisons must be treated with care.

- 4.13 Making such a comparison is useful for two reasons. The first is to point up the differences between claims in the domestic law and the practice in the Strasbourg Court to which courts in the United Kingdom must now have regard. This may be particularly relevant when a claimant combines claims under the Act and on some other basis.<sup>18</sup> The second is to identify rules which might usefully be applied by analogy when the Strasbourg jurisprudence does not seem to provide an answer to the question to be decided. For example, the Strasbourg Court has no developed doctrines of mitigation or of contributory negligence, though it is arguable that it reaches comparable results by using causation and its general discretion.<sup>19</sup> As we have said, there seems nothing to prevent a United Kingdom court applying more familiar concepts to cases under section 7 of the HRA.
- 4.14 The obvious comparator in English law is the award of damages in tort claims. As has been seen, the Strasbourg Court aims to provide *restitutio in integrum*: that is, to put the victim into the same position as if the wrong had not been committed.<sup>20</sup> This is also the general aim of compensatory damages in tort:

where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong...<sup>21</sup>

- 4.15 Further, there is no doubt that many of the rights protected by the HRA correlate to interests which are already protected in tort. The close connection between unlawful detention under Article 5 of the Convention and the tort of false or wrongful imprisonment provides a good example. There may also be a close connection between claims under the Act and, for example, claims for negligence or breach of statutory duty against public authorities.<sup>22</sup>

## **(2) Constitutional rights in the Commonwealth**

- 4.16 Remedies in damages for human rights violations are not new to the common law world. Bills of rights similar to those in the Convention have been included in many Commonwealth constitutions, often linked with provision for

<sup>18</sup> See above, paras 2.22 - 2.25.

<sup>19</sup> See above, paras 3.54 - 3.56.

<sup>20</sup> This aim is shared by many rights-based provisions: see for example *Carey v Piphus* (1978) 435 US 247, 254 and *Schachter v Canada* [1992] 2 SCR 679, 725-726.

<sup>21</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 *per* Lord Blackburn. The question of non-compensatory damages in tort is discussed below, paras 4.71 - 4.73 and 4.75 - 4.77.

<sup>22</sup> Lester and Pannick describe the remedy under the HRA as “a new public law tort of acting in breach of the victim’s Convention rights” [2000] 116 LQR 380, 382.

compensation for their breach.<sup>23</sup> The leading judicial exposition of the nature and scope of such provisions (in relation to the Constitution of Trinidad and Tobago) is that of Lord Diplock, delivering the majority opinion, in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*.<sup>24</sup> Lord Diplock emphasised the special nature of the remedy under the Constitution in relation to judicial acts:

The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution.<sup>25</sup>

4.17 He was careful to distinguish the “redress” available under section 6 of that Constitution from damages at common law.<sup>26</sup> He said:

[T]heir Lordships would say something about the measure of monetary compensation recoverable under section 6 where the contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages are recoverable at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration...<sup>27</sup>

4.18 It is doubtful, however, whether this analogy, or the distinction drawn between liability in tort and in “public law”, will be of great assistance in the context of the HRA. The particular problem of liability for judicial<sup>28</sup> acts is dealt with specifically by imposing a liability on the Crown in defined circumstances.<sup>29</sup> In other cases, liability will fall, not on the Crown, but upon the particular public

<sup>23</sup> See for example Anthony Lester QC *Fundamental Rights - the United Kingdom Isolated?* [1984] PL 46. As at that date he was able to list 24 Commonwealth countries with Bills of Rights generally following the form of the Convention: [1984] PL 46, 56 n 51.

<sup>24</sup> [1979] AC 385. The case concerned a claim by an advocate who had been imprisoned for contempt of court by the judge, without (as the Privy Council found) being given a proper opportunity to be heard.

<sup>25</sup> [1979] AC 385, 399.

<sup>26</sup> [1979] AC 385, 400. Lord Hailsham, dissenting, thought that if, as the majority held, s 6 of the Constitution gave rise to an action for damages, in many respects the damages would need to be assessed by reference to principles of tort: *ibid* p 410.

<sup>27</sup> [1979] AC 385, 400.

<sup>28</sup> Lord Diplock was seeking to explain why the decision did not involve any departure from the “rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity” [1979] AC 385, 399.

<sup>29</sup> HRA, s 9, see paras 2.26 - 2.27 above.

authority responsible for the breach, in the same way as liability in tort. Furthermore, there seems no warrant in the Strasbourg case-law for limiting the scope of damages in the way Lord Diplock suggested. For example, loss of reputation, which Lord Diplock appeared to exclude from the scope of “redress” under section 6 of the Constitution of Trinidad and Tobago, is a factor which the Strasbourg Court takes into account as an element of non-pecuniary loss, in awarding just satisfaction.<sup>30</sup>

- 4.19 In another important common law case, *Simpson v Attorney General, Baigent’s Case*,<sup>31</sup> the New Zealand Court of Appeal followed the *Maharaj* case, holding that the applicant had a cause of action for breach of rights guaranteed by the New Zealand Bill of Rights Act 1990, which was not an action in tort. Again special circumstances applied.<sup>32</sup> Of more assistance may be the guidance given as to the level of compensation:

As to the level of compensation, on which again there is much international case-law, I think it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided. If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action.<sup>33</sup>

- 4.20 In comparing such cases, the differing statutory contexts are important. The HRA is not directly comparable to the Constitution of Trinidad and Tobago. It is not part of a “constitution” in any formal sense, and it does not therefore create “constitutional” rights. Nor is it directly comparable to the New Zealand Bill of Rights Act, which does not contain any express clause as to remedies. Rather, sections 6 and 7 of the HRA create a new cause of action, which is in effect a form of action for breach of statutory duty,<sup>34</sup> but with the difference that the remedy is discretionary, rather than as of right.

<sup>30</sup> See for example *Alenet de Ribemont v France* A 308 (1995), 20 EHRR 557, discussed at para 6.131 below.

<sup>31</sup> [1994] 3 NZLR 667. The case concerned an unlawful search of a private house by the police.

<sup>32</sup> The court seems to have been concerned to avoid labelling the wrong done as a tort since the state would then have been immune from action by reason of the Crown Proceedings Act 1950, s 6(5). To this extent the decision that the action was not one in tort may be seen as instrumental.

<sup>33</sup> [1994] 3 NZLR 667, 678, *per* Cooke P.

<sup>34</sup> The description may be more useful by way of analogy than as a precise description (see para 4.49 n 84 below). The HRA does not in terms impose a duty on authorities to

### (3) Use of common law analogies

- 4.21 We refer below to some examples which may illustrate the possible uses of such analogies.<sup>35</sup> However, even if damages in tort are the most obvious analogy to damages under section 8 of the HRA, the analogy is one which must be applied with great care. First, the principles according to which the Strasbourg Court awards damages are sometimes inconsistent with the rules on damages for tort. For example, in English law punitive damages are currently available for certain torts.<sup>36</sup> The Strasbourg Court has never awarded punitive damages and, as already mentioned, to do so would be inconsistent with such general principles as it has laid down.<sup>37</sup>
- 4.22 Conversely, in cases of negligence, damages are not normally recoverable for pure economic losses,<sup>38</sup> whereas the Strasbourg Court awards damages for pecuniary loss, including what to an English lawyer might seem to be purely economic loss, without regard to whether the respondent State was acting intentionally or was merely negligent.<sup>39</sup> Equally, the Strasbourg Court regularly awards damages to compensate parents whose right to respect for family life has been infringed when State action has led to them losing contact with their child. There seems to be no equivalent of this claim for loss of relationship in English law.<sup>40</sup>
- 4.23 In any of the three examples we have given, to apply the existing rules of tort simply because of the analogy to tort would be to disregard the requirement in section 8(4) of the HRA to take into account the principle of *restitutio in integrum* as applied by the Strasbourg Court.
- 4.24 Even when the Strasbourg jurisprudence provides no answer to the question before the court, care must be taken. For example, there is no single rule as to which losses are compensatable by damages in tort. In particular the rules vary between intentional and non-intentional torts. Thus the remoteness rule found

comply with the Convention, but makes it “unlawful” for them to fail to do so (s 6), and provides a remedy by way of civil proceedings for that failure (s 7). For the essential elements of the tort of breach of statutory duty, see *Clerk & Lindsell on Torts* (17th ed 1995) para 11-06 ff. Cf, for example, the Consumer Protection Act 1987, s 41, which expressly refers to a “duty” contravention of which is “subject... to incidents applying to actions for breach of statutory duty...”.

<sup>35</sup> The *ex turpi causa* principle: para 4.47 below; and contributory negligence at para 4.49 below.

<sup>36</sup> See below, para 4.71.

<sup>37</sup> See para 3.47 above.

<sup>38</sup> See *Clerk & Lindsell on Tort* (17th ed 1995) paras 7.54 - 7.95. On the other hand there is no general rule against recovery of economic loss in an action for breach of statutory duty: see *Clerk & Lindsell on Tort* (17th ed 1995) para 11.23.

<sup>39</sup> See eg *Sporrong and Lönnroth v Sweden* A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction), discussed at paras 6.231 - 6.232 where substantial damages were paid for pecuniary loss caused by delays in removing planning restrictions.

<sup>40</sup> See further below, para 4.64.

in negligence cases<sup>41</sup> does not apply to cases of fraud;<sup>42</sup> nor does the doctrine of contributory negligence.<sup>43</sup> Under the HRA, the measure most likely to achieve just satisfaction must be selected.

- 4.25 Thus, the analogy to tort should not be taken too far. This has been recognised in Canada, where similar issues have arisen:

Damages to be awarded for a breach of the Charter may be similar to damages usually awarded in tort cases but owing to the nature of the right that was infringed the remedy to be awarded under s 24(1) would not necessarily be tantamount or restricted to the same kind and measure of compensation as in a tort action.<sup>44</sup>

- 4.26 Nonetheless, we consider that in the majority of cases under the HRA the courts in England and Wales will find it possible and appropriate to apply the rules by which damages in tort are usually assessed to claims under the HRA. Indeed, they may find it appropriate to treat those rules as the prima facie measure to be applied unless the results appear inconsistent with the principles applied by the Court in Strasbourg.

#### **4. PRINCIPLES FOR THE DOMESTIC COURTS**

- 4.27 An important discussion of the likely approach of the English courts to the grant of remedies under the Act is to be found in a recent paper by Lord Woolf.<sup>45</sup> This is of particular interest when set beside the contemporaneous reasoning of the Court of Appeal, led by him, in *Heil v Rankin*.<sup>46</sup>
- 4.28 In the paper he was at pains to emphasise the differences between existing remedies for tort and those under the Act.

In the case of a tort there is a right to be paid such damages as will restore the claimant as far as possible to the position which would have existed if the tort had not been committed. The position is very

<sup>41</sup> *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co, The Wagon Mound* [1961] AC 388 (PC).

<sup>42</sup> *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court Securities v Citibank NA* [1997] AC 254 (HL).

<sup>43</sup> *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462.

<sup>44</sup> *R v McGillivray* (1990) 56 CCC (3d) 304, 306 per Rice JA. Fundamental rights are protected by the Canadian Charter of Rights and Freedoms. Section 24(1) of the Charter allows the courts to grant remedies which are “appropriate and just in the circumstances” to anyone whose rights have been infringed.

<sup>45</sup> “The Human Rights Act 1998 and Remedies” in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective: II* (2000), pp 429 - 436.

<sup>46</sup> [2000] 2 WLR 1173.



different in the case of a breach of the ECHR at Strasbourg and I suggest under the Act.<sup>47</sup>

The provisions of section 8, in particular the words “just and appropriate” and “just satisfaction”, suggested to him that the payment of damages “should not be automatic or as of right”.<sup>48</sup>

4.29 With regard to the obligation to have regard to the “principles” applied by the Strasbourg Court, he said:

The difficulty... is that that Court has singularly (probably out of choice) failed to identify any such principles. The Court prefers to invoke a wide discretion, that is an equitable approach, depending on the circumstances of a particular case when deciding whether it should award any damages, and if so, the amount of those damages...

This unprincipled approach need not be a disadvantage so far as our courts are concerned. It allows us to develop our own principles within the statutory framework which the Act creates...<sup>49</sup>

These principles, in his view, should take account of the fact that the damages would be paid out of public funds, and that -

[t]he days when public bodies could be regarded as having purses of bottomless depth are now past. For example, an award of damages against a Health Authority can reduce the funds resources available for treating patients. An award against a Housing Authority can reduce the funds available for providing or repairing homes. There can be numerous victims of the same unlawful act.<sup>50</sup>

He expressed sympathy with the objective stated by the Constitutional Court of South Africa, to meet “the interests of both the complainant and society as a whole”.<sup>51</sup>

4.30 He also drew an analogy with the jurisprudence of European Court of Justice, under which a “serious breach” is required before a member state has to pay monetary compensation:<sup>52</sup>

<sup>47</sup> “The Human Rights Act 1998 and Remedies” in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective: II* (2000), p 432.

<sup>48</sup> *Ibid* p 433.

<sup>49</sup> *Ibid* p 432-3.

<sup>50</sup> *Ibid* p 433.

<sup>51</sup> *Ibid* p 433, citing Ackerman J in *Fose v Ministry of Safety and Security* (1997) 3 SA 786, 808. There is a close parallel with the language used by Lord Woolf in *Heil v Rankin* [2000] 2 WLR 1173, see below at para 4.67.

<sup>52</sup> He referred to Cases C-6/90 and C-9/90, *Frankovitch v Italy* [1991] ECR I-5357 and *R v Secretary of State, ex p Factortame Ltd and others (No 5)* [2000] AC 524. See paras 4.54 - 4.58 below.

... it would be preferable for our basic domestic approach to be the same in relation to unlawful Community acts as it is in relation to breaches of the Convention. Fault I would say should not be ignored. Instead it should be a factor making it more appropriate to award damages.<sup>53</sup>

4.31 Lord Woolf suggested 8 possible principles, which can be summarised as follows:

- (1) If there is any other remedy in addition to damages, that other remedy<sup>54</sup> should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.
- (2) The court should not award exemplary or aggravated damages.<sup>55</sup>
- (3) An award should be “of no greater sum than that necessary to achieve just satisfaction”. If it is necessary for a decision to be retaken, the court should wait and see what the outcome is;<sup>56</sup>
- (4) The quantum of the award should be “moderate”, and “normally on the low side by comparison to tortious awards”.<sup>57</sup>
- (5) The award should be restricted to compensating the victim for what has happened “so far as the unlawful conduct exceeds what could lawfully happen”.<sup>58</sup>
- (6) Failure by the claimant to take preventative or remedial action will reduce the amount of damages.
- (7) There is no reason to distinguish between pecuniary and non-pecuniary loss. What matters is that the loss should be “real [and] clearly caused by the conduct contrary to the Act”.
- (8) Domestic rules as to costs will probably cover any costs or expenses incurred by the complainant.

<sup>53</sup> “The Human Rights Act 1998 and Remedies” in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective: II* (2000), p 433.

<sup>54</sup> For example, an order to retake the decision, an injunction to restrain the unlawful conduct, or a declaration to establish its unlawfulness.

<sup>55</sup> He distinguishes such awards from awards for “anxiety, distress, injured feelings or other forms of non-pecuniary loss”, which he regards as acceptable in accordance with Strasbourg practice.

<sup>56</sup> Thus, he suggests, “if... a retrial is necessary of a criminal offence the decision as to whether to make an award of damages could well depend on the outcome of the retrial.”

<sup>57</sup> Cf Cooke P’s caution against “extravagant awards”: *Simpson v Attorney General, Baigent’s case* [1994] 3 NZLR 667, 678. See above at para 4.19.

<sup>58</sup> Thus damages for unreasonable delay in holding a hearing (in breach of Article 6) should be limited to the excess over a reasonable time: see below para 4.79.

4.32 These suggested principles are likely to be influential on judicial thinking about awards of damages under the Act, and in what follows we will refer to them where appropriate.

## **5. THE STRASBOURG PRINCIPLES AND THE APPLICATION OF SECTION 8**

### **(1) The court's discretion to make an award**

4.33 The discretion given to the court in section 8(1), to “grant such relief or remedy, or make such order, within its powers as it considers just and appropriate” is a reflection of the discretion possessed by the Strasbourg Court to decide whether or not to award damages (the only remedy available to that court). It is in apparent contrast to the common law position. Generally, at common law, once a legal wrong and consequent loss<sup>59</sup> have been established, damages are recoverable as of right.<sup>60</sup> Lord Woolf is right to emphasise, in relation to the award of damages, the extent of the discretion under the Act.

4.34 On the other hand, the Strasbourg Court has often emphasised that the purpose of awards of damages is *restitutio in integrum*, which, in theory at least, is no different to the purpose of common law damages.<sup>61</sup> The Strasbourg Court seeks to compensate the applicant fully for any loss which he or she can prove resulted from a violation of Convention rights. Insofar as the fourth principle proposed by Lord Woolf is intended to suggest otherwise, it is not consistent with the principle applied by the Strasbourg Court.

4.35 As far as awards of damages under the HRA are concerned, the general discretion is qualified by section 8(3). This provides:

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.

### **(2) No damages if other remedy provides just satisfaction**

4.36 It follows from section 8(3) that the court cannot make an award of damages unless it is satisfied that an award is necessary to afford just satisfaction to the victim of the breach of Convention rights. This is Lord Woolf's first principle,

<sup>59</sup> In some torts nominal damages may be recovered even though no loss has been shown: see below para 4.74.

<sup>60</sup> Subject also to the rules of remoteness and mitigation.

<sup>61</sup> See above, paras 3.19 - 3.21.

and is a direct reflection of the jurisprudence of the Strasbourg Court.<sup>62</sup> The onus will lie on claimants and pursuers not only to establish a breach of their Convention rights but also to show that other remedies which the court has power to grant will not provide just satisfaction. While the negative structure of section 8(3) seems to imply that damages are to be the exception rather than the rule, the obligation to ensure that, as far as possible, full reparation is made (which the Strasbourg Court has implied into Article 41 of the Convention) has also been incorporated into the HRA by section 8(4), and must be considered.

- 4.37 Subsection 8(3)(a) requires the court to consider the outcome of any other action brought in respect of the act in question, whether it be a separate head of claim within the same action or a separate action. If ‘just satisfaction’ has already been obtained by other means then damages should not be awarded under section 8 of the HRA. This too reflects practice in Strasbourg.<sup>63</sup>
- 4.38 In this connection, in considering the Strasbourg cases, it must be borne in mind that a much wider range of remedial powers is available to the domestic courts than to Strasbourg.<sup>64</sup> Section 8(3) stipulates that the domestic court must take into account other responses that have been made in respect of the unlawful act, including any other relief, remedy or order given by it or another court. A court may find that it is not ‘necessary’ to award damages because, for example, it is able to grant injunctive relief, or to quash an offending decision.
- 4.39 Lord Woolf suggested that it might be appropriate for the court not to award damages immediately but to wait and see what response was made to its finding that the victim’s Convention rights had been infringed. This proposed principle is uncontroversial. The Act itself makes clear that damages should be no more than “necessary” to afford just satisfaction. The proposal that the court should, if appropriate, “wait and see”, by adjourning the just satisfaction claim until the retrial is concluded or the decision retaken, accords with the former Strasbourg practice.<sup>65</sup> Although that has become less common recently, the reasons for the change seem to be ones of practicality. It is clearly much easier for a domestic court to arrange for a suitable adjournment in such circumstances.

<sup>62</sup> See above, para 3.18.

<sup>63</sup> See above, paras 3.32 - 3.34.

<sup>64</sup> It has been suggested that new remedies will be developed by the courts. See S Grosz, J Beatson and P Duffy, *Human Rights: The 1998 Act and The European Convention* (2000), para 6.22.

<sup>65</sup> See L-E Pettiti, E Dacaux and P-H Imbert (eds), *La Convention Européenne des Droits de L’Homme* (2nd ed 1995), p 824, cited in footnote 64 to para 3.32 above. A good example is *Barberà, Messegué and Jabardo v Spain* A 285-C (1994) (just satisfaction) where there was a stay of proceedings in Strasbourg pending a retrial, which resulted in acquittal. The Strasbourg Court then made awards of between 4 million (£19,410) and 8 million pesetas (38,810) to cover pecuniary and non-pecuniary loss: see Part VI para 6.101.

### (3) The consequences of the decision

4.40 In addition, section 8(3) stipulates that the domestic court must take into account other responses that have been made in respect of the unlawful act, including any other relief, remedy or order given by it or another court, and:

the consequences of any decision (of that or any other court) in respect of that act.

It is not entirely clear what is meant by ‘the consequences of any decision ... in respect of that act’. It has been argued that this would entitle the court to take into account general policy issues, such as “floodgates” arguments.<sup>66</sup> This may be what Lord Woolf had in mind when referring to the possibility of “numerous victims of the same unlawful act.”<sup>67</sup>

4.41 However, it seems unlikely that the sub-section is intended to detract from the basic requirement for just satisfaction to “the person in whose favour it is made”. These words direct attention to the needs of the victim. Where the victim has suffered an identifiable and readily measurable loss, and is otherwise held to deserving of a monetary remedy, there seems little scope for the consideration of other wider interests, such as those of potential defendants. To have regard to such considerations would be difficult to reconcile with the general principle of *restitutio in integrum* adopted by the Strasbourg Court. However, there may be more scope for consideration of such wider policy issues in relation to the amount of awards for non-pecuniary loss, as the Court of Appeal indicated in *Heil v Rankin*.<sup>68</sup>

4.42 More probably however, subsection (3)(b) refers to the Strasbourg jurisprudence under which the court may hold that some non-judicial act by the state in light of

<sup>66</sup> “The most likely interpretation is that when contemplating an award of damages, the courts should take into account that they might be opening the ‘floodgates’... To make an award of damages in respect of that act may mean that hundreds, even thousands of potential applicants will have a similar claim representing a considerable strain on the public purse”: M Amos, “Damages for breach of the Human Rights Act 1998” [1999] EHRLR 178, 186-187, citing, *inter alia*, *X v Bedfordshire County Council* [1995] 2 AC 633, 749-51 *per* Lord Browne-Wilkinson.

<sup>67</sup> See para 4.29 above. In *Norris v Ireland* A 142 (1988), 13 EHRR 186, a successful challenge to Irish laws against homosexual acts in private (see Part VI para 6.176), the Strasbourg Court in refusing damages referred to “the effects [of the decision] extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provisions and not from individual measures of implementation” (para 50). However, in that case there had been no prosecution, and no direct damage. Cf *ADT v United Kingdom* Application no 35765/97, 31 July 2000 where conviction for such an offence in the United Kingdom led to an award of £10,000 for non-pecuniary loss (see paras 6.177 - 6.178).

<sup>68</sup> See below paras 4.66 - 4.67. Note, however, that in *Smith and Grady v United Kingdom* Application nos 33985/96 and 33986/96, 25 July 2000 the Strasbourg Court made substantial awards for pecuniary and non-pecuniary loss without any reference to claims by others affected (see paras 6.179 - 6.181 below). In practice, the ‘short time-limits’ for claims under the Convention may mitigate any ‘floodgates’ effect (para 3.17 n 27).

the court's decision may constitute just satisfaction.<sup>69</sup> Such acts might include a change in the State's procedures or legislation,<sup>70</sup> an *ex gratia* payment or the grant of a pardon, at least where this is coupled with an acknowledgement that the applicant's rights were infringed.<sup>71</sup>

#### **(4) Exercise of the general discretion**

4.43 Although section 8(3) of the HRA requires the court to consider various factors in deciding whether or not an award of damages is necessary, we have seen that the restrictions so imposed are consistent with the Strasbourg principles which the court is also required by section 8(4) to take into account. In practice, the discretion given to the domestic courts under the HRA appears to be no less broad than that of the Strasbourg Court under Article 41.

4.44 We have seen that the Strasbourg Court, in deciding whether just satisfaction requires an award of damages, takes into account a wide range of matters which are not referred to in section 8 of the HRA. Thus it may refuse damages altogether, or grant them on a more or less generous basis. Such cases are never expressly identified by the Court as departures from the principle of *restitutio in integrum*; usually the reasons are simply not articulated. In Part III we attempted to identify the factors which the case-law suggests are taken into account by the Strasbourg Court when it assesses damages:

- (1) A finding of a violation may constitute just satisfaction.<sup>72</sup>
- (2) The degree of loss suffered must be sufficient to justify an award of damages.<sup>73</sup>
- (3) The seriousness of the violation will be taken into account.<sup>74</sup>
- (4) The conduct of the respondent will be taken into account.<sup>75</sup> This may include both the conduct giving rise to the application, and a record of previous violations by the State.
- (5) The conduct of the applicant will be taken into account.<sup>76</sup>

4.45 Some of these have approximate equivalents in English law; others do not. Some of the issues we deal with later under the headings of "Heads of Loss"<sup>77</sup> and

<sup>69</sup> See above paras 3.32 - 3.34.

<sup>70</sup> See for example *Dudgeon v United Kingdom* A 59 (1983), 5 EHRR 573 (just satisfaction), at para 6.176 below.

<sup>71</sup> See paras 3.34 - 3.36 above.

<sup>72</sup> See paras 3.38 - 3.43 above.

<sup>73</sup> See para 3.44 above.

<sup>74</sup> See paras 3.45 - 3.46 above.

<sup>75</sup> See paras 3.47 - 3.53 above.

<sup>76</sup> See paras 3.54 - 3.57 above.

“Causation”.<sup>78</sup> Others relate more closely to the general discretion exercised by the Strasbourg Court and are dealt with here.

**(a) Where there is an equivalent rule in English law**

- 4.46 Where there is an equivalent rule in English law, it seems that the court may either, under its discretion under section 8, award damages consistently with what would be done in Strasbourg, or apply the “normal” rule of English law as representing what is necessary to afford just satisfaction.
- 4.47 For example, in Part III we saw that the Strasbourg Court may deny damages in a case in which the violation was directly linked to illegal activity by the victim, as in *McCann v United Kingdom* (the Gibraltar terrorists case).<sup>79</sup> This appears to be very close to the *ex turpi causa* rule found in English law.<sup>80</sup> This does not always exclude claims by a person who was engaged in criminal activity. English law applies a flexible test. An English court hearing a claim under the HRA might equally refuse to award damages, either by applying the *ex turpi causa* doctrine or under the general discretion given by section 8 of the Act.
- 4.48 Other equivalents are less exact but sufficiently close that, in our view, the domestic courts would be justified in employing the “normal” rule in HRA cases.
- 4.49 Thus we also saw in Part III that the Strasbourg Court will consider whether the applicant contributed to the loss as one of the factors that forms part of the Court’s overall equitable assessment of the circumstances. The nearest equivalent in English law would seem to be the court’s power to reduce damages under the principle of mitigation or under the Law Reform (Contributory Negligence) Act 1945.<sup>81</sup> Thus, a domestic court, wishing to take account of acts or omissions on the part of the claimant which have contributed to the loss, might do this in one of two ways. It might be done by direct reference to whether a full award is necessary to achieve “just satisfaction” under section 8(3) of the HRA.<sup>82</sup> Alternatively it might be done by simply applying one of the familiar principles of domestic law, for example: causation, where the claimant’s action was the

<sup>77</sup> See paras 4.59 - 4.77 below.

<sup>78</sup> See paras 4.78 - 4.87 below.

<sup>79</sup> A 324 (1995), 21 EHRR 97. See para 3.56 above.

<sup>80</sup> See *Clunis v Camden and Islington Health Authority* [1998] QB 978; *Standard Chartered Bank v Pakistan National Shipping Corporation* [2000] 1 Lloyd’s Rep 218 (CA).

<sup>81</sup> This latter analogy is not exact, since neither that Act, nor the doctrine of contributory negligence at common law, applies to all intentional torts: *Clerk & Lindsell on Torts* (17th ed 1995) para 3.19; *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462.

<sup>82</sup> See Lord Woolf’s 6th principle: failure to take “preventative or remedial action” will reduce the damages: para 4.31 above.

predominant cause of the loss;<sup>83</sup> the Law Reform (Contributory Negligence) Act 1945, which may apply to claims under section 6 of the HRA;<sup>84</sup> or the duty to mitigate,<sup>85</sup> where it is the victim's action after the violation which is in question.

**(b) Cases with no obvious equivalent**

- 4.50 The Strasbourg Court regularly refuses, as a matter of discretion, to award damages (at least for non-pecuniary loss) because of factors which seem to have no equivalent in English or Scottish law. In particular, we have noted the frequent practice in Strasbourg of holding that its own judgment declaring that a violation has occurred may *per se* be sufficient to constitute just satisfaction.<sup>86</sup> The application of this practice in the domestic courts is made more difficult by the fact that the reasons are rarely explained. Given that the claimant's rights have (*ex hypothesi*) been violated by a public authority, it may be asked whether a declaration in an English court could ever be itself sufficient to provide just satisfaction.<sup>87</sup>
- 4.51 This is not to say that damages should always be awarded. The structure of section 8(3) prevents such an outcome, at least where some other form of remedy is appropriate and sufficient.<sup>88</sup> Furthermore, as we have noted,<sup>89</sup> just as the Strasbourg Court may refuse a monetary remedy because of a change of law or administrative practice, so section 8(3)(c) seems to allow the domestic court to take account of similar "consequences" of its decision. This may be particularly

<sup>83</sup> See eg *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 where the claimant workman, who was injured by his careless use of a trestle, was held to have caused the accident, even though his need to use the trestle was the result of a breach by the defendant company of its contractual duty to provide a stepladder.

<sup>84</sup> We argued earlier that s 6 creates a new form of action for breach of statutory duty. The Law Reform (Contributory Negligence) Act 1945 applies to claims for breach of statutory duty. If the cause of action is properly described as "breach of statutory duty" (see para 4.20 note 34 above), the 1945 Act will apply, since that is one of the causes of action included in the definition of "fault" (s 4). Otherwise, it seems, the Act will not apply. This is because s 4 of that Act defines fault on the part of the claimant as an act which "would, apart from this Act, give rise to the defence of contributory negligence". This is a reference to the law on contributory negligence before 1945 and obviously does not include actions under the HRA. Cf *Forsikringsaktieselskapet Vesta v Butcher (No 1)* [1989] 2 AC 852, 862 ff; *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462, 1174. The point is likely to be academic, since the discretion under s 8 seems wide enough to enable the principles of the 1945 Act, where appropriate, to be applied by analogy).

<sup>85</sup> *Clerk & Lindsell on Torts* (17th ed 1995) paras 21.214 - 21.224.

<sup>86</sup> See Part III paras 3.38 - 3.43.

<sup>87</sup> Although Lord Woolf refers to the wide Strasbourg discretion, he does not suggest that the domestic courts should be unfettered. He appears implicitly to accept that, subject to his eight principles, a claimant who establishes a breach and consequent loss, should be entitled to at least "moderate" damages.

<sup>88</sup> Lord Woolf's principle (1): see para 4.31 above.

<sup>89</sup> Para 4.42 above, citing *Dudgeon v United Kingdom* A 59 (1983), 5 EHRR 573 (just satisfaction).



appropriate where, as often in judicial review proceedings, the principal purpose of the application is to establish a principle, rather than to obtain a monetary remedy. But were the public authority to refuse even to acknowledge that a violation had occurred, or to refuse to change its practices, an English court might hesitate to say that a mere declaration that the applicant's Convention rights would amount to 'just satisfaction'.

4.52 The domestic courts might wish to follow the Strasbourg approach of treating the issue as to some extent one of degree and denying a monetary remedy where the injury is not of sufficient "intensity".<sup>90</sup> Although there is no direct equivalent in English or Scottish law, at least where the injury is more than *de minimis*, the discretion under section 8 seems wide enough to permit such considerations.

4.53 Other possible factors in the exercise of the Strasbourg discretion considerations may be more difficult to justify in the domestic context. For example, we have noted the suggestion that the Strasbourg Court may have refused damages on the basis of the status of the victim.<sup>91</sup> As a general principle, the status of the claimant is irrelevant in a claim for damages in tort.<sup>92</sup>

**(c) Analogies to the European Court of Justice**

4.54 A more radical approach is suggested by Lord Woolf's analogy with the principles laid down by the European Court of Justice in relation to damages for a breach by a Member State of a Community law. The European Court has held that three conditions must be satisfied by an applicant seeking such damages, namely:

- (1) the rule of law infringed must have been intended to confer rights on individuals;
- (2) breach of this rule of law must have been sufficiently serious; and,
- (3) there must have been a direct causal link between the breach and the damage sustained by the applicant.<sup>93</sup>

4.55 The Court held further that the test for determining whether the breach was "sufficiently serious" was whether the Member State had "manifestly and gravely" disregarded the limits of its discretion.<sup>94</sup> It cited a range of factors as relevant to this issue, including the clarity and precision of the rule breached, the measure of discretion left by the rule to the relevant authorities, whether the

<sup>90</sup> See para 3.44 citing *Silver v United Kingdom* A 61 (1983), 5 EHRR 347 (merits), A 67 (1983), 6 EHRR 62 (just satisfaction).

<sup>91</sup> Para 3.57 above.

<sup>92</sup> So, for instance, prison authorities owe the normal duty of care for the safety of inmates. See, for example, *Reeves v Commissioner of Police of the Metropolis* [1999] 3 WLR 363. See Part V para 5.5(5) below, in relation to Scots law.

<sup>93</sup> Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Germany*, *R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029.

<sup>94</sup> [1996] ECR I-1029, para 56.

breach and consequential damage were intentional or voluntary, and whether any error of law was excusable or inexcusable. *Fault* on the part of the Member State was not, as such, an essential element, but was a relevant factor in deciding whether the breach was sufficiently “serious” in the relevant sense.<sup>95</sup>

- 4.56 These principles are applied by the English courts when making awards of damages for breaches of Community law. For example, in the *Factortame* case, in which a United Kingdom Act aimed at protecting British fishing communities from competition by foreign nationals was held to contravene European Union law,<sup>96</sup> the English courts had to consider claims for compensation by the Spanish fishermen affected by the Act. The House of Lords<sup>97</sup> upheld the decisions of the lower courts that the breach was sufficiently serious, since the legislation was a fundamental breach of clear articles of the Treaty, and it was inevitable that it would seriously affect the rights of non-British citizens. The House of Lords acknowledged that the Government had acted in good faith, and on legal advice; but it had taken a calculated risk by choosing to disregard the opinion of the Commission that the Act contravened Community law.<sup>98</sup>
- 4.57 The Strasbourg Court has not expressly applied a “sufficiently serious” test in its own jurisprudence. On the other hand, as we have seen, it does on occasion refer to the “seriousness” of a violation as a factor in the exercise of its discretion to award damages.<sup>99</sup> The recent case of *Smith and Grady v United Kingdom*<sup>100</sup> provides a further example. In that case, the Court noted that the investigations and consequent discharges “constituted ‘especially grave’ interferences with the applicants’ private lives” in considering the amount of damages to be awarded to the applicants for non-pecuniary loss.<sup>101</sup>
- 4.58 Such an approach does not find any express support in the reasoning of the Strasbourg Court, but is not obviously excluded by it. Similarly, although there is no express reference to a criterion of “sufficient seriousness” in the wording of section 8, the discretion appears wide enough to encompass such a development. As Lord Woolf says, the absence of clear principle in the Strasbourg jurisprudence may leave some scope for the national courts to develop their own principles.<sup>102</sup> However, if there is to be a discretion to depart from strict

<sup>95</sup> [1996] ECR I-1029, paras 78-79.

<sup>96</sup> Case C-221-89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 3)* [1992] QB 680.

<sup>97</sup> *R v Secretary of State for Transport, ex p Factortame Ltd and others (No 5)* [2000] AC 524.

<sup>98</sup> [2000] AC at 541-7, per Lord Slynn.

<sup>99</sup> Part III para 3.45 - 3.46 above.

<sup>100</sup> Application nos 33985/96 and 33986/96, 25 July 2000. See paras 6.179 - 6.181 below for a full discussion of the case.

<sup>101</sup> The applicants were awarded £19,000 each in respect of non-pecuniary loss.

<sup>102</sup> It has been suggested that the “sufficiently serious” test could be deployed by English courts in cases involving claims in tort (in particular, in negligence) against public authorities in general. See P Craig “Once More Unto the Breach: the Community, the

compensation principles, one would expect the parameters of that discretion to be clearly defined.

## **6. HEADS OF LOSS**

### **(1) Pecuniary and non-pecuniary loss**

- 4.59 The Strasbourg Court traditionally draws a distinction between pecuniary and non-pecuniary loss. This practice is followed reasonably consistently in the Strasbourg case-law (although on occasions a global award is made). One would expect domestic courts to adopt the same approach, having regard to their duty to take into account the principles used by the Strasbourg Court.<sup>103</sup> As we have seen, the Court of Appeal itself, in *Heil v Rankin*, highlighted the different problems of assessment which arise as between pecuniary and non-pecuniary loss.<sup>104</sup> The development of coherent principles for the award of damages under the HRA is likely to require similar distinctions.
- 4.60 Apart from the general categories of pecuniary and non-pecuniary loss, it is convenient under this heading to mention particular categories of damages which may arise under English law: for example, nominal, punitive and restitutionary damages.<sup>105</sup>

### **(2) Pecuniary loss**

- 4.61 As already noted,<sup>106</sup> Strasbourg gives damages for pure economic loss, even if the State is not shown to have acted intentionally. For example, in *Sporrong and Lönnroth v Sweden*<sup>107</sup> the applicants were unable either to develop or to sell their properties for a long period of time because of delays in proceedings; they were awarded 800,000 Swedish krona (£76,080) for their pecuniary losses. The domestic Courts may be expected to follow that lead. Subject to that issue, there appears to be no difficulty in principle under this head in following the Strasbourg principles. Cases like *Sporrong and Lönnroth v Sweden*, and *Pine*

State and Damages Liability” in M Andenas (ed) *English Public Law and the Common Law of Europe* (1998), ch 8; P Craig “The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?” in J Beatson and T Tridimas, *New Directions in European Public Law* (1998), p 75; M Andenas and D Fairgrieve “Sufficiently Serious? Judicial Restraint in Tortious Liability of Public Authorities and the European Influence” in Andenas (ed) *English Public Law and the Common Law of Europe* (1998), ch 14.

<sup>103</sup> HRA, s 8(4).

<sup>104</sup> [2000] 2 WLR 1173; see paras 4.7 - 4.9 above. Having regard to what was said there, it is unclear why Lord Woolf suggested that there was “no reason” for this distinction (his principle (7), para 4.31 above).

<sup>105</sup> Discussed below at paras 4.74; 4.71 - 4.73 and 4.75 - 4.77 respectively.

<sup>106</sup> See para 4.22 above.

<sup>107</sup> A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction). See paras 6.231 - 6.232 below.

*Valley Developments Ltd v Ireland*<sup>108</sup> show that in principle, subject to causation, substantial awards may be made. The problems of assessment which have led to a somewhat imprecise “equitable” approach in Strasbourg are largely practical.<sup>109</sup> English courts will be able to apply their ordinary rules of evidence and procedure for the proof of pecuniary loss. English courts will be able to apply their ordinary rules of evidence and procedure for the proof of pecuniary loss. In this context, Lord Woolf’s suggestion that awards should be “on the low in comparison to tortious claims” would seem to require a departure from the principle of *restitutio in integrum* applied by the Strasbourg Court. As we have noted, like awards in tort, Strasbourg awards are designed to reflect the full amount of the loss.<sup>110</sup>

4.62 As we have noted,<sup>111</sup> the Strasbourg Court regularly awards damages to compensate the applicant’s costs and expenses as a separate head of loss. Again these present little difficulty for domestic Courts, which will be normally be able to deal with them under ordinary rules for costs.<sup>112</sup>

### **(3) Non-pecuniary loss**

4.63 We have observed in Part III<sup>113</sup> that the Strasbourg Court’s awards for non-pecuniary losses cover a wide range of intangible injuries. The categories of loss which have been compensated under this head include pain, suffering and psychological harm, distress, frustration, inconvenience, humiliation and anxiety. Comparison with English law will be discussed in more detail in paragraphs 4.69 to 4.77 below. We also noted that the Strasbourg Court is prepared to recognise ‘corporate anxieties’ in a way which is unfamiliar in English law.

4.64 We have also seen that the Strasbourg Court is prepared to give compensation for loss of relationship. For example, in the child-care cases involving breaches of Article 8, the Strasbourg Court has awarded damages for loss of relationship, including deprivation of the love, companionship and support of a child. In these cases, the Court is awarding damages for a kind of loss which the English common law does not recognise following the abolition of claims for loss of

<sup>108</sup> A 222 (1991), 14 EHRR 319 (merits); A 246-B (1993), 16 EHRR 379 (just satisfaction) (see paras 6.219 - 6.221). See also the recent decision on just satisfaction in *Smith and Grady v United Kingdom* (2000) Application nos 33985/96 and 33986/96, 25 July 2000 discussed in paras 6.179 - 6.181 above.

<sup>109</sup> More recently the Strasbourg Court has been able to adopt a more precise approach in response to, for example, actuarial evidence as the value of a claim for loss of earnings. See *Salman v Turkey* Application no 21986/93, 27 June 2000 (see para 6.11); *Ilhan v Turkey* Application no 22277/93, 27 June 2000 (see para 6.23).

<sup>110</sup> See para 4.34 above; cf Lord Woolf’s 4th principle in para 4.31 above.

<sup>111</sup> Paras 3.29 - 3.30 above.

<sup>112</sup> As suggested by Lord Woolf’s 8th principle; see para 4.31 above.

<sup>113</sup> Paras 3.26 - 3.28 above.

society.<sup>114</sup> The nearest modern equivalent appears to be the claim for bereavement damages under section 1A of the Fatal Accidents Act 1976.<sup>115</sup>

4.65 In respect of injuries which are similar to those for which domestic law has awarded damages (for example, unlawful detention under Article 5 and false or wrongful imprisonment), the domestic courts are likely to rely on the domestic figures in awarding damages for non-pecuniary injury under section 8.<sup>116</sup> However, not all injuries suffered as a result of a breach of the Convention will have a domestic equivalent (for example, loss of relationship). Appropriate amounts will have to be determined by the United Kingdom courts.

4.66 It may be reasonable to expect awards for non-pecuniary loss under the HRA to be kept to “moderate” levels, to use Lord Woolf’s term.<sup>117</sup> This proposal is consistent with the general experience that the Strasbourg Court “has not proved unduly generous” in awarding compensation.<sup>118</sup> In *Heil v Rankin*,<sup>119</sup> the Court drew attention to observations of the Canadian Supreme Court in relation to the assessment of non-pecuniary loss:

[T]his is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to wildly extravagant claims...<sup>120</sup>

4.67 This caution was echoed by the Court of Appeal:

The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result

<sup>114</sup> Administration of Justice Act 1982, s 52 and Law Reform (Miscellaneous Provisions) Act 1970, ss 4 and 5. See further *McGregor on Damages* (16th ed 1997) para 91; NV Lowe and G Douglas, *Bromley’s Family Law* (9th ed 1998) pp 61 - 62.

<sup>115</sup> This aspect of the Strasbourg case-law has not seem to have been highlighted by the United Kingdom commentators. In D Shelton, *Remedies in International Human Rights Law* (1999) p 227 the author discusses this form of compensation under human rights instruments generally:

Loss of consortium when one is deprive of a spouse may include loss of love and companionship as well as services in the home, society and sexual relations. The impairment of any of these gives a right to damages. Interference with parent/child relations may lead to damages for loss of companionship, comfort, guidance, affection and aid. All these factors represent the irreplaceable intangibles of family life.

<sup>116</sup> See paras 4.26 above.

<sup>117</sup> See above, para 4.31.

<sup>118</sup> K Reid, *A Practitioner’s Guide to the European Convention on Human Rights* (1998), p 398.

<sup>119</sup> [2000] 2 WLR 1173, 1184.

<sup>120</sup> *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 476, per Dickson J.

in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.<sup>121</sup>

Thus:

Awards must be proportionate and take into account the consequences of increases in the awards of damages on defendants as a group and society as a whole.<sup>122</sup>

This required the court to have regard to factors such as the fact:

that our decision will have a significant effect on the public at large, both in the form of higher insurance premiums and as a result of less resources being available for the NHS.<sup>123</sup>

4.68 Similar considerations will apply under the HRA. However, in this context, as in that of pecuniary loss, it is hard to see why awards under the HRA should be “on the low side by comparison with tortious awards”.<sup>124</sup> In those cases where there is a close common law analogy, for example wrongful detention, the tariffs established in cases such as *Thompson v Commissioner of Police of the Metropolis*,<sup>125</sup> would appear equally applicable, subject of course to account being taken of the facts of particular cases.<sup>126</sup> But there is no reason to think that the courts will find any difficulty in developing appropriate tariffs for standard types of case.<sup>127</sup>

<sup>121</sup> [2000] 2 WLR 1173, 1186.

<sup>122</sup> [2000] 2 WLR 1173, 1188-1189.

<sup>123</sup> [2000] 2 WLR 1173, 1187.

<sup>124</sup> See above, para 4.61.

<sup>125</sup> As we have noted above (para 3.10 n 15), there is some anecdotal evidence that these tariffs were taken into account by the Strasbourg Court itself in *Perks v United Kingdom* Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33.

<sup>126</sup> See *R v Governor of Brockhill Prison ex p Evans (No 2)* [1999] 2 WLR 103, 116 (CA). In the House of Lords’ decision on that case Lord Hope noted that the Court of Appeal were performing a legitimate function

in taking the opportunity to provide guidance, in an area where guidance was almost entirely lacking, as to [the] approach which should be taken in the making of such awards, as to some of the factors to be taken into account in the assessment and as to the general level of award which should be made in similar cases.

<sup>127</sup> See for example, the levels of general damages established by case-law for discomfort, inconvenience and injury to health arising out of breach of repairing covenants in residential tenancies: *Wallace v Manchester City Council* (1998) 30 HLR 1111 CA. Some categories of case, for example those relating to administrative delay (see eg *Sporrong and Lönnroth v Sweden* A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction) at paras 6.231 - 6.232), are similar to those dealt with currently by the Local Commissioners for Administration. For examples of the compensation recommended in typical cases, see Local Government Ombudsman, 1998 Digest of Cases (<http://www.open.gov.uk/lgo/digest.htm>).

#### (4) Anxiety, distress and frustration.

- 4.69 English law allows compensation for non-pecuniary loss such as pain and suffering where there has been a physical injury; but in respect of tortious actions, the general rule is that “[m]ental distress is not by itself sufficient damage to ground an action.”<sup>128</sup> In respect of certain torts, damages for mental distress can be recovered in particular circumstances under the rubric of “aggravated damages.”<sup>129</sup> These seem designed to compensate the claimant for the additional distress caused by the way in which the tort was committed.<sup>130</sup> One of the preconditions to the award of aggravated damages stated by Lord Devlin in *Rookes v Barnard*<sup>131</sup> is that the conduct of the defendant must have been offensive, or accompanied by malevolence, spite, insolence or arrogance (or, presumably, have been the kind of oppressive conduct which would give rise to punitive damages).
- 4.70 As Lord Woolf recognised,<sup>132</sup> the Strasbourg Court awards damages for non-pecuniary losses such as pain and suffering, anxiety, distress and frustration in a wider range of cases. It does sometimes take into account the seriousness of the violation and the conduct of the respondent State in awarding damages, so that the Strasbourg principles are not inconsistent with the grant of what are in effect aggravated damages. However, it also regularly awards damages for non-pecuniary losses, including distress, anxiety and injury to feelings, even when there are no “aggravating features”. Section 8(4) of the HRA would suggest that English courts should adopt the same approach.

<sup>128</sup> *McGregor on Damages* (16th ed 1997) para 90.

<sup>129</sup> See further *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, Part II, *passim*. It appears that aggravated damages may not be recovered in an action for negligence: *Ibid*, para 2.42.

<sup>130</sup> This seems to be the correct explanation, although the point is not free from difficulty: *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, paras 2.15-2.38. The Report recommended the enactment of legislation making it clear that aggravated damages may be awarded only to compensate a person for his or her mental distress, and not to punish the defendant for his conduct: Law Com No 247, para 2.42. It was also recommended that wherever possible the label “damages for mental distress” should be used instead of the phrase “aggravated damages” (*ibid*).

<sup>131</sup> [1964] AC 1129, 1232.

<sup>132</sup> Lord Woolf, “The Human Rights Act 1998 and Remedies” in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective: II* (2000), p 434, referring to the cases listed in K Starmer, *European Human Rights Law* (1999) p 65 - 66. Starmer argues that the damages awards in these cases might be characterised as examples of “aggravated damages”:

So far as aggravated damages are concerned, it could be argued that the Court’s broad approach to non-pecuniary loss in effect recognises their legitimacy, particularly where it has made awards to compensate for frustration, distress and feelings of helplessness. (Starmer, *European Human Rights Law* (1999) p 61.

See also Amos, “Damages for breach of the HRA 1998” [1999] EHRLR 178, 192.

## **(5) Exemplary or punitive damages**

- 4.71 Exemplary (or punitive) damages seek to punish the defendant for the wrong committed.<sup>133</sup> They are not concerned to compensate and are therefore not referable to any loss suffered by the claimant. Punitive damages are, however, usually awarded in addition to compensatory damages.
- 4.72 We have seen, that the Strasbourg Court has never yet awarded punitive damages<sup>134</sup> and on more than one occasion has refused to do so.<sup>135</sup> Moreover, it seems clear for other reasons that even in England punitive damages will not be available under the HRA. Apart from other factors, the preconditions for an award of punitive damages under English law include the principle that, in the absence of specific statutory provision, they will only be awarded if the tort in question is one for which punitive damages had been awarded prior to *Rookes v Barnard*.<sup>136</sup> As an action under the HRA does not satisfy this requirement, and no provision for punitive damages is made in the Act itself, there seems no basis for such awards.<sup>137</sup>
- 4.73 The fact that punitive damages are not available under the HRA 1998 does not of course prevent a claimant from recovering them under the existing common law rules, where the HRA claim overlaps with a cause of action which attracts such an award.

<sup>133</sup> *Rookes v Barnard* [1964] AC 1129, 1121 *per* Lord Devlin; *AB v South West Water Services Ltd* [1993] QB 507, 529 *per* Sir Thomas Bingham MR. For a description of the present law see *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, Part IV.

<sup>134</sup> See above, para 3.47.

<sup>135</sup> See K Starmer, *European Human Rights Law* (1999) p 61; M Amos, "Damages for breach of the Human Rights Act 1998" [1999] EHRLR 178, 192. See also the dissenting judgment of Judge Matscher in *Gaygusuz v Austria* 1996-IV p 1129, 23 EHRR 364 (see further para 6.217 below).

<sup>136</sup> See *AB v South West Water Services Ltd* [1993] QB 507. The torts which satisfy this requirement are malicious prosecution, false imprisonment, assault and battery, defamation, trespass to land or to goods, private nuisance and tortious interference with business: See *Aggravated, Exemplary and Restitutionary Damages* (1993) Law Commission Consultation Paper No 132, paras 3.57 - 3.64.

<sup>137</sup> See M Amos, "Damages for breach of the Human Rights Act 1998" [1999] EHRLR 178, 193. In *Fose v Minister of Safety and Security* 1997 (3) SA 786, the Constitutional Court of South Africa also rejected a claim for punitive damages. The Constitutional Court was concerned not simply that punitive damages were non-compensatory, but with issues such as the propriety of imposing penal sanctions without procedural safeguards, doubts as to the efficacy of punitive damages as a deterrent and the best ways of using limited Government resources. Similarly, in relation to the New Zealand Bill of Rights, it has been said that "in the assessment of compensation, the emphasis must be on the compensatory and not the punitive element. The objective is to affirm the right, not to punish the transgressor": *Simpson v Attorney-General, Baigent's Case* [1994] 3 NZLR 667, 703, *per* Hardie Boys J. By contrast, in the USA and Canada, punitive damages have been awarded for breaches of human rights provisions: see *Smith v Wade* (1983) 461 US 30; *Lord v Allison* (1986) 3 BCLR (2d) 300.



## **(6) Nominal damages**

4.74 Nominal damages may be awarded in English law in cases where there is no loss.<sup>138</sup> However, they have not featured in Strasbourg practice, and in a number of cases the Strasbourg Court has explicitly refused to make such an award.<sup>139</sup> Given that domestic courts will have the power to make a declaration under the HRA, there seems little reason for making such awards.<sup>140</sup>

## **(7) Restitutionary damages**

4.75 In contrast to compensatory damages, which are measured by reference to the applicant's loss, restitutionary damages are measured by reference to the defendant's gain, or a proportion of it.<sup>141</sup> Thus a defendant who has made wrongful use of the claimant's property may be made to pay a reasonable sum for that use even though the claimant would not have used the property itself at the time and has suffered no identifiable loss.<sup>142</sup> Thus, the idea underpinning restitutionary damages is the notion that one should not profit from a wrong.

4.76 Restitutionary damages have been awarded in English law for many years but without that label. Now they are increasingly recognised as an alternative to compensatory damages.<sup>143</sup> A claimant must elect one or the other as both cannot

<sup>138</sup> Except where a tort is not actionable per se. Nominal damages are most commonly awarded where the defendant infringes the claimant's legal rights, but the claimant does not suffer any loss: *The Mediana* [1900] AC 113, 116. They "mark the fact that there was a wrong done": *Bradley v Menley & James Ltd* 1913 SC 923, 926. Nominal damages can also be recovered where "the fact of a loss is shown but the necessary evidence as to its amount is not given": *McGregor on Damages* (16th ed 1997) para 423. However, nominal damages of this sort are rarely awarded.

<sup>139</sup> See *Marckx v Belgium* A 31 (1979), 2 EHRR 330, noted at para 6.187 below, where there were strong dissenting judgments in favour of a "token" award, and *Albert and Le Compte v Belgium* A 68 (1983), 13 EHRR 415 (just satisfaction). In *Engel and Others v Netherlands (No 2)* A 22 (1976), 1 EHRR 706, the Court awarded what it described as a "token indemnity" of 100 Dutch guilders (£24) for a breach of Article 5(1). However, it was not strictly a case of nominal damages, since the Court referred to the "moral damage" suffered by the claimant. See D Shelton, *Remedies in International Human Rights Law* (1999), p 218.

<sup>140</sup> It has been suggested that, since nominal damages at common law perform the same function as a declaration in acknowledging a wrong, nominal damages should be abolished: A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) pp 269 - 270.

<sup>141</sup> *Attorney-General v Blake* [1998] Ch 439, 456 (CA); *Attorney-General v Blake*, HL, unreported, 27 July 2000; Aggravated, Exemplary and Restitutionary Damages (1997) Law Com No 147, Part III.

<sup>142</sup> *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359; *Ministry of Defence v Ashman* (1993) 66 P & CR 195.

<sup>143</sup> *Attorney-General v Blake* [1998] Ch 439, 456 - 459. The Law Commission has recommended that in the context of restitution for wrongs, the term "restitutionary damages" be adopted to replace phrases such as "action for money had and received" and "account of profits": Aggravated, Exemplary and Restitutionary Damages (1997) Law Com No 247, para 3.82. However, in *Attorney-General v Blake* in the House of Lords, Lord Nicholls (with whom Lords Goff and Browne-Wilkinson agreed) said that he would prefer to avoid "the unhappy expression 'restitutionary damages'"; rather he referred to an

be recovered together. Hitherto, restitutionary damages have only been awarded in English law for proprietary torts; namely, conversion, trespass to goods, trespass to land and nuisance. Restitutionary remedies, in the form of an account of profits, are commonly awarded for infringement of intellectual property rights.<sup>144</sup> It is unclear whether or not restitutionary damages are available for non-proprietary torts.<sup>145</sup> As the House of Lords has recently held that the victim of a breach of contract may be able to obtain an account of profits in exceptional circumstances, if the normal remedies of compensatory damages, specific performance and injunction will not provide an adequate remedy, it may well be that an account of profits or other restitutionary measures of damages will also become more widely available in tort.<sup>146</sup>

4.77 The Strasbourg Court has not made an award of restitutionary damages. In one case it made an award which might appear to go beyond compensating the applicants.<sup>147</sup> However, this may be simply because appropriate cases for restitutionary damages have not yet been presented to the Strasbourg Court. It is conceivable that, were a clear case to arise,<sup>148</sup> the Court would find that just satisfaction required an account of profits or an award of restitutionary damages.

account of profits (27 July 2000, unreported, p 10 of transcript). The appropriate terminology is thus unclear. Here we use the phrase “restitutionary damages” to refer to measures which give the claimant a share of the gain made by the defendant but less than a full account of profits.

<sup>144</sup> See *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, paras 3.19-3.22.

<sup>145</sup> See *Halifax Building Society v Thomas* [1996] Ch 217, 227, *per* Peter Gibson LJ.

<sup>146</sup> *Attorney-General v Blake*, HL, unreported, 27 July 2000. The Court of Appeal ([1998] Ch 439, 455-459) had also contemplated a role for restitutionary damages in certain cases of breach of contract. The Law Commission has recommended that in general the development of the law of restitution for torts should be left to the common law, but that legislation should provide that restitutionary damages may be recovered where the defendant has committed a tort, or a civil wrong under an Act where an award of restitutionary damages would be consistent with the policy of that Act, provided in each case that the defendant’s conduct showed a deliberate and outrageous disregard of the claimant’s rights (*Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, paras 3.42 and 3.51). This should be without prejudice to remedies under the existing law (Law Com No 247, para 3.53).

<sup>147</sup> This was the case of *Papamichalopoulos v Greece*, A 260-B (1993), 16 EHRR 440 (merits); A 330-B (1995), 21 EHRR 439 (article 50); see below, paras 6.225 - 6.226. In this case the applicants were awarded not just the value of the land of which they had been dispossessed unlawfully but the value of the buildings which had subsequently been constructed on it. However the court was careful to emphasise that the award of the damages for the value of the buildings was intended to compensate the applicants for loss of enjoyment: A 330-B (1995), 21 EHRR 439, para 40 (read in conjunction with para 38). There is no sign that the Court intended to depart from its normal compensatory measure.

<sup>148</sup> For example, a case in which the applicant’s Convention rights had been violated by the state taking his confidential information, and that information had then been used to make a profit. (The point would arise only if the applicant would not have made the same profit himself, since in that case he would be able to claim compensatory damages. One can envisage cases in which the applicant wanted personal information kept confidential and would not have exploited it).

Even if this must remain speculative, courts in the United Kingdom may be able to award an account of profits or another form of restitutionary damages if that is the only way in which to afford a “just and appropriate” remedy, whether or not it falls within “just satisfaction”, as interpreted by Strasbourg.

## 7. CAUSATION

### (1) Causal link

- 4.78 As we have seen in paragraph 3.58 above, the need for a clear causal link is fundamental to Strasbourg case-law. The test corresponds closely to the “but for” test in domestic law - the principle that the claimant must prove that “but for” the wrong, he or she would not have suffered the loss.<sup>149</sup>
- 4.79 This may necessitate a consideration of what the claimant’s position would have been had no violation occurred. As Lord Woolf suggested in his fifth principle, awards should be restricted to compensating for what has happened “so far as the unlawful conduct exceeds what could lawfully happen”. Thus damages for unreasonable delay in holding a hearing (in breach of Article 6) should be limited to the excess over a reasonable time. This requires the court to make a judgment as to what a reasonable time would have been.<sup>150</sup>
- 4.80 In addition to the principles of causation, domestic courts apply the test of remoteness to restrict further the availability of compensatory damages for many types of claim. Compensatory damages will only be awarded for losses that are not too remote. In England, the relevant test is that of reasonable foreseeability of the loss in respect of which damages are claimed must be a reasonable foreseeable consequence of the defendant’s wrong.<sup>151</sup> The rules vary, however, between different torts, based on the culpability of the wrongdoer. For example, in respect of the tort of deceit, and arguably in respect of all intentional torts, a

<sup>149</sup> See for example, *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428. See further *Clerk and Lindell on Torts* (17th ed 1995) paras 2.01 - 2.17; A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 26-36.

<sup>150</sup> See, for example, *Sporrong and Lönnroth v Sweden* A 52 (1982), 5 EHRR 35, (1984) (merits); A 88 (1984), 7 EHRR 256 (just satisfaction) (discussed in Part VI at para 6.231 - 6.232 below), where the Court determined that 4 years should have been sufficient for the planning decisions there under consideration, which in fact took between 8 and 23 years. The damages were based on the excess over 4 years.

<sup>151</sup> *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Ltd, The Wagon Mound* [1961] AC 388. This rule is subject to two qualifications. First, damages are recoverable for an unforeseeable degree of loss provided that the loss is of a foreseeable type. This is sometimes referred to as the “thin skull” principle. See *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405. Secondly, damages are recoverable for a loss which occurs in an unforeseeable manner, provided that the loss is of a foreseeable type. *Hughes v Lord Advocate* [1963] AC 837.

wrongdoer will be liable for all consequent losses as “[c]onsequences intended by the defendant will never be too remote.”<sup>152</sup>

4.81 The Strasbourg Court does not distinguish between causation and remoteness in the same way as domestic courts. There is no express reference to concepts such as reasonable foreseeability; the requirement of a causal link provides the only express limit to the availability of compensatory damages. In this respect, the Strasbourg practice seems more akin to the domestic approach to intentional torts than non-intentional torts.

## **(2) Apportioning responsibility where judicial acts are involved**

4.82 A potential difficulty is the effect of the immunity given under the HRA for judicial acts or omissions. As has been seen,<sup>153</sup> although the term “public authority” includes a “court or tribunal”, remedies in respect of a judicial act may be brought only by exercising a right of appeal or judicial review, and damages may not be awarded, other than as required by Article 5(5) (unlawful detention). Thus, for example, violations of Article 6, by unreasonable delay caused by the courts,<sup>154</sup> are not the subject of damages under the HRA.

4.83 The Strasbourg Court considers the effect of a State’s conduct as a whole, and is not usually concerned to distinguish between the contributions made by different state agencies, be they courts or administrative bodies. Two examples will illustrate the problem:-

(1) In *H v United Kingdom*,<sup>155</sup> the Strasbourg Court awarded the applicant £12,000<sup>156</sup> for non-pecuniary loss under Articles 6(1) and 8, arising from delays in adoption and access proceedings relating to her child. Although the proceedings as a whole had taken just over two years, the crucial period was a delay of 5 months in the provision of the Council’s evidence, at a time when they had already placed the child for adoption (without informing the applicant). This delay was described by the High Court as “deplorable” and “seriously prejudicial” to her case;<sup>157</sup> the Local Ombudsman found “maladministration”, but thought it “very unlikely indeed” that it affected the

<sup>152</sup> *Clerk and Lindsell on Torts* (17th ed 1995) para 2.20. A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) pp 44 - 45. Contrast *Kuwait Airways Corp v Iraqi Airways Co (No 5)*, *The Times* 7 April 2000.

<sup>153</sup> Paras 2.26 - 2.27 above.

<sup>154</sup> Such breaches of Article 6 are one of the most fruitful sources of damages in Strasbourg, particularly in relation to Italy: See Part VI paras 6.113 - 6.124.

<sup>155</sup> A 120 (1987), 10 EHRR 95 (merits); A 136-B (1988), 13 EHRR 449 (just satisfaction). This case is noted at para 3.65 above.

<sup>156</sup> The damages reflected her “loss of real opportunities”, and her “feeling of frustration and helplessness” as she saw her chances of success becoming more remote: A 136-A (1988), 13 EHRR 449 at paras 13 and 14.

<sup>157</sup> A 120 (1987), 10 EHRR 95, para 28.

outcome of the case.<sup>158</sup> Although the Strasbourg Court absolved the other parties (including the domestic court) from criticism, it found that overall the proceedings were not concluded within a “reasonable time”.<sup>159</sup>

(2) *EDC v United Kingdom*<sup>160</sup> was a Commission decision which was settled without coming to the Strasbourg Court. It concerned an alleged breach of Article 6(1) arising from delays in proceedings in the High Court under the Company Directors’ Disqualification Act 1986. Delays had been caused by the decision to await the outcome of criminal proceedings against other respondents. The proceedings extended over 4 years, before the High Court granted a stay in January 1996. The Commission did not question the decision to await the trial; but it criticised the Official Receiver’s delay in starting proceedings, and the failure of “the competent authorities” to fix a trial date until 14 months after the conclusion of the criminal trial. The Commission found that overall the period exceeded a “reasonable time”, observing that it was “up to states to organise their legal systems” so as to secure compliance with Art 6.<sup>161</sup>

- 4.84 One can envisage the problems of a claim under the HRA in a similar case, where the decision-making process has involved court proceedings to which a public authority is a party, and the court itself is found partly responsible for the delay. Only that part of the delay attributable to public authorities other than the court will attract damages. Presumably, therefore, it will be necessary to apportion responsibility between the court and any other public authorities found responsible. In *H v United Kingdom*, for example, it appears that the local authority was principally responsible for the delay, and would therefore be at risk of paying all the damages. In *EDC v United Kingdom*, the apportionment of blame might be much more difficult.<sup>162</sup>

### (3) Speculative losses

- 4.85 The “loss of opportunity” cases in Strasbourg seem similar to domestic claims for loss of a chance. Where the loss in question concerns a hypothetical event, damages may be awarded for the loss of a chance. Such damages do not comprise the full amount that would be awarded were the claimant able to prove on the balance of probabilities that, but for the wrong, some event favourable to

<sup>158</sup> A 120 (1987), 10 EHRR 95, para 31.

<sup>159</sup> It referred particularly to the nature of the proceedings, which would be decisive of the mother’s relations with her child, and in which any procedural delay could result in a *de facto* determination of the issues before the court. The authorities were therefore under a duty to exercise exceptional diligence: A 120 (1987), 10 EHRR 95, paras 85-6.

<sup>160</sup> [1998] BCC 370.

<sup>161</sup> [1998] BCC 370, para 56.

<sup>162</sup> See also *Massa v Italy* A 265-B (1993), 18 EHRR 266, noted in para 6.119 below, where the blame was apportioned between the state authorities and the backlog of the relevant court.

him would have occurred.<sup>163</sup> Rather, such damages are awarded in proportion to the percentage chance of loss.<sup>164</sup>

- 4.86 Given the inconsistencies in the Strasbourg case-law,<sup>165</sup> it is difficult to see how domestic courts will derive useful assistance from it as to when damages should be awarded for loss of opportunity. It is submitted that it should be treated as a purely factual question: if the violation of the claimant's Convention rights resulted in the loss of a chance of more beneficial treatment or consequences, damages should be awarded for loss of that chance upon normal common law principles.<sup>166</sup>
- 4.87 In practice, as Lord Woolf suggests,<sup>167</sup> the element of speculation may be lessened in the domestic context, by the availability of other remedies. For example, where an applicant has been convicted of a crime by a tribunal which was not impartial in breach of Article 6(1), a retrial complying with the Convention will show whether or not the violation affected the outcome of the original proceedings.

## **8. OTHER ISSUES**

### **(1) Concurrent liability**

- 4.88 An issue which is related to the treatment of other responses to a violation, but which only arises for the domestic court, is concurrent liability. There is no question of concurrent liability when a claim reaches the Strasbourg Court because of the rule that domestic remedies must first be exhausted. Where there are causes of action under the HRA and under existing domestic law (for example in tort),<sup>168</sup> remedies (including damages) obtained at common law must form part of the assessment of just satisfaction under section 8. If there are

<sup>163</sup> These cases, in most of which the chance was that, but for the wrong, a third party might have acted in a way that would have advantaged the claimant, must be distinguished from those in which the court is faced with evaluating whether or not an event would have occurred in the past. In the latter type of case the claimant must prove his case on the balance of probabilities: *Hotson v East Berkshire Area Health Authority* [1987] AC 750.

<sup>164</sup> A recent English authority is *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, CA. A well-known case in contract is *Chaplin v Hicks* [1911] 2 KB 786.

<sup>165</sup> Paras 3.59 - 3.69 above. As there noted, in *Perks v United Kingdom* Application nos 25277/94 et al, 12 October 1999, 30 EHR 33, the Court declined the claimant's invitation to clarify the position. See, however, *Pressos Compania Naviera SA v Belgium* A 332 (1995), 21 EHR 301 (merits); 1997-IV p 1292, 24 EHR CD 16 (just satisfaction), discussed in Part VI paras 6.229 - 6.230, where the Court awarded half the claim to allow for the uncertainty of litigation.

<sup>166</sup> Dannemann makes a similar proposal. He suggests that damages should be for the loss of the chance of a favourable outcome, not to compensate for the unfavourable outcome; the claimant should receive a proportion of the benefit, according to the chance of success, that being an issue to be determined by evidence. "Haftung für die Verletzung von Verfahrensgarantien nach Article 41 EMRK" in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, December 1999 at pp 465 - 469.

<sup>167</sup> Lord Woolf's third principle: see above, para 4.31.

<sup>168</sup> See above paras 2.22 - 2.25 and 4.15.

heads of loss which are not fully compensated by the common law, the issue of damages under section 8 will still be a live issue.<sup>169</sup> If full *restitutio* is achieved in a concurrent action it will not be appropriate to award damages under section 8. This is wholly consistent with existing domestic law on concurrent liability; the claimant must not be allowed to recover damages in both actions for the same loss.<sup>170</sup>

## (2) Interest

- 4.89 We saw in Part III that the Strasbourg Court normally awards interest on damages for pecuniary loss.<sup>171</sup> Frequently the interest is included in a global award, though the rate used to calculate the interest may be stated.<sup>172</sup> Since the English court need only take into account the principle applied by the Strasbourg Court,<sup>173</sup> which is clearly to award interest on awards, it need not concern itself with the details of the Strasbourg practice. It may either exercise its general power under section 8(1) to fashion a just and appropriate remedy to include interest in a global award or, which would seem simpler, exclude interest from the calculation of damages and exercise its statutory power to award interest.<sup>174</sup>
- 4.90 The Strasbourg Court does not seem to award interest on damages for non-pecuniary loss,<sup>175</sup> but it is doubtful whether this is a matter of principle. It may be no more than a reflection of the same concern which leads the English courts to give only moderate awards of interest<sup>176</sup> on this type of loss, namely that the award will be at figures prevailing at the time of trial so that the interest rate used need not include any element for loss in the value of money.<sup>177</sup> We therefore consider that English courts making awards under section 8 of the HRA are free to follow their normal practice in relation to interest on damages for non-pecuniary loss.
- 4.91 We saw that the Strasbourg Court now also awards default interest on judgment debts which remain unpaid for over three months. It is doubtful whether this is

<sup>169</sup> See Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention* (2000) para 6-20.

<sup>170</sup> See A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 4. It is also consistent with the leading case in New Zealand law: *Simpson v Attorney General, Baigent's case* [1994] 3 NZLR 667, where Cooke P indicated that double recovery should not be allowed. This case is discussed at para 4.19 above.

<sup>171</sup> See paras 3.70 - 3.74 above.

<sup>172</sup> As in *Pine Valley Developments Ltd v Ireland* A No 222, 14 EHRR 319; A No 246-B, 16 EHRR 379. For details see below, paras 6.219 - 6.222.

<sup>173</sup> HRA s 8(4): see the discussion at paras 4.3 - 4.11 above.

<sup>174</sup> Under Supreme Court Act 1981, s 35A or County Courts Act 1984, s 69.

<sup>175</sup> Para 3.74 above.

<sup>176</sup> For example 2%. *Clerk & Lindsell on Torts, Fourth Supplement* suggest that 3% should be taken, following *Wells v Wells* [1999] 1 AC 345. See pp 25 - 27.

<sup>177</sup> See *Wright v British Railways Board* [1983] 2 AC 773, 782.

to be regarded as a matter of “damages” so that section 8(4), which requires the English court to take the Strasbourg case law into account, applies; but even if that section does apply, it is again only the principle which is relevant. The normal statutory rules on interest on judgment debts therefore apply.<sup>178</sup>

## 9. CONCLUSION

- 4.92 This Part has compared the principles applied by the Strasbourg Court to those which the English courts apply in cases of tort; but it must always be borne in mind that it is the terms of the HRA itself, and particularly of section 8, that govern the availability and quantum of damages. In many cases the application of these tests may lead to the conclusion that no award of damages is necessary, particularly those in which either the infringement has not yet occurred and the court is able to issue an injunction to prevent it, and those in which the public authority has accepted that the applicant’s Convention rights have been infringed and has taken steps to rectify the matter.
- 4.93 In other cases an award of damages will have to be considered. The comparison we have made between the “normal” rules on damages, particularly in cases of tort, and the discretion under the HRA, suggests that in the majority of HRA cases the courts of England and Wales will be able to ascertain whether damages are appropriate, and if so the level of award, without great difficulty. Although the Strasbourg jurisprudence is sometimes unfamiliar in both its terminology and concepts, it frequently reaches very similar results to those reached under the rules of tort.
- 4.94 There are likely to be some cases under the HRA which present heads of damage that do not fit easily with the established rules of tort. We saw, for example, that in the “child care” cases the Strasbourg Court awards damages for loss of relationship.<sup>179</sup> There appears to be no equivalent in domestic law. Here the United Kingdom courts will need to fashion a remedy which is just and appropriate and which affords just satisfaction to the victim. As they must take into account the principles used by the Strasbourg Court, we would expect them to award compensation in such cases. In establishing appropriate tariffs, they will no doubt have in mind the awards made in Strasbourg, the awards made in loosely parallel cases such as bereavement,<sup>180</sup> and the general concerns referred to in the judgment of the Court of Appeal in *Heil v Rankin*<sup>181</sup> and in Lord Woolf’s suggested principles.<sup>182</sup>

<sup>178</sup> See Judgments Act 1838, s 17 (as amended by s 44(1) of the Administration of Justice Act 1970) and Judgment Debts (Rate of Interest) Order 1983 (SI 1983 No 564); County Courts Act 1984 s 74 and County Courts (Interest on Judgments) Order 1991 (SI 1991 No 1184).

<sup>179</sup> See above, paras 3.27, 3.65.

<sup>180</sup> See above, para 4.64.

<sup>181</sup> [2000] 2 WLR 1173. See above, paras 4.66 - 4.67.

<sup>182</sup> See above, para 4.31.



- 4.95 There are points on which the principles used to assess damages in the domestic courts, and those used by the Strasbourg Court, differ in matters that are less fundamental. For example in the Strasbourg Court damages for anxiety or mental distress seem to be awarded more readily than in claims in tort. Here the domestic courts will need to decide what approach to take: whether to award such damages whenever the victim of a violation of Convention rights suffers anxiety or mental distress, or only in “aggravated” cases.<sup>183</sup>
- 4.96 More generally, the courts will have to decide to what extent it will follow Strasbourg in applying a general “equitable” discretion, which takes account of a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law.
- 4.97 In many cases - probably the majority of cases - the terms of section 8, read in the light of our review of the Strasbourg case-law, will not require the courts awarding damages under the HRA to apply measures which are significantly different to those it would reach were the claim one in tort. As we have suggested, the court may either apply the well-established rules of English law, or apply its general discretion under section 8 to reach the same result.

<sup>183</sup> See above, paras 4.69 - 4.70.

# **PART V**

## **JUST SATISFACTION UNDER SCOTS LAW**

### **1. INTRODUCTION**

- 5.1 Section 8 of the HRA gives the courts<sup>1</sup> the power to grant relief to a victim of a breach of human rights by a public authority. This can include an award of damages. In this Part, we shall consider the power to award damages from the perspective of Scots law.
- 5.2 At the outset, it should be emphasised that the court's power to award damages derives from statute. The nature of the damages which can be awarded will ultimately depend on the construction of section 8(3). The wording of section 8(3) is therefore of the utmost importance:

(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.

### **2. THE DISCRETION TO AWARD DAMAGES**

- 5.3 It is clear from the statutory language that a court cannot make an award of damages unless it is satisfied that an award is necessary to afford just satisfaction to the victim of the breach of the Convention rights (the necessity criterion). The onus will lie on pursuers not only to establish a breach of their rights but also to satisfy the necessity criterion. Given the range of other remedies available,<sup>2</sup> the courts may often be able to provide just satisfaction to the pursuer without resorting to an award of damages. The negative structure of section 8(3) makes it plain that damages are to be the exception rather than the rule. This appears consistent with the jurisprudence of the Strasbourg Court,<sup>3</sup> which has to be considered at this stage: section 8(4)(a). But the issue is ultimately a question of statutory construction for the Scottish Courts.
- 5.4 In determining whether the necessity criterion is established the court must take account of all the circumstances of the case. The judicial discretion is

<sup>1</sup> Though the power to award damages is limited to courts which have the power to award damages or pay compensation in civil proceedings: s 8(2), see above, paras 2.16 - 2.18.

<sup>2</sup> For example interdict or specific implement.

<sup>3</sup> See above paras 3.18 and 3.31 - 3.34.

deliberately wide in order to deal with the merits - or demerits - of individual cases. Principles will be difficult to formulate, as is demonstrated in the decisions of the Strasbourg Court.<sup>4</sup> One issue deserves comment. The Strasbourg Court has argued that its own judgment declaring that a violation has occurred may *per se* be sufficient to constitute just satisfaction.<sup>5</sup> Given that the pursuer's rights have (*ex hypothesi*) been violated by a public authority, should a declarator of a Scottish Court ever be itself sufficient to provide just satisfaction? This is not to say that damages should always be awarded - the structure of section 8(3) prevents such an outcome. But it is suggested that the pursuer should receive some relief *in addition* to a declarator before there is just satisfaction for the breach. Otherwise, it would appear that public authorities may breach human rights with impunity. This further relief need not be judicial: it might, for example, be a change in administrative practice.

### 3. HOW QUANTUM SHOULD BE ASSESSED

5.5 Once section 8(3) is triggered, the court can award damages. The jurisprudence of the Strasbourg Court must also be considered when considering *quantum*: section 8(4)(b). As a general rule, the Strasbourg Court takes the view that the purpose of damages is to compensate the victim for losses arising from the breach of a Convention Right, that is to obtain *restitutio in integrum*. This is consistent with the law of Scotland where the purpose of damages in delict is to compensate the pursuer for losses arising from the defender's wrongful conduct. Several points should be noticed.

- (1) Damages under section 8(3) should not be nominal.<sup>6</sup> This is because it is difficult to see how an award of nominal damages can be "necessary" to afford just satisfaction. However, this should not prevent a court awarding a small sum of damages when the pursuer has suffered a small loss. This is consistent with Scots law, which has always been reluctant to award only nominal damages.<sup>7</sup>
- (2) Damages under section 8(3) should not be exemplary or punitive.<sup>8</sup> The purpose is to compensate the pursuer's loss, not to punish the public authority. Again this is consistent with Scots law which rejects exemplary or punitive damages.<sup>9</sup>

<sup>4</sup> See paras 3.4 - 3.14.

<sup>5</sup> See, for example, *Golder v United Kingdom* A 18 (1975), 1 EHRR 524; *Kruslin v France* A 176-B (1990), 12 EHRR 547. See above, paras 3.38 - 3.43.

<sup>6</sup> Cf para 4.74 above.

<sup>7</sup> D M Walker, *The Law of Delict in Scotland* (revised 2nd ed 1981) p 463.

<sup>8</sup> Para 3.47. Cf paras 4.71 - 4.73 above.

<sup>9</sup> D M Walker *The Law of Delict in Scotland* (revised 2nd ed 1981) p 461: *Black v North British Railway Co* 1908 SC 444, 453 *per* the Lord President (Dunedin) at 453. ("The other ground is that, where fault is great, damages ought to be what is termed 'exemplary'").

- (3) Where the breach of a human right amounts to conduct already recognised by Scots law as delictual then it is thought that the damages awarded under section 8(3) should correspond with the damages that would have been awarded in a delictual claim. Consider the following examples:
- (a) A is wrongly shot by B, a policeman: A is killed. This is a breach of Article 2. The court could award damages to A's family and dependants under section 8(3). Title to sue could be determined *by analogy* with the Damages (Scotland) Act 1976. Awards could be made for loss of financial support and loss of society on analogy with the 1976 Act.
  - (b) A is assaulted by police while in police detention. This is a breach of Article 3. The court could award damages to A based on analogy with the Scots delict of assault.<sup>10</sup>
  - (c) A is wrongfully detained in prison. This is a breach of Article 5. The court could award damages to A based on analogy with the Scots delict of wrongful imprisonment.<sup>11</sup>

It remains to be seen whether a delictual claim should have to be pursued before a court can consider damages under section 8(3). While availability of a delictual action might suggest that damages under section 8(3) are not necessary to afford just satisfaction,<sup>12</sup> it was suggested earlier that this is probably not a correct interpretation of the Act.<sup>13</sup>

- (4) In our view, the importance of section 8(3) arises when the breach of a human right does not amount to delictual conduct already recognised by Scots law. Where this is a mere 'technical' breach which has not caused the victim any physical or economic harm, the necessity criterion may not be triggered. If so, no award of damages will be due. But on the assumption that this criterion is satisfied, how should a Scottish court assess *quantum* when there is no analogous delictual claim? Cases are most likely to arise under Articles 5, 6 and 8.<sup>14</sup>

I am bound to say I find no authority for any distinction between damages and 'exemplary damages' in the law of Scotland".)

<sup>10</sup> *Downie v Chief Constable of Strathclyde Police* 1997 SCLR 603.

<sup>11</sup> *Henderson v Chief Constable, Fife Police* 1988 SLT 361.

<sup>12</sup> The argument being that a person should pursue the delictual claim rather than seek damages under s 8(3) on analogy with having to exhaust internal remedies before proceeding to the Strasbourg Court. Of course, the pursuer cannot obtain delictual damages and damages under s 8(3), as he cannot be compensated twice for the same loss.

<sup>13</sup> See above, para 2.22 - 2.25.

<sup>14</sup> For example, if a parent wrongfully loses care of her child to a local authority this can be a breach of Articles 6 and 8: *W v United Kingdom (Just Satisfaction)* A 136-C (1988), 13

While it is, of course, ultimately a matter for the courts, it is thought that an analogy with the law of defamation might provide a starting point for the assessment of damages in these circumstances. In an action of defamation, the pursuer is entitled to solatium in respect of insult and hurt feelings.<sup>15</sup> A possible approach is that a victim of a breach of human rights should be entitled to solatium under section 8(3) to compensate for the indignity of that breach. The more serious the breach, the greater will be the amount of solatium because the victim's hurt will be deeper.<sup>16</sup> However, where the pursuer alleges that he has suffered pecuniary loss as a consequence of the breach this would have to be averred and proven and the ordinary rules of causation and remoteness would apply.

Where the breach has involved a wrongful interference with proprietary interests contrary to Article 1 of Protocol No 1 the question arises whether the measure of damages may be restitutionary.<sup>17</sup> It is not clear that a restitutionary measure can be justified as necessary to afford "just satisfaction" to the victim. However, it might be justified by the court's power under section 8(1) to award a remedy which is "just and appropriate".<sup>18</sup> There is no authority in Scots law that a pursuer has to elect between restitutionary and compensatory damages, provided the pursuer is seeking damages for wrongful interference with separate and different interests.

Where the victim has suffered a long period of wrongful detention, compensation could be based on the criteria used by the executive when currently making an *ex gratia* payment. Of course, if such a payment has been made or is available, the necessity criterion may not be satisfied and damages under section 8(3) will not be triggered.

- (5) In a claim for damages under section 8(3), whether or not the breach amounts to delictual conduct under Scots law, the pursuer will have to establish that his loss was caused by the breach.<sup>19</sup> Similarly, the losses must not be too remote.<sup>20</sup> Thus, consistent with the Strasbourg

EHRR 453. A parent's loss of *de facto* care of a child is not a reparable interest in Scotland: *McKeen v Chief Constable, Lothian and Borders Police* 1994 SLT 93.

<sup>15</sup> See for example *Gilbert v Yorston* 1997 SLT 879.

<sup>16</sup> This is the position in the law of defamation: see *Baigent v British Broadcasting Corporation* 1999 GWD 10-474.

<sup>17</sup> Where the breach amounts to delictual conduct under Scots law, then, of course, the pursuer may seek damages on general principles of *culpa* or in an action of *spulzie* (moveable property) or an action of intrusion or ejection (heritable property) which can include violent profits, ie all the profits which the owner might have made from the property while in the wrongful possession of the defender.

<sup>18</sup> Compare para 4.77 above.

<sup>19</sup> On causation see J M Thomson, *Delictual Liability* (1999 2nd ed) Ch 6.

<sup>20</sup> In Scots law the classic rule is that the damages must arise naturally and directly out of the wrong and therefore be reasonably foreseeable: *Allan v Barclay* (1864) 2M 873.

jurisprudence,<sup>21</sup> damages under section 8(3) for speculative losses can easily be curtailed.<sup>22</sup> When the pursuer's conduct has contributed to the breach, it is thought that any damages awarded under section 8(3) should be reduced as a result of contributory fault.<sup>23</sup>

It would appear that the Strasbourg Court has refused damages on the basis of the status of the victim.<sup>24</sup> As a general principle, the status of the pursuer is irrelevant in a claim for damages in delict: so, for instance, prison authorities owe the normal duty of care for the safety of inmates.<sup>25</sup> Moreover, even when the pursuer is injured in the course of committing a crime, his delictual claim is not automatically barred.<sup>26</sup> Instead, the court has a discretion to refuse damages, depending on the gravity of the offence.<sup>27</sup> Thus, while the claim of the relatives of a deceased terrorist would not automatically be barred in Scots law, it is likely that the court would refuse damages if the deceased had been engaged in terrorist activity at the time of the delict.<sup>28</sup> But the mere fact that the pursuer has been convicted of a criminal offence before the breach of human rights has occurred, should not prevent him from obtaining damages under section 8(3).<sup>29</sup> The only issue is whether the necessity criterion is otherwise satisfied.

#### 4. CONCLUSION

- 5.6 This report provides a guide to the Strasbourg jurisprudence. It also illustrates the limitations of the Strasbourg case law, particularly in its lack of clear principles. It should also be clear that the Strasbourg Court operates in a highly

<sup>21</sup> Para 3.58 above.

<sup>22</sup> Nevertheless, damages could be awarded under section 8(3) for loss of opportunities. First, the pursuer must show that on the balance of probabilities the defender's conduct caused the pursuer's *damnum* ie harm; *Kenyon v Bell* 1953 SC 125. But once causation is established it does not matter that the *damnum* was itself the loss of an opportunity, for example, the loss of a chance to pursue an appeal: the pursuer does not have to show on the balance of probabilities that the appeal would have been successful. See *Kyle v P & J Stormonth Darling WS* 1993 SC 57. Cf paras 3.59 - 3.69 above.

<sup>23</sup> Law Reform (Contributory Negligence) Act 1945. In spite of the short title, a deduction is made in respect of the pursuer's *fault* which can include deliberate as well as negligent wrongdoing: s 5(a) and *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

<sup>24</sup> See para 3.59 above.

<sup>25</sup> See, for example, *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

<sup>26</sup> Cf the position in English law, para 4.74 above.

<sup>27</sup> *Duncan v Ross Harper & Murphy* 1993 SLT 105; *Weir v Wyper* 1992 SLT 579.

<sup>28</sup> *McCann v United Kingdom* A 324 (1995), 21 EHRR 97.

<sup>29</sup> Under the Criminal Injuries Compensation Scheme, the Authority has discretion to refuse or reduce an award on the ground of the applicant's criminal record. For discussion, see *The Laws of Scotland, Stair Memorial Encyclopaedia* (1995) Vol 7 para 656.11. It is submitted that this is not a suitable precedent in respect of claims under section 8(3) where a public authority has breached human rights.

politicised environment.<sup>30</sup> Hence the perceived need to give a victim damages when the State's breaches have been serious or blatant and repeated. This is difficult to reconcile with the purported purpose of damages under the Convention, that is compensation for the victim's loss: in other words, there is a punitive element in the damages. However, it was argued earlier that the damages are not truly punitive; they are to compensate for a genuine loss suffered by the victim, though one which the Strasbourg Court might have left uncompensated but for the seriousness of the State's violation.<sup>31</sup>

- 5.7 However, the absence of detailed guidance on the quantification of damages should not be a cause for great concern in Scotland. The Scottish Courts have traditionally taken a pragmatic approach to the whole question of damages. Scots law has avoided the complex rules on the calculation of damages which are a feature of English law. Given that background, Scottish courts should experience little difficulty in applying section 8 which has been deliberately drafted to allow a considerable degree of judicial discretion on both whether or not to award damages and their quantification. The Strasbourg jurisprudence may prove to be of limited value. But there are enough analogous principles in the Scots law of delict to give the courts at least a starting point in dealing with section 8(3) claims for damages.

<sup>30</sup> This is particularly evident in cases brought against Turkey (*Baskaya and Okçuoglu v Turkey* Application nos 23536/94 and 24408/94, 8 July 1999 (see paras 6.151 and 6.198 below); *Aydin v Turkey* 1997-VI p 1866, 25 EHRR 251 (see para 6.20 below); *Socialist Party v Turkey* 1998-III p 1233, 27 EHRR 51 (see para 6.210 below); *Kaya v Turkey* 1998-I p 297, 28 EHRR 1 (para 6.8 below); *Güleç v Turkey* 1998-IV p 1698, 28 EHRR 121 (see para 6.10 below); *Yasa v Turkey* 1998-VI p 2411, 28 EHRR 408; *Kurt v Turkey* 1998-III p 1152, 27 EHRR 373 (see para 6.21 below) ; and Greece (*Papamichalopoulos v Greece* A 260-B (1993), 16 EHRR 440 (merits); A 330-B (1995), 21 EHRR 439 (article 50) (see paras 6.225 - 6.226 below); *Stran Greek Refineries and Stratis Andreadis v Greece* A 301-B (1994), 19 EHRR 293 (para 6.228 below).

<sup>31</sup> See above, paras 3.47 - 3.48.

# **SECTION B: JUST SATISFACTION UNDER INDIVIDUAL ARTICLES OF THE CONVENTION**

## **PART VI ARTICLE BY ARTICLE ANALYSIS**

### **1. INTRODUCTION**

- 6.1 In this Part, we consider the general principles discussed in Parts III and IV as applied by the Strasbourg Court to specific articles of the Convention. As we have seen, the Strasbourg Court exercises a broad discretion in awarding damages under Article 41 and its approach is far from consistent. The volume of case-law makes it impossible to do more than illustrate the typical categories of case under the various articles.
- 6.2 Generally the reasoning of the Strasbourg Court on the issue of damages is very short or non-existent, and we have simply summarised the relevant facts. Where, unusually, there is detailed discussion of this issue, particularly in cases involving the UK, we have included longer quotations. For reasons explained in Part III,<sup>1</sup> we have concentrated on awards for pecuniary and non-pecuniary loss, and have not included detailed discussion of costs and expenses.

### **2. ARTICLE 2**

- 6.3 Article 2 protects an individual's right to life. It states that:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

<sup>1</sup> Para 3.30 above.



- 6.4 Cases involving a violation of Article 2 are rare. The few cases which do exist have come rather late in the Court's jurisprudence. The first was decided in 1995 and arose out of the killing of suspected IRA terrorists by SAS soldiers in Gibraltar.<sup>2</sup> Most other cases to date have arisen from recent conflicts in Turkey.<sup>3</sup>
- 6.5 In *McCann v United Kingdom*<sup>4</sup> the Court found a violation of Article 2 in relation to the killing by SAS soldiers of three members of the IRA suspected of planning a terrorist attack on Gibraltar. Although the Court held that the actions of the soldiers themselves did not constitute a violation of Article 2, the decision not to stop the suspects from entering Gibraltar, the failure to make allowances for erroneous intelligence, and the automatic use of lethal force convinced the Court that Article 2 had been breached. A claim for compensation followed in which the applicants (representative of the deceaseds' estates) sought damages at the same level as awarded under English law for unlawful killings by the state. In addition, exemplary damages were claimed, again drawing on similar English awards. The Court rejected in entirety the claim for pecuniary and non-pecuniary damage<sup>5</sup> because of the nature of the conduct in which the victims had been involved:
- ...having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head.<sup>6</sup>
- 6.6 This decision provides a clear example of the Court refusing to award damages on the basis that the deceased was engaged in an illegal activity. The applicants were, however, successful in recovering costs. This indicates that although conduct can influence the Court's discretion to award pecuniary or non-pecuniary damages, it is unlikely to affect the Court's decision on costs.
- 6.7 In the cases arising out of the recent conflict in Turkey, the facts surrounding the deaths in question have often been in dispute, and the Court has found a violation of Article 2 because of the state's failure to carry out a proper investigation into the deaths, rather than finding the state actually responsible for

<sup>2</sup> See *McCann v United Kingdom* A 324 (1995), 21 EHRR 97.

<sup>3</sup> See *Kaya v Turkey* 1998-I p 297, 28 EHRR 1 (see para 6.8 below); *Güleç v Turkey* 1998-IV p 1698, 28 EHRR 121 (see para 6.10 below); *Yasa v Turkey* 1998-VI p 2411, 28 EHRR 408 (see para 6.9 below); *Salman v Turkey* Application no 21986/93, 27 June 2000 (see para 6.11 below); *Timurtas v Turkey* Application no 23531/94, 13 June 2000; 18 May 2000; *Kiliç v Turkey* Application no 22492/93, 28 March 2000 (see paras 6.13 - 6.14 below). *Valikova v Bulgaria* Application no 41488/98, 18 May 2000 is an example of a case on Article 2 which did not involve Turkey (see para 6.12 below).

<sup>4</sup> A 324 (1995), 21 EHRR 97.

<sup>5</sup> The Court pointed out that it was not clear from the applicants' submissions whether the claim was made in respect of pecuniary damage or non-pecuniary damage or both.

<sup>6</sup> A 324 (1995) 21 EHRR 97, 178. See para 3.56 above.

the death. In several of the cases, a violation of Article 13<sup>7</sup> has been established in addition to the violation of Article 2. The following are examples.

- 6.8 In *Kaya v Turkey*,<sup>8</sup> the applicant was the deceased's brother, and made a claim on behalf of himself and the deceased's widow and children. He claimed that his brother was shot by security forces whilst unarmed and that afterwards a rifle was planted on his body. The Turkish Government claimed that soldiers had been fired upon and returned fire, after which the body was found with a rifle nearby. The Court did not resolve this dispute but found violations of Articles 2 and 13 due to the authorities' failure to conduct an adequate investigation into the death. It made an award of £10,000<sup>9</sup> to the widow and children, but no award was made to the applicant himself as the Court was not convinced of his loss.
- 6.9 In *Yasa v Turkey*,<sup>10</sup> the applicant alleged that he and his uncle, who subsequently died, were attacked by security forces for selling a Kurdish newspaper. As in *Kaya*, the Court found violations of Article 2 and Article 13 in the failure by the state to carry out an adequate investigation. It noted, however, that neither the alleged attack on the applicant and the killing of his uncle by security forces, nor "a practice of violations of the Convention", had been established. It accordingly rejected the claims based on those allegations. The nephew received £6,000 in non-pecuniary damage on an "equitable basis", but the claims for the uncle's family were rejected because they were not parties to the application.<sup>11</sup>
- 6.10 Failure to conduct a proper investigation and disproportionate use of force were the basis of the violation of Article 2 found in *Güleç v Turkey*.<sup>12</sup> In this case, the claim for compensation was brought by a father, whose son was killed during unauthorised demonstrations. He claimed 400,000 French francs (£42,790) for pecuniary loss and 100,000 French francs (£10,700) for non-pecuniary loss, as the loss of a son deprived him "of financial support and had caused him great distress". Noting that the son had died "during a violent demonstration",<sup>13</sup> the

<sup>7</sup> Article 13 protects the right to an effective remedy. It does not form part of the Human Rights Act 1998. See Part II para 2.3 above.

<sup>8</sup> 1998-I p 297, 28 EHRR 1.

<sup>9</sup> The award appears to be for non-pecuniary damage only. The applicant had claimed £30,000 for the loss of the support for the widow and children, and £10,000 for the authorities' failure to investigate. The latter appears to be the basis of the award.

<sup>10</sup> 1998-VI p 2411, 28 EHRR 408.

<sup>11</sup> The nephew was treated as "a person who is himself affected" and "not as his uncle's representative": 1998-VI p 2411, 28 EHRR 408, para 63. As far as appears from the judgments, the refusal of any award to the deceased's family in this case merely reflected the fact that they had not been made parties to the application, whereas in *Kaya v Turkey* 1998-I p 297, 28 EHRR 1 para 122, the application was expressly made on behalf of the deceased's family.

<sup>12</sup> 1998-IV p 1698, 28 EHRR 121.

<sup>13</sup> Two judges voted against the award of non-pecuniary damages, because the son had voluntarily and deliberately taken part in an illegal and violent demonstration; and further

Strasbourg Court made an award of 50,000 French francs (£5,350) for non-pecuniary loss.

- 6.11 In *Salman v Turkey*<sup>14</sup> the applicant's husband was detained by security forces and subjected to torture which induced a fatal heart attack. The Strasbourg Court found that there had been a violation of Article 2 in respect of the death. The applicant submitted a claim for pecuniary loss in respect of the loss of earnings of her husband, a taxi driver, supported by detailed submissions concerning the actuarial basis of the calculation. The Strasbourg Court awarded the claim in full. She was also awarded damages of £10,000 for non-pecuniary loss.<sup>15</sup> The Court had regard to the awards it had made in comparable cases.
- 6.12 This result can be contrasted with *Valikova v Bulgaria*<sup>16</sup> another case where the applicant's partner died in police custody, and the evidence suggested that the death was the result of injuries which had been inflicted while he was in police custody. The applicant claimed damages of 39,047.55 French francs (£3,580) as pecuniary loss for the loss of her partner's earnings. However, she was unable to submit documentary evidence of his earnings (predominantly from the shadow economy) or of the likelihood of his living to the average life expectancy. The Strasbourg Court noted that

the method used by [the applicant] in calculating the loss of income for the family is far from precise. The applicant has not presented an actuarial report. The Court is therefore obliged to deal with the claim on an equitable basis.

She was awarded 8,000 new Bulgarian leva (approximately £2,536) on this basis. The Court also awarded the applicant 100,000 French francs (£9,170) for non-pecuniary loss, having regard to awards made in comparable cases.<sup>17</sup>

- 6.13 In *Kiliç v Turkey*<sup>18</sup> the Strasbourg Court considered claims for pecuniary and non-pecuniary loss made by the applicant on behalf of his brother, a Kurdish journalist murdered in the street. The pecuniary loss claimed was for the earnings his brother would have made if he had not died. The Strasbourg noted that

objected in principle to awarding non-pecuniary damages to the relatives of a victim because it was "unseemly to derive financial gain from the death of a relative": see the joint partly dissenting opinion of Judges Gölcüklü and Matscher 1998-IV p 1698, 28 EHRR 121, 167.

<sup>14</sup> Application no 21986/93, 27 June 2000.

<sup>15</sup> The Court also found a violation in respect of Article 3 in respect of the torture to which her husband had been submitted.

<sup>16</sup> Application no 41488/98, 18 May 2000.

<sup>17</sup> The Court specified that the award should be paid to the applicant in full, free from any attachment for tax or other reasons.

<sup>18</sup> Application no 22492/93, 28 March 2000.

the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damages being made to an applicant who has established that a close member of the family has suffered a violation of the Convention. ... In the present case however the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death, or by the applicant after his death.

- 6.14 The applicant's claim for pecuniary loss was unsuccessful. However the Court made an award of £15,000 for the non-pecuniary loss which had been suffered by his brother, referring to its past practice:

[The Court] has previously awarded sums as regards the deceased where it was found that there had been arbitrary detention or torture before his disappearance or death, such sums to be held for the person's heirs.

It also awarded the applicant £2,500 in respect of his own non-pecuniary loss.<sup>19</sup>

### **3. ARTICLE 3**

- 6.15 Article 3 of the European Convention prohibits torture. It states that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

#### **(1) Threatened violations**

- 6.16 In a number of cases, the Court has been concerned with threatened, rather than actual, violations. Although Article 50 has been held to apply in such cases, compensation has in practice been refused, and the awards have been limited to costs and expenses.
- 6.17 For example, in *Soering v United Kingdom*,<sup>20</sup> the applicant was a German national, whom the Home Secretary intended to extradite to the United States to stand trial for murder. In being extradited, the applicant faced the possibility of a death sentence and exposure to the "death-row phenomenon". The Court held that implementing the decision to extradite the applicant would therefore amount to a violation of Article 3. In relation to Article 50 it said:

No breach of Article 3 has as yet occurred. Nevertheless, the Court having found that the Secretary of State's decision to extradite to the United States of America would, if implemented, give rise to a breach

<sup>19</sup> See also *Kaya v Turkey*, Application no 22535/93, 28 March 2000 (see para 6.8 above).

<sup>20</sup> A 161 (1989), 11 EHRR 439.

of Article 3, Article 50 must be taken as applying to the facts of the present case.<sup>21</sup>

The Court made no award, concluding that its finding amounted to just satisfaction but it awarded costs and expenses in full.<sup>22</sup>

6.18 In *Chahal v United Kingdom*,<sup>23</sup> the applicant, a Sikh separatist leader, had been detained in custody by the Home Secretary pending deportation as a threat to national security. The Strasbourg Court held that the decision to deport him to India would, if implemented, constitute a violation of Article 3 because it would expose him to risk of torture. In addition, the Court held that he had been denied an effective remedy in the Courts because of the national security aspects, and found violations of Article 13 and Article 5(4). However, the detention as such was not held (by a majority) not to be unlawful under Article 5(1). Accordingly, his claim for compensation for non-pecuniary loss suffered during his detention was rejected, and in respect of the violations found, the Court held that the judgment itself constituted sufficient just satisfaction.

6.19 The same result was reached in *Ahmed v Austria*,<sup>24</sup> even though the Court acknowledged that there was some non-pecuniary loss. The applicant was a Somali national who lost his refugee status and faced deportation following a criminal conviction. The Court held that for as long as there was a real risk that the applicant would be subjected to torture or inhuman and degrading treatment in Somalia, the decision to deport would if implemented contravene Article 3. No monetary compensation was awarded. The Court simply commented:

The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgment affords him sufficient compensation in that respect.<sup>25</sup>

## **(2) Actual violations**

6.20 Where there have been actual violations of article 3, substantial awards of damages have been recovered by applicants, in recognition of the seriousness of the violation. In *Aydin v Turkey*,<sup>26</sup> the applicant was raped and tortured while detained by the security forces. The Court said:

<sup>21</sup> A 161 (1989) 11 EHRR 439, para 126.

<sup>22</sup> The applicant invited the Court to give directions on the implementation of its judgment, but the Court held that it had no power to give directions to give effect to its decision. The Committee of Ministers is responsible for supervising the enforcement of the Court's judgment. See para 3.31 above.

<sup>23</sup> 1996-V p 1831, 23 EHRR 413. See further para 6.76 below.

<sup>24</sup> 1996-VI p 2195, 24 EHRR 278.

<sup>25</sup> The judgment does not further explain the nature of the non-pecuniary damage.

<sup>26</sup> 1997-VI p 1866, 25 EHRR 251.

...having regard to the seriousness of the violation of the Convention suffered... and the enduring psychological harm which she may be considered to have suffered on account of being raped, the Court has decided to award a sum of £25,000 by way of compensation for non-pecuniary damage.<sup>27</sup>

- 6.21 In *Kurt v Turkey*<sup>28</sup> the applicant, who lived in a village which was burned down by security forces, alleged that soldiers had taken her son and that his whereabouts had since been unknown to her. The Court found a violation of Article 3 in respect of the applicant herself, noting that after she witnessed her son's detention by the security forces she had been left for a prolonged period of time with the anguish of knowing that her son had been detained with no official information as to his subsequent fate, and that the authorities had ignored her complaints. Having regard to "the gravity of the breach", it awarded £10,000 to the applicant herself for non-pecuniary damage.<sup>29</sup>
- 6.22 In *Aksoy v Turkey*,<sup>30</sup> the Strasbourg Court similarly had regard to the seriousness of the breach. Here the applicant had been tortured by the security forces. After he had made an application under the Convention, he was killed. The application was continued by his father. The Court awarded the full amount of compensation sought

In view of the extremely serious violations of the convention suffered by [the applicant] and the anxiety and distress that these undoubtedly caused to his father ...

In *Selçuk and Asker v Turkey*<sup>31</sup> the Court also made substantial awards for pecuniary and non-pecuniary loss, but specifically rejected claims for "punitive" and "aggravated" damages.<sup>32</sup>

<sup>27</sup> 1997-VI p 1866, 25 EHRR 251, para 131.

<sup>28</sup> 1998-III p 1152, 27 EHRR 373.

<sup>29</sup> The Strasbourg Court also awarded £15,000 to the son in respect of a breach of Article 5, to be held by the mother for her son and his heirs.

<sup>30</sup> 1996-VI p 2260, 23 EHRR 553. Violations of Arts 3, 5(3) and 13 were established in this case. "In view of the extremely serious violations", the Court awarded 4,283,450,000 Turkish lira (£24,325) for pecuniary and non-pecuniary damage. See also 3.45 above.

<sup>31</sup> 1998-II p 891, 26 EHRR 477. In addition to substantial sums awarded to compensate for homes and property that had been destroyed, and losses of income derived from such property, the Court awarded £10,000 for non-pecuniary damage to each applicant, "bearing in mind the seriousness of the violations which it has found in respect of Articles 3, 8 and 13... and Article 1 of Protocol No 1".

<sup>32</sup> The applicants claimed £10,000 for "aggravated damages" and a further £10,000 for "punitive damages". The Strasbourg Court gave no reason for rejecting either of these claims. The distinction being drawn by the applicants between "punitive damages" and "aggravated damages" is unclear. There is no indication that the term "aggravated damages" was being used in the English sense of compensation for the manner in which the breach was committed by the defendant. See the discussion at Part III paras 3.45 - 3.48 above.

6.23 In *Ilhan v Turkey*<sup>33</sup> the applicant's brother was kicked, beaten and struck on the head with a rifle. He suffered severe bruising, brain damage and long-term impairment of function. The Strasbourg Court made a substantial award for pecuniary loss in respect of the past medical expenses of the applicant's brother and the past and future income which his brother had lost. In each case the claims submitted by the applicant were accepted,

having regard ... to the detailed submissions by the applicant concerning these elements, which included the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to [his brother's] injuries.

In contrast, a claim for future medical expenses, for which no supporting evidence was submitted, was rejected as being largely speculative. As with similar cases under Article 2,<sup>34</sup> an award of £25,000 was made in respect of the brother's non-pecuniary loss.<sup>35</sup>

6.24 Substantial awards under Article 3 have not been limited to cases arising from the violent conflicts in Turkey. In *Ribitsch v Austria*,<sup>36</sup> the applicant was physically assaulted by police officers while in custody.<sup>37</sup> He was awarded 100,000 Austrian schillings (£6,410) for non-pecuniary damage on an "equitable basis". In *A v United Kingdom*,<sup>38</sup> the state was found to be in violation of Article 3 for the failure of the law to protect a child who had been beaten by his stepfather.<sup>39</sup> The Government had accepted the Commission's finding of a violation, and undertaken to amend the law. However, the Court considered that "in the circumstances of the case" (unspecified) there should be an award of £10,000 for non-pecuniary damage.

6.25 In *Assenov v Bulgaria*,<sup>40</sup> the Court found a violation of Article 3 in the State's failure adequately to investigate alleged maltreatment of the applicant (then aged 14) by the police. The judgment also found breaches of Article 5 arising out of a separate incident 3 years later. The Court made a global award of 6 million Bulgarian leva (£2,155) in respect of the non-pecuniary loss suffered by Mr Assenov, "given the gravity and number of violations found in this case." It is

<sup>33</sup> Application no 22277/93, 27 June 2000.

<sup>34</sup> See *Salman v Turkey*, Application no 21986/93, 27 June 2000, discussed in para 6.11 above.

<sup>35</sup> To be held by the applicant on behalf of his brother.

<sup>36</sup> A 336 (1995) 21 EHRR 573.

<sup>37</sup> The applicant alleged that he had received punches to the head, kidneys and right arm and kicks to the upper leg and kidneys, and that his head was banged against the floor. When released he had bruises on his right arm and one thigh and was suffering from a cervical syndrome, vomiting, diarrhoea and a violent headache.

<sup>38</sup> 1998-VI p 2692, 27 EHRR 611.

<sup>39</sup> He was acquitted at his trial for assault, having pleaded "reasonable chastisement".

<sup>40</sup> 1998-VIII p 3264, 28 EHRR 652.

not possible to distinguish the proportion attributable to the violation of Article 3. In *Sevtap Veznedaroglu v Turkey*<sup>41</sup> the Strasbourg Court similarly found that Article 3 had been violated because of the failure of the authorities to investigate allegations that the applicant had been tortured by the police. It awarded the applicant 2,000 United States dollars (£1,265) in respect of his non-pecuniary loss.

#### **4. ARTICLE 4**

6.26 This Article deals with the “prohibition of slavery and forced labour”. The Court has not yet considered the availability of damages under this Article.

#### **5. ARTICLE 5**

6.27 Article 5 of the Convention provides:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

<sup>41</sup> Application no 32357/96, 11 April 2000.



2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

6.28 There are numerous cases in which the Court has considered the availability of damages for a violation of Article 5. The points emerging from these cases are illustrated in the paragraphs that follow. Consistent principles are not easy to detect. It is convenient to divide the discussion between claims for pecuniary loss, which generally have failed, and those for non-pecuniary loss which have been slightly more successful.

**(1) Article 5(1)**

**(a) Pecuniary loss**

6.29 Claims for pecuniary loss have almost invariably failed, usually for lack of clear evidence of financial loss caused by the detention.<sup>42</sup>

6.30 A rare exception was *Tsirlis and Kouloumpas v Greece*,<sup>43</sup> in which the award was said to cover both pecuniary and non-pecuniary loss. The applicants were Jehovah Witness ministers who were detained by military courts (for periods of 13 and 12 months respectively) in connection with their refusal to perform military services. The Strasbourg Court held that their detention was arbitrary and violated Article 5, because the military court had “blatantly ignored” previous case-law on the religious exemption. Although there appear to have been no details of pecuniary loss,<sup>44</sup> the Court made a global award for both pecuniary and non-pecuniary loss.<sup>45</sup>

<sup>42</sup> See, for example, *Erkalo v Netherlands* 1998-VI p 2464, 28 EHRR 509, para 6.32 below.

<sup>43</sup> 1997-III p 909, 25 EHRR 198. See paras 3.45 - 3.46 above.

<sup>44</sup> It is simply recorded that they sought “compensation for damage” in the amount of 14.7 million Greek drachmas (£31,645) each.

<sup>45</sup> See para 3.22 above.

The Court observes that Mr Tsirlis and Mr Kouloumpas spent 13 and 12 months respectively in what was unlawful detention. The very fact of their deprivation of liberty must have produced damage of both a pecuniary and a non-pecuniary nature. However, no compensation was granted by the domestic courts.

Making an assessment on an equitable basis, as required by Article 50, the Court grants Mr Tsirlis 8,000,000 Greek drachmas [£17,220] and Mr Kouloumpas 7,300,000 Greek drachmas [£15,715] in respect of any damage they have sustained.<sup>46</sup>

**(b) Non-pecuniary loss**

6.31 Many claims have failed on the basis that the finding of a violation was sufficient just satisfaction. Two recent examples follow.

6.32 In *Erkalo v Netherlands*,<sup>47</sup> the applicant, who was serving a prison sentence for manslaughter, and was also undergoing psychiatric treatment, was eligible for early release. The prosecutor's request for an extension of his placement was made out of time, but was admitted by the local court because the applicant had been informed in advance and was therefore not prejudiced. The Strasbourg Court held that there was a breach of Article 5(1) because there had been a resulting delay of over two months in the review of the applicant's detention, and he had been kept "in a state of uncertainty" for that time. However, it rejected his claim for compensation (claimed at a rate of 250 Dutch guilders (£80) per day), because no pecuniary loss had been proved, and, in respect of non-pecuniary loss, it said

the Court considers that a finding of a violation of Article 5(1) of the Convention constitutes in itself sufficient just satisfaction in the circumstances.<sup>48</sup>

6.33 In *Amuur v France*,<sup>49</sup> the applicants were Somali nationals who had applied for asylum. They were detained at the airport for 20 days before their applications were refused and they were deported. The French procedures under which they were detained resulted in them having no access to legal advice for 15 days, and no access to a court for 17 days. Again, the Court held that the finding of a violation "having regard to the particular circumstances of the case" was sufficient just satisfaction.

6.34 In these cases, the Court probably took the view that an earlier review would not have made any practical difference to the length of the detention, and that the "state of uncertainty" was not sufficiently serious to attract a monetary award.

<sup>46</sup> 1997-III p 909, 25 EHRR 198, para 80 (footnotes omitted).

<sup>47</sup> 1998-VI p 2464, 28 EHRR 509.

<sup>48</sup> 1998-VI p 2464, 28 EHRR 509, para 70.

<sup>49</sup> 1996-III p 826, 22 EHRR 533.

- 6.35 Similarly, in other cases, although reasons for refusing damages are not usually given, it is sometimes possible to infer them from the facts of the case. The length of detention may be very short, or there may be other factors which mitigate its seriousness.<sup>50</sup> For example, in *K-F v Germany*,<sup>51</sup> the applicant was unlawfully detained for only 45 minutes. In *Fox, Campbell and Hartley v United Kingdom*,<sup>52</sup> the applicants were unlawfully detained (in Northern Ireland) for periods varying between 30 and 40 hours, but the Court accepted that the police had grounds for *bona fide* suspicion that they were involved in terrorist offences.<sup>53</sup> In *Ciulla v Italy*,<sup>54</sup> the applicant was unlawfully detained for 17 days; but he had given no particulars of damage, and had indicated that his main concern was to have the detention declared in breach of Article 5.
- 6.36 However, even short periods of detention can attract small awards, if there are special circumstances.<sup>55</sup> For example, in *Steel v United Kingdom*,<sup>56</sup> the applicants handed out pacifist leaflets outside a military conference. They were charged with breaches of the peace and held for 7 hours. Ultimately, the prosecution called no evidence and the case was dismissed. The Court found violations of Articles 5 and 10 in their detention “following the peaceful exercise of their right to freedom of expression”.<sup>57</sup> It awarded them £500 each for non-pecuniary loss.
- 6.37 A substantial award is more likely in cases of deliberate misconduct by the authorities. *Bozano v France*<sup>58</sup> is a striking example, since a breach lasting only 2 days attracted an award of 100,000 French francs (£9,880). It also deserves attention because of the unusually detailed discussion of the issue of compensation. The applicant, an Italian national, was convicted *in absentia* by the Genoa Assize Court of Appeal of murdering a young Swiss tourist in Genoa.

<sup>50</sup> See para 3.44 above.

<sup>51</sup> 1997-VII p 2657, 26 EHRR 390.

<sup>52</sup> A 182 (1990), 13 EHRR 157; A 202 (1991), 14 EHRR 108. They had been arrested in Northern Ireland on suspicion of terrorist offences, but the Government had failed to provide adequate information as to the grounds.

<sup>53</sup> The Government had declined on security grounds to provide details of the full reasonable grounds for their arrest.

<sup>54</sup> A 148 (1989), 13 EHRR 346.

<sup>55</sup> Note also *Engel v The Netherlands (No 2)* A 22 (1976), 1 EHRR 707, where the applicant claimed “a purely symbolic sum” for 33 hours unlawful detention, and was awarded a “token indemnity” of 100 Dutch guilders (£24). But see the discussion of “nominal damages” in para 4.74 above. In *Litwa v Poland* Application no 26629/95, 4 April 2000 the applicant, who had been detained unlawfully for approximately six and a half hours, was awarded 8,000 Polish zloties (£1,195) on an equitable basis for non-pecuniary loss. The Strasbourg Court may have been influenced by the fact that the applicant was elderly and nearly blind.

<sup>56</sup> 1998-VII p 2719, 28 EHRR 603.

<sup>57</sup> 1998-VII p 2719, 28 EHRR 603, para 122. See also *Raninen v Finland* 1997-VIII p 2804, 26 EHRR 563 (an award of 10,000 Finnish markka (£1,120), for the humiliation of public arrest and handcuffing, lasting 2 hours).

<sup>58</sup> A 111 (1986), 9 EHRR 297; A 124-F (1987), 13 EHRR 428. See also para 3.49 above.

Following issue of an international arrest warrant in 1976, he was arrested in France in January 1979, but in May a French Court ruled that, since the applicant had been convicted *in absentia*, he could not be extradited to Italy. However, on 26 October, on an order of the Minister of the Interior (service of which was delayed, so giving him no chance to challenge it in court) he was arrested, and the following day forcibly deported to Switzerland (which had an extradition agreement with Italy). Although the deportation order was later quashed by the French Courts, the applicant was extradited from Switzerland to Italy, where he was imprisoned.

- 6.38 In these circumstances, the Strasbourg Court held that his treatment by the French authorities violated Article 5(1). It rejected the Government's argument that damages should be a "nominal" sum because of the limited period involved.

... such a sum is far from commensurate with the seriousness of the breach of Article 5(1)... This was a violation of the right to liberty and to security of person, a disguised form of extradition designed to circumvent a negative ruling by the appropriate French court, and an abuse of deportation procedures for objects and purposes other than its normal ones. The attendant circumstances inevitably caused the applicant substantial non-pecuniary damage.<sup>59</sup>

The Court accepted that the Government could not be held responsible for the applicant's detention in Switzerland and Italy, but referred to the potential benefits that access to the court might have offered.

... [O]n 26 October, [the applicant] could reasonably hope to remain at liberty in France for at least a while. If any appeals of his to the administrative court and the Conseil d'Etat had failed - by no means a foregone conclusion in view of the first reason given for the judgment quashing the deportation order, he should normally have been able to go (under supervision, if necessary) to a country other than Switzerland. Admittedly, there is nothing to say that another country would not likewise have handed him over to Italy under an extradition treaty applicable to their mutual relations, or even in the absence of such a treaty; but there would at least have been some delay in delivering him into the custody of the Italian authorities. The forcible removal of [the applicant] from Limoges to the Swiss border therefore caused him real damage, although this cannot be precisely assessed. This was a consequence not of the deportation itself, as the Government stated, but of the 'process' whereby it was carried out and of the unlawful and arbitrary deprivation of liberty suffered by the applicant in France during the night of 26-27 October 1979.<sup>60</sup>

The Court awarded the applicant 100,000 French francs (£9,880).

<sup>59</sup> A 124-F (1987), 13 EHRR 428, para 8 (footnotes omitted).

<sup>60</sup> A 124-F (1987), 13 EHRR 428, para 9 (footnotes omitted).

- 6.39 Even where there are no special circumstances, longer periods of detention have usually attracted substantial awards. The following are recent examples.
- 6.40 In *Quinn v France*,<sup>61</sup> the applicant was an American citizen who was subject to proceedings for financial fraud in France and Switzerland. After he had been remanded in custody in France for several months, a French court ordered his immediate release on 4 August 1989; but, following a delay of 11 hours in executing the order, he was re-arrested on a warrant from the Swiss authorities pending extradition. He was held until 10 July 1991, when he was convicted of various offences in the French court and sentenced to imprisonment. He was later extradited to Switzerland. The Strasbourg Court held that there had been violations of Article 5(1): (a) his detention for 11 hours in August 1989; and (b) the excessive length of detention (almost 2 years) pending extradition. He was awarded 10,000 French francs (£1,310) for (a) and 50,000 French francs (£6,550) for (b).
- 6.41 In *Lukanov v Bulgaria*,<sup>62</sup> the applicant, a member of the Government, was arrested on 9 July 1992, on suspicion of having misappropriated public funds, and was detained until 30 December 1992, when he was released on bail. He was assassinated in 1996, while the case was still pending. Before the Strasbourg Court the Bulgarian Government was unable to produce any evidence demonstrating the commission of an offence. The Court found a violation of Article 5(1) during the period 7 September-30 December 1992.<sup>63</sup> It awarded 40,000 French francs (£4,050) to the applicant's widow and children (who were pursuing the application on his behalf).<sup>64</sup>
- 6.42 In *Johnson v United Kingdom*,<sup>65</sup> the applicant was committed to Rampton Hospital under the Mental Health Act. On 15 June 1989, the Mental Health Review Tribunal ("the Tribunal") ordered the applicant's conditional discharge, one of the conditions being residence in a supervised hostel.<sup>66</sup> No such accommodation could be found, and he remained at Rampton Hospital until 21 January 1993, when he was unconditionally released. The Court observed that, as the Tribunal lacked the power to guarantee his relocation within a reasonable period, the imposition of the condition led to indefinite deferral of his release. Accordingly, his detention from June 1989 to January 1993 violated Article 5(1)

<sup>61</sup> A 311 (1995), 21 EHRR 529.

<sup>62</sup> 1997-II p 529, 24 EHRR 121.

<sup>63</sup> The Court only had jurisdiction to examine the facts and circumstances of the applicant's complaint in so far as they related to the period after 7 September 1992, when Bulgaria ratified the Convention and recognised the Court's compulsory jurisdiction: 1997-II p 529, 24 EHRR 121, para 40.

<sup>64</sup> Their right to do so was not challenged, on the basis of previous case-law: *Ahmet Sadik v Greece* 1996-V p 1652, 24 EHRR 323, para 26. See para 2.15(6) above.

<sup>65</sup> 1997-VII p 2391, 27 EHRR 296.

<sup>66</sup> The Tribunal made similar orders on 9 May 1990 and 9 April 1991. In each case the order was suspended until arrangements could be made for suitable hostel accommodation.

of the Convention. The Court accepted that the delay could not be “attributed entirely to the authorities”:

In the first place, some period of deferment of release was inevitable, having regard to the need to locate a hostel suited to the applicant's situation... Secondly, the applicant's negative attitude towards his rehabilitation did not facilitate their task and after October 1990 he refused to co-operate further with the authorities in finding a suitable hostel.<sup>67</sup>

He was awarded £10,000.<sup>68</sup>

## **(2) Article 5(2)**

6.43 There are very few cases of an award under this paragraph. In *Van der Leer v Netherlands*,<sup>69</sup> the applicant was a voluntary patient at a psychiatric hospital. In November 1983, an order was made in her absence for her to be confined at the hospital for a period of six months. She was only informed after 10 days, and her application for a discharge order was not heard until 7 May 1984, when she was released. The Court found violations of Article 5(1) (failure to comply with relevant legal procedures), 5(2) (failure to inform her promptly), and 5(4) (excessive time for review by the Court). It accepted that there was “some non-pecuniary damage”:

The fact that she was not heard by the Cantonal Court judge could have led to a feeling of frustration, to which was added the fear of being sent back to the hospital during the delay resulting from the failure to take the relevant decision ‘speedily’.<sup>70</sup>

It awarded her 15,000 Dutch florins (£4,620), the sum proposed by the Government, in respect of all heads of claim (including expenses).

## **(3) Article 5(3)**

6.44 Article 5(3) embodies the following rights:<sup>71</sup>

- (1) The right of a person arrested on suspicion of having committed an offence to be brought promptly before a judge or other officer authorised by law to exercise judicial power.

<sup>67</sup> 1997-VII p 2391, 27 EHRR 296, para 77.

<sup>68</sup> He had claimed £100,000 for non-pecuniary loss, relying on comparative English awards, and the award in *Lukanov v Bulgaria* 1997-II p 529, 24 EHRR 121. See paras 3.54 - 3.57 above.

<sup>69</sup> A 170 (1990), 12 EHRR 567.

<sup>70</sup> A 170 (1990), 12 EHRR 567, para 42.

<sup>71</sup> The effect of Art 5(3) is discussed in detail in *Bail and the Human Rights Act 1998*, Law Commission Consultation Paper No 157 (1999) p 37 ff. See also *ibid* para 1.21 ff, on the approach of the Strasbourg Court in relation to damages.

- (2) The right of a person arrested on suspicion of having committed an offence to be released pending trial. This right is not absolute. A court may order a person to be detained pending trial if there are sufficiently compelling reasons to do so.
- (3) The right of a person who is ordered to be detained pending trial to be tried within a reasonable time.

**(a) The right to be brought promptly before a judge**

*(i) Pecuniary loss*

6.45 There have been no examples of awards of damages for pecuniary loss under this head. The Strasbourg Court has invariably held that the causal link between the loss and the violation is insufficient.

6.46 In *Pauwels v Belgium*,<sup>72</sup> the applicant was an army officer who had been arrested on embezzlement charges; his detention had been confirmed by a Board of Inquiry. The Strasbourg Court found a breach of Article 5(3) because the board did not have the necessary independence. The applicant claimed damages for loss of salary and pension rights, proceeding “on the assumption that an independent and impartial judge would have released him”.<sup>73</sup> The Court dismissed the claim for pecuniary loss. It shared the Commission’s view that:

The evidence... did not afford any reason to suppose that the applicant’s detention on remand would probably have been brought to an end if ... an independent judicial officer had chaired the Board of Inquiry. In short, no pecuniary damage had flowed from the breach of the Convention.<sup>74</sup>

*(ii) Non-pecuniary loss*

6.47 Some of the earlier cases suggested that damages for non-pecuniary loss would be awarded wherever an applicant was not brought promptly before a judge. For example, in three cases in 1984, the applicants were detained for periods of six to fourteen days without being brought before a judge. In each case the Strasbourg Court held that there had been violations of Article 5(3), and that the applicants should be paid damages for non-pecuniary loss of 300 Dutch guilders (£72). In *Duinhof and Duijf v Netherlands*, for example, it noted

<sup>72</sup> A 135 (1988), 11 EHRR 238.

<sup>73</sup> A 135 (1988), 11 EHRR 238, para 43. He also wished to secure reform of the Belgian law concerning military personnel. The Strasbourg Court noted that its judgments leave the State concerned the choice of the appropriate means to give effect to the decision. See further para 3.31 above.

<sup>74</sup> A 135 (1988), 11 EHRR 238, para 43. See para 3.58 above. See also *Brincat v Italy* A 249-A (1992), 16 EHRR 591, para 25. Surprisingly, an award was made in this case for non-pecuniary loss relating to “effects on his reputation” and “feelings of insecurity”; under more modern practice this award would have been unlikely (see para 6.49 below).

At the very least, each applicant did... forfeit the opportunity of a 'prompt' judicial control of his detention. The applicants must have suffered, by reason of the absence of the relevant guarantees, some non-material prejudice not wholly compensated by the findings of violation or even by the deduction of the period spent in custody on remand from the sentence of imprisonment ultimately imposed.<sup>75</sup>

6.48 However, this practice has not been consistent. For example, in *Brogan v United Kingdom*,<sup>76</sup> the applicants were arrested on suspicion of various terrorist offences. They were detained for periods of four to six days without appearing before a judge, and subsequently released without charge. In these circumstances, the Court held that there had been violations of Article 5(3) and (5). However, the Court dismissed the applicants' claims for non-pecuniary loss on the basis that the finding of a violation was sufficient just satisfaction for any loss that they may have suffered.

6.49 More recent cases tend to refuse compensation for non-pecuniary loss on the ground that the Court's judgment provides just satisfaction.<sup>77</sup> An example is *TW v Malta*.<sup>78</sup> The applicant was arrested on 6 October 1994 on suspicion of sexually abusing his daughter; he was released on bail on 25 October. The applicant was not brought before a judge during the period of detention. On 8 May 1995, the applicant was convicted and sentenced to two years' imprisonment (suspended). The Court held that there had been a violation of Article 5(3), but held that the finding of a violation was sufficient just satisfaction for any loss suffered.

6.50 In *Jordan v United Kingdom*<sup>79</sup> the Strasbourg Court rejected a claim for damages for non-pecuniary loss by the applicant. The applicant, a soldier, had been sentenced to detention following a hearing by his commanding officer. The Court found that Article 5(3) had been violated because the commanding officer could not be considered to be independent of the parties. However, it noted that

just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he had had the benefit of the guarantees of Article 5(3).<sup>80</sup>

<sup>75</sup> A 79 (1984), 13 EHRR 478, para 45 (footnotes omitted). The Court expressed itself in nearly identical terms in *De Jong, Baijet and Van den Brink v Netherlands* A 77 (1984), 8 EHRR 20, para 65, and *Van der Sluijs, Zuiderveld and Klappe v Netherlands* A 78 (1984), 13 EHRR 461, para 52.

<sup>76</sup> A 145-B (1989), 11 EHRR 117 (merits); A 152-B (1989), 13 EHRR 439 (just satisfaction).

<sup>77</sup> The Court itself has acknowledged this trend: *Nikolova v Bulgaria* Application no 31195/96, 25 March 1999; see above, paras 3.39 - 3.41. See also *Niedbala v Poland* Application no 27915/95, 4 July 2000.

<sup>78</sup> Application nos 25644/94 and 25642/94, 29 April 1999, 29 EHRR 185.

<sup>79</sup> Application no 30280/96, 14 March 2000.

<sup>80</sup> Application no 30280/96, 14 March 2000, para 37.



6.51 However, special factors may justify an award. In *Sakik v Turkey*<sup>81</sup> the applicants were elected to the Turkish National Assembly as members of the People's Labour Party. On 24 March 1994, the National Assembly removed their parliamentary immunity. On the same day, they were arrested and detained on suspicion of various terrorist activities. They were held for periods of 12-14 days without judicial supervision. The Court held that there had been violations of Article 5(3), 5(4) and 5(5). The applicants claimed compensation for non-pecuniary loss due to deprivation of their liberty, aggravated by the damage to their "reputation as members of Parliament". The Court made awards of between 25,000 French francs (£2,530) and 30,000 French francs (£3,040), on the basis that "the circumstances in which they were deprived of their liberty" must have caused them non-pecuniary damage. Although not referred to expressly by the Court, it seems likely that the Court accepted that the political position of the applicants justified special treatment.

**(b) The right to release pending trial**

*(i) Pecuniary loss*

6.52 Again, there appear to be no examples of awards for pecuniary loss under this head. Often this seems to be because the period of pre-trial detention has been deducted from a prison sentence subsequently imposed.

6.53 In *Letellier v France*<sup>82</sup> the applicant was charged as an accessory to murder in July 1985 and remanded in custody.<sup>83</sup> In May 1988, she was convicted and sentenced to three years' imprisonment; but the period of pre-trial detention was automatically deducted, so that she was released a few days later. The Court held that there had been a violation of Article 5(3), because the national authorities had failed to identify any sufficiently compelling grounds for the applicant's continued pre-trial detention. She claimed 435,000 French francs (£44,570), as damages for pecuniary loss, based on a proportion of the turnover of the bar-restaurant of which she was proprietor/manager. The Court dismissed the claim "because the pre-trial detention was deducted in its entirety from the sentence."<sup>84</sup>

<sup>81</sup> 1997-VII p 2609, 26 EHRR 662.

<sup>82</sup> A 207 (1991), 14 EHRR 83.

<sup>83</sup> Though released under supervision in December 1985, she returned to prison in January 1986 following an appeal by the public prosecutor.

<sup>84</sup> A 207 (1991), 14 EHRR 83 para 62. See para 3.58. The same conclusion was reached for the same reasons in *Mansur v Turkey* A 321 (1995), 20 EHRR 535, on which see para 6.56 below.

(ii) *Non-pecuniary loss*

- 6.54 Recent practice of the Court, exemplified by *Nikolova v Bulgaria*,<sup>85</sup> suggests that awards of damages for non-pecuniary loss are the exception, not the rule, in cases involving violations of Article 5(3) and 5(4).<sup>86</sup>
- 6.55 *Nikolova* itself was a case of refusal of bail on inadequate grounds.<sup>87</sup> The applicant had been charged with an offence of a kind which, under Bulgarian law, required bail to be refused except in very narrowly defined circumstances. The Court found a breach of Article 5(3) because the investigator before whom the applicant was brought could not be regarded as an “officer authorised by law to exercise judicial power”, and of Article 5(4), because there had been no proper judicial consideration of her case for bail (based on the fact that she had not attempted to abscond or obstruct the investigation previously, and had a family and stable way of life). However, non-pecuniary damages were refused on the basis that the finding was sufficient just satisfaction.<sup>88</sup>
- 6.56 There are some recent examples of awards under this head, although in each case combined with a violation of Article 6(1) or other articles of the Convention. In *Mansur v Turkey*<sup>89</sup> the applicant was arrested on suspicion of drug trafficking in November 1984 and detained pending trial. In February 1991 he was sentenced to thirty years’ imprisonment (reduced on appeal to ten years), the pre-trial detention being deducted from sentence. He was released on 1 July 1991. The Court held that there had been a violation of Article 5(3) during the period January 1990-February 1991,<sup>90</sup> because there were inadequate reasons for his continued detention; and a violation of Article 6(1) in respect of the length of the criminal proceedings. The claim for pecuniary loss failed,<sup>91</sup> but the applicant also claimed substantial damages for non-pecuniary loss, because “the poor conditions of his detention had had lasting effects on his health.”<sup>92</sup> The Court awarded the applicant 30,000 French francs (£3,930).<sup>93</sup>

<sup>85</sup> Application no 31195/96, 25 March 1999.

<sup>86</sup> See paras 3.40 and 3.41 n 85 above.

<sup>87</sup> See paras 3.39 - 3.40 above. The substantive aspects of the case are discussed in detail in *Bail and the Human Rights Act 1998 (1999) Law Commission Consultation Paper No 157*, paras 9.10 - 9.14.

<sup>88</sup> The same conclusion was reached in *Letellier v France* A 207 (1991), 14 EHRR 83 above, para 6.53.

<sup>89</sup> A 321 (1995), 20 EHRR 535.

<sup>90</sup> The Court had jurisdiction only in respect of the period after 22 January 1990.

<sup>91</sup> See note 84 above.

<sup>92</sup> A 321 (1995), 20 EHRR 535, para 72. Thus the applicant confined his claim to losses flowing from the violation of Art 5(3).

<sup>93</sup> The Commission had proposed an award of 50,000 - 60,000 French francs (£6,550 - £7,860). See also *Yagci and Sargin v Turkey* A 319 (1995), 20 EHRR 505: the applicants were arrested in November 1987 on suspicion of various political offences and detained pending trial until May 1990. They were acquitted of all charges. The Court awarded them 30,000 French francs (£3,930) each.

6.57 In *Labita v Italy*<sup>94</sup> the applicant had been arrested on suspicion of being a member of a Mafia association and related offences. He was detained pending trial for two years and seven months. At trial, he was acquitted. In civil proceedings in Italy he was awarded 64 million lire (£19,780) as compensation for his unjust and particularly harsh detention (he alleged that he had been ill treated by his prison warders), the damage to his reputation and the costs to his family. Subsequently he was made the subject of 'preventative' orders under Italian law, which led to his disenfranchisement. The Strasbourg Court found that, *inter alia*, there had been violations of Articles 5(1) because on his acquittal he was detained for a further eight to ten hours because of the absence of the registration officer and of 5(3) because of the unreasonably long period of pre-trial detention.<sup>95</sup> The applicant claimed for pecuniary loss for, *inter alia*, the closing down of the discotheque he owned while he was in detention.<sup>96</sup> The Strasbourg Court rejected this, taking account of the fact that the applicant had already been compensated by national courts for any damage that he might have suffered while in detention pending trial. The applicant was however awarded 75 million lire (£23,180) in compensation for his non-pecuniary loss "on an equitable basis", having regard to the number and seriousness of the violations found in the case.

6.58 A recent case which was explicitly treated as an exception to the *Nikolova* approach was *Caballero v United Kingdom*.<sup>97</sup> The applicant, who was 70 years old at the time, was arrested in January 1996 on a charge of attempted rape. He was refused bail, because he had a previous conviction for manslaughter, the magistrate having no discretion in such a case.<sup>98</sup> In October 1996 he was convicted, and in January 1997 he was sentenced to life imprisonment, from which the period of detention on remand was deducted. The Strasbourg Court accepted the Government's concession that there was a violation of Article 5(3). In the special circumstances, the Court referred to the undisputed affidavit evidence that, apart from the statute, he would have had a good chance of bail, and noted that

the applicant further argued that any such release on bail prior to his trial could have been his last days of liberty given his advanced age,

<sup>94</sup> Application no 26772/95, 6 April 2000.

<sup>95</sup> The Strasbourg Court also found violations of Article 3 (due to the failure to investigate his allegation of ill treatment properly); Article 8 (because of interference with his correspondence); Protocol No 1, Article 3 (because of his disenfranchisement) and Protocol No 4, Article 2 (because his freedom of movement had been severely restricted).

<sup>96</sup> He also claimed compensation for the confiscation of some of his property and the attachment of his shareholding. These claims were rejected on causal grounds.

<sup>97</sup> Application no 32819/96, 8 February 2000.

<sup>98</sup> Under Criminal Justice and Public Order Act 1994 s 25. It has since been amended: see Bail and the Human Rights Act 1998, Law Commission Consultation Paper No 157 (1999) para 2.35.

his ill-health and the long sentence he was serving, a submission on which the Government also did not comment.<sup>99</sup>

It awarded “on an equitable basis” £1,000 compensation for non-pecuniary damage.

**(c) The right to trial within a reasonable time**

- 6.59 As with cases in relation to the right to release pending trial, an important factor in these claims is whether the period of detention has been set off against a subsequent prison sentence. Where this is the case, the Strasbourg Court is likely to hold that the finding of a violation is sufficient just satisfaction for any non-pecuniary loss.
- 6.60 In *Toth v Austria*,<sup>100</sup> the applicant was arrested in January 1985 on suspicion of aggravated fraud; he was not released on bail until February 1987. In May 1988, he was sentenced to four and a half years’ imprisonment (later reduced to four years), from which the period of pre-trial detention was automatically deducted. The Strasbourg Court held that he had not been tried within a reasonable time. He claimed damages for pecuniary loss, based on “his loss of earnings during the pre-trial detention and the reduction in his salary after his release.”<sup>101</sup> The Court dismissed the claim for pecuniary loss “because the entire period of pre-trial detention was deducted from the sentence.”<sup>102</sup> He also claimed damages for “mental suffering” in prison.<sup>103</sup> This claim also was rejected on the basis that the finding of a violation was sufficient just satisfaction for any non-pecuniary loss.
- 6.61 One case in which a substantial award was made was *Tomasi v France*,<sup>104</sup> but it was an extreme cases involving breaches of Articles 3, 5 and 6. The applicant, a shopkeeper and salaried accountant, had been arrested in March 1983 on suspicion of terrorist offences. He was held for over 5 years, during which time numerous applications for release were refused, there were delays by judicial authorities, and he alleged that he had suffered beating and ill-treatment in prison. He was eventually acquitted at his trial in October 1988. In 1991 he received 300,000 French francs (£30,740) from the French Compensation Board as compensation for the period that he had spent in detention on remand. The Strasbourg Court found a violation of Article 5(3), because he had not been tried within a reasonable time; it also found violations of Articles 3 and 6.<sup>105</sup> The

<sup>99</sup> Application no 32819/96, 8 February 2000 para 31.

<sup>100</sup> A 224 (1991), 14 EHRR 551. See further *Scott v Spain* 1996-VI p 2382, 24 EHRR 391.

<sup>101</sup> A 224 (1991), 14 EHRR 551, para 89.

<sup>102</sup> A 224 (1991), 14 EHRR 551, para 91.

<sup>103</sup> A 224 (1991), 14 EHRR 551, para 89.

<sup>104</sup> A 241-A (1992), 15 EHRR 1. For an earlier case in which the Strasbourg Court made an award of damages for non-pecuniary loss, see *Ringeisen v Austria (No 2)* A 15 (1972), 1 EHRR 504, discussed above at para 3.35.

<sup>105</sup> The applicant was physically abused by the police in violation of Art 3. The length of the investigation relating to the abuse - five years and ten months - violated Art 6(1).

Court took account of the payment by the Compensation Board, but awarded a further 700,000 French francs (£83,590) in respect of pecuniary and non-pecuniary loss.<sup>106</sup>

- 6.62 An award for pecuniary loss was also made in *Cesky v Czech Republic*.<sup>107</sup> Here the applicant, having been arrested in 1993 for robbery and suspected murder, was held on remand until 1997. The Strasbourg Court found that there had been a violation of Article 5(3) due to the length of the applicant's detention on remand. The applicant claimed 324,000 Czech koruna (£5,660) for loss of earnings during the four years of his detention. The claim was calculated on the basis of average wages in the Czech Republic during that time. The Strasbourg Court noted that the applicant's appeal against his conviction was still pending, and that it could not therefore be said that the period of his pre-trial detention had been deducted from his sentence.

In these circumstances, and even assuming that the applicant did not have permanent employment in the Czech Republic when he was arrested and detained on remand, the Court considers that there is a certain causal link between the violation of Article 5(3) of the Convention found and the sums claimed by the applicant to compensate for his loss of earnings.

- 6.63 Unusually, therefore, the Court awarded the applicant 100,000 Czech koruna (£1,745) for his pecuniary loss. His claim for non-pecuniary loss in respect of his 'health, psychological and social injuries' was rejected on the ground that the finding of a violation provided sufficient just satisfaction.
- 6.64 *Cesky v Czech Republic*<sup>108</sup> can be contrasted with *Punzelt v Czech Republic*.<sup>109</sup> The facts were similar: the applicant had been held on remand for over three years before being brought to trial, in violation of Article 5(3). However, the time which he spent on remand was deducted from his sentence. The Strasbourg Court therefore rejected the applicant's claim for pecuniary loss, on the grounds that the finding of a violation provided sufficient just satisfaction. However, the Court awarded the applicant 10,000 German marks (£3,060) as compensation for non-pecuniary loss.<sup>110</sup>

<sup>106</sup> He had claimed pecuniary loss of over 1,000,000 French francs (£119,410), for loss of salary, loss of commercial income, and expenses incurred by his family in visiting him. He also claimed non-pecuniary loss of 1,000,000 French francs (£119,410) for the violation of Art 5(3), and 500,000 French francs (£59,705) for the violations of Arts 3 and 6.

<sup>107</sup> Application no 33644/96, 6 June 2000.

<sup>108</sup> Application no 33644/96, 6 June 2000.

<sup>109</sup> Application no 31315/96, 25 April 2000.

<sup>110</sup> The applicant had claimed 500,000 German marks (£152,990) in non-pecuniary loss in compensation for the deterioration in his health due to the conditions of his detention on remand.

#### **(4) Article 5(4)**

6.65 This article guarantees the right to have the lawfulness of arrested or detention “decided speedily by a court”.

##### *(i) Pecuniary loss*

6.66 Claims for pecuniary loss in Article 5(4) cases have generally been dismissed for lack of a sufficient “causal link”.<sup>111</sup>

6.67 An early example was *De Wilde, Ooms and Versyp v Belgium*.<sup>112</sup> A police court, consisting of a single magistrate, ordered that the applicants should be detained as vagrants; they were detained for periods varying between seven and twenty-one months. The Court held the administrative character of the proceedings in the police court did not satisfy the requirements of Article 5(4). The claim for pecuniary loss was rejected on the ground that compliance with Article 5(4) would not have resulted in the applicants obtaining their release any sooner.<sup>113</sup>

6.68 A rare example of an award for pecuniary (as well a non-pecuniary) loss was *Weeks v United Kingdom*.<sup>114</sup> The facts were unusual. In 1966, the applicant, who was then aged seventeen, was arrested and, in December, convicted of armed robbery and sentenced to life imprisonment.<sup>115</sup> The Parole Board recommended that the applicant should be provisionally released in April 1975. This recommendation was not implemented, but he was released on licence in March 1976. He began work as a labourer in June 1977, but soon after he was arrested on suspicion of various offences, and the Home Secretary revoked his licence. At the trial in October 1977, the trial judge imposed a two-year conditional discharge and advised the Home Secretary that he should be released on licence, but this advice was not accepted. A similar recommendation in May 1979 by the Parole Board was also rejected. In October 1981, he was sentenced to three months’ imprisonment for an offence of malicious wounding committed in detention. In October 1982, he was released on licence, but this was revoked in

<sup>111</sup> In addition to the cases noted below, see, for example, *Luberti v Italy* A 75 (1984), 6 EHRR 440 (para 3.54 above); *Lamy v Belgium* A 151 (1989), 11 EHRR 529; *Bezicheri v Italy* A 164 (1989), 12 EHRR 210; and *Kampanis v Greece* A 325 (1995), 21 EHRR 43 (para 6.74 below).

<sup>112</sup> *De Wilde, Ooms and Versyp v Belgium (No 1)* A 12 (1971), 1 EHRR 373; *De Wilde, Ooms and Versyp v Belgium (No 2)* A 14 (1972), 1 EHRR 438.

<sup>113</sup> A 14 (1972) 1 EHRR 438, para 24 (footnotes omitted). This precedent was invoked to justify refusing a claim in similar circumstances in *Van Droogenbroeck v Belgium (Just Satisfaction)* A 63 (1983), 13 EHRR 546. (In the latter case, an award for non-pecuniary loss was made, but this was not followed in *Nikolova v Bulgaria* Application no 31195/96, 25 March 1999: see above paras 6.54 - 6.55).

<sup>114</sup> A 114 (1987), 10 EHRR 293 (merits), A 143-A (1988), 13 EHRR 435 (just satisfaction). See further para 3.64 above.

<sup>115</sup> He had entered a pet shop with a starting pistol loaded with blank cartridges, and told the owner of the shop to hand over the cash in the till (35 pence, which was later found on the shop floor). He had committed the robbery for money to pay his mother, who had told him to find lodgings elsewhere.

November 1984, after he had absconded to France. He was apprehended in April 1985, and released again on licence in September, but this licence was revoked in March 1986. The applicant was still at large during the currency of the Strasbourg proceedings.

- 6.69 The Court observed that the indeterminate life sentence had been imposed by the sentencing court in order that the Home Secretary might monitor the applicant's progress and release him back into the community when he was no longer a danger to society or himself. It noted that the provisions of Article 5(4) entitled the applicant to have the lawfulness of his detention determined speedily by a "court" at reasonable intervals during the course of his detention and immediately he was returned to prison after any period of liberty on licence.<sup>116</sup> The Court held that since the Parole Board did not qualify as a "court", there had been a violation of Article 5(4). In April 1987, the Government remitted the applicant's life sentence in response to the Court's judgment.
- 6.70 The applicant claimed damages for both pecuniary and non-pecuniary loss. His claim for pecuniary loss was for loss of earnings,<sup>117</sup> on the basis of his hypothetical release on one of the dates when recommendations had been made by the Parole Board or the judge. The non-pecuniary loss was based on the "adverse effects on his personal life and development".<sup>118</sup> The Government resisted both, on the ground that he had not shown that he would have been released earlier in proceedings complying with Article 5(4).
- 6.71 The Court awarded him £8,000 "on an equitable basis", as damages for pecuniary and non-pecuniary loss. It noted that the detention had been found lawful under Article 5(1); compensation, therefore, could only be paid for prejudice caused by the violation of Article 5(4). The remainder of the reasoning deserves citation in full, since it is a rare example in the context of Article 5 of the Court accepting "loss of opportunities" (albeit, "questionable") as a sufficient basis for an award.

The Court finds it impossible to state that the applicant would definitely have been released had such proceedings been available to him. On the other hand, it cannot be entirely excluded that he might have been released earlier and, in view of his age, might have obtained some practical benefit. Consequently, [the applicant] may be said to have suffered a loss of opportunities by reason of the absence of such proceedings, even if in the light of the recurrence of his behavioural problems the prospect of his realising them fully was questionable. The claim for pecuniary loss cannot therefore be completely discounted.

<sup>116</sup> In this context, the Court held that detention is lawful only insofar as it is based on grounds consistent with the objectives of the sentencing court: A 114 (1987), 10 EHRR 293, para 58.

<sup>117</sup> Totalling £35-45,000.

<sup>118</sup> He claimed around £50,000, based on the level of ex-gratia payments made by the Home Secretary in cases of wrongful imprisonment.

14. As regards non-pecuniary loss, the absence of a remedy satisfying the requirements of Article 5(4) must have caused [the applicant] a feeling of frustration and helplessness, especially in view of his age and the particular circumstances of the case. In the opinion of the Court, neither the remission of his life sentence in April 1987 nor its finding of a violation constitutes adequate just satisfaction for the prejudice suffered as a result of the violation up to April 1987. Accordingly, some monetary compensation is justified.

15. In fixing the amount of compensation to be awarded, account should be taken of the special features of the case, notably the severity of the 'indeterminate' life sentence in relation to the crime committed. Even so, the amounts sought in respect of both pecuniary and non-pecuniary damage are excessive. However, it is impossible to quantify either head of damage in any precise way. Taking them together and, as is required by Article 50, on an equitable basis, the Court affords the applicant just satisfaction in the sum of £8,000.<sup>119</sup>

(ii) *Non-pecuniary loss*

6.72 Awards have been made in some cases. For example, in *Megyeri v Germany*,<sup>120</sup> the applicant was awarded 5,000 German marks (£2,040), on an "equitable basis", to reflect the "feeling of isolation and helplessness" caused by the lack of legal assistance in the first set of proceedings. However, as already noted, in the light of the more recent discussion in *Nikolova*, it is unclear how often such awards can be expected in future.<sup>121</sup>

6.73 One recent case in which an award was made is *Curley v United Kingdom*.<sup>122</sup> Here the applicant, convicted of murder, was detained at Her Majesty's pleasure at the age of 17. He complained that his detention was only subject to review by the Parole Board, a body which did not fulfil the requirements laid down under Article 5(4). The Strasbourg Court found that Article 5(4) had been breached. The applicant argued that he should receive compensation calculated according to domestic scales of compensation for unlawful detention from the first or second date on which the Parole Board had recommended his release, giving rise to a claim of £50,000 or £25,000 respectively.<sup>123</sup> The Court noted that

... the applicant must have suffered feelings of frustration, uncertainty and anxiety which cannot be compensated solely by the findings of violations. It does not, however, consider that the domestic scales of compensation applicable to unlawful detention

<sup>119</sup> A 143 (1988), 13 EHRR 437, paras 12-15 (footnotes omitted).

<sup>120</sup> A 237-A (1992), 15 EHRR 584.

<sup>121</sup> See paras 3.39 - 3.41 above.

<sup>122</sup> Application no 32340/96, 28 March 2000.

<sup>123</sup> The recommendation had been rejected by the Secretary of State.



apply in the present case where there has been no equivalent finding of unlawfulness.

The applicant was awarded £1,500 on an equitable basis.

- 6.74 There are numerous recent cases in which awards have been refused. In *Kampanis v Greece*,<sup>124</sup> the Indictment Division of the Athens Court of Appeal had ordered the continued detention of the applicant pending trial. Since the Indictment Division had refused to hear the applicant, there had been a violation of the “equality of arms” principle embodied in Article 5(4). The applicant claimed 20 million Greek drachmas (£61,600) as damages for non-pecuniary loss. The Strasbourg Court rejected this claim, holding that the finding of a violation constituted sufficient just satisfaction.
- 6.75 In *Hussain v United Kingdom*,<sup>125</sup> the applicant was convicted on 12 December 1978 of murdering his younger brother; being only sixteen, he was detained at Her Majesty’s pleasure. The Home Secretary set a tariff of 15 years. The applicant’s case had been reviewed by the Parole Board in 1986, 1990, 1992 and 1994. The board did not recommend release. The Strasbourg Court held that immediately the tariff period expired, the criterion by which to determine the lawfulness of the applicant’s continued detention was his danger to society, which should be decided by a court at reasonable intervals; and that, since the Parole Board did not possess the characteristics of a “court”, there had been a violation of Article 5(4). However, the Court rejected the applicant’s claim for damages for non-pecuniary loss, holding that there was no evidence that he would have regained his freedom in the absence of the violation of Article 5(4). Even though he may have suffered “some anxiety”, the Court held that the finding of a violation was sufficient just satisfaction.<sup>126</sup>
- 6.76 In *Chahal v United Kingdom*,<sup>127</sup> the Home Secretary determined that the applicant constituted a threat to national security and should be deported to India. He was detained in August 1990. His application for release on bail was refused, and an application for judicially review was dismissed in November 1995, the judge observing that he did not have access to all the material relating to the security issue. The Court held that, since the national court was unable to determine whether the decision to detain the applicant was justified on national security grounds, there had been a violation of Article 5(4). However, it dismissed the claim for damages for non-pecuniary loss, holding that the finding of a violation constituted sufficient just satisfaction.

<sup>124</sup> A 325 (1995), 21 EHRR 43.

<sup>125</sup> 1996-I p 252, 22 EHRR 1.

<sup>126</sup> Although not stated in terms, one may infer that a distinction from *Weeks v United Kingdom*, noted at para 6.68 - 6.71 above, was the fact that the Parole Board had consistently refused release. In *Weeks v United Kingdom* the fact that the Parole Board had recommended that the applicant be released on licence provided some evidence that in the absence of a breach of Article 5(4) the applicant might have been released earlier.

<sup>127</sup> 1996-V p 1831, 23 EHRR 413. See further para 6.18 above.

6.77 A recent case, in which an award was made in somewhat special circumstances, was *RMD v Switzerland*.<sup>128</sup> The applicant was arrested, and, during his detention, was transferred several times to different prisons in different cantons; numerous attempts to secure his release finally succeeded after 2 months. The Court found a breach of Article 5(4), and “on an equitable basis”, awarded 5,000 Swiss francs (£2,090) for non-pecuniary loss. It referred to the particular problems caused by the separate criminal codes of the different Cantons, which led to the applicant being “continually transferred” from one jurisdiction to another.

### **(5) Article 5(5)**

6.78 Article 5(5) is noteworthy, as the only Article in the Convention which expressly requires domestic law to provide a right to compensation.<sup>129</sup>

6.79 In practice, this feature has not proved a significant factor in the Strasbourg case-law. First, the existence of a specific right to compensation under Article 5(5) has not been treated by the Court as limiting its general powers under Article 41.<sup>130</sup> As when the Court considers whether to award just satisfaction under Article 41, once a breach of Article 5(5) has been established, the Court has not found it necessary to wait for the exhaustion of any domestic compensation rights before granting its own remedy.<sup>131</sup> Secondly, notwithstanding the substantive right to compensation apparently guaranteed by Article 5(5), there is no presumption that damages are necessary to afford just satisfaction in cases involving a violation of Article 5. As already noted in this section, in many cases under Article 5 the Court has held that a finding of a violation is sufficient just satisfaction.<sup>132</sup>

6.80 Accordingly, there have been few cases which deal specifically with Article 5(5). Damages for pecuniary loss have not been the subject of consideration under Article 5(5).<sup>133</sup> In the few cases in which the Court has expressly considered the availability of damages for non-pecuniary loss under Article 5(5), it has held that

<sup>128</sup> 1997-VI p 2003, 28 EHRR 224.

<sup>129</sup> This is recognised in the HRA by the special provision for the award of damages in the case of judicial acts contrary to Article 5: see s 9(3), discussed in Part II paras 2.26 - 2.27 above, and Appendix A.

<sup>130</sup> See *Neumeister v Austria (No 2)* A 17 (1974), 1 EHRR 136, para 30, discussed at para 3.34 above. For the principal proceedings, see *Neumeister v Austria (No 1)*, A 8 (1968), 1 EHRR 91.

<sup>131</sup> See *Tsirlis and Kouloumpas v Greece* 1997-III p 909, 25 EHRR 198 (para 6.30 above). See para 3.17 above.

<sup>132</sup> This practice has not escaped criticism. See the discussion of *Nikolova v Bulgaria* Application no 31195/96, 25 March 1999, Part III paras 3.39 - 3.40 above.

<sup>133</sup> In *Tsirlis and Kouloumpas v Greece* 1997-III p 909, 25 EHRR 198, noted at para 6.30 above, the Court awarded the applicants damages for pecuniary and non-pecuniary loss for violations of Art 5(1) and 5(5), but without any separate consideration of the latter.

the principal judgment is sufficient just satisfaction for any loss that might have been suffered.<sup>134</sup>

## **6. ARTICLE 6**

6.81 Article 6 of the European Convention protects the right to a fair trial. Article 6(1) states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

6.82 Articles 6(2) and 6(3) provides further guarantees to those who are charged with criminal offences:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

<sup>134</sup> See, for example, *Fox, Campbell and Hartley v United Kingdom* A 202 (1991), 14 EHRR 108 (noted at para 6.35 above) and *Brogan v United Kingdom* A 152-B (1989), 13 EHRR 439 (noted at para 6.48 above). The Court has awarded damages for non-pecuniary loss in a number of cases involving a violation of Art 5(1), 5(2), 5(3) or 5(4), coupled with a violation of Art 5(5): *Tsirlis and Kouloumpas v Greece* 1997-III p 909, 25 EHRR 198, noted at para 6.30 above; *Sakik v Turkey* 1997-VII p 2609, 26 EHRR 662, noted at para 6.51 above; and *Caballero v United Kingdom* Application no 32819/96, 8 February 2000, noted at para 6.58 above. However, again there is no indication that any part of the damages awarded in these cases is referable to the violation of Art 5(5).

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

6.83 Breaches of Article 6 are by far the most frequent among the various articles of the European Convention. The case-law in this area is therefore considerable and this Report will not attempt exhaustive coverage of it.

**(1) Access to a court**

6.84 Provided the necessary causal link is shown, the Strasbourg Court may award damages for both pecuniary and non-pecuniary losses. However, claims for pecuniary losses frequently fail on causal grounds, while claims for non-pecuniary losses may be rejected on the ground that subsequent actions by the respondent State, or the Strasbourg Court's judgment itself, provide just satisfaction.<sup>135</sup>

**(a) Pecuniary loss**

6.85 *Airey v Ireland*<sup>136</sup> is a case in which a claim for pecuniary loss failed on causal grounds. The Court found that the applicant's rights under Article 6(1) had been breached because she did not enjoy an effective right of access to a court in connection with her petition for a decree of judicial separation. The applicant claimed compensation for the cost of finding new accommodation. The Court held that the applicant was not entitled to the cost of re-housing herself, as her decision to move had not been motivated by the denial of a right of access to a court but by fear of molestation by her husband.

6.86 Similarly, in *Bodén v Sweden*,<sup>137</sup> the applicant was found to have suffered a violation of his right of access to a court, in that no domestic court remedy was available which would enable him to challenge the lawfulness of an expropriation permit which affected his property. The applicant claimed compensation for pecuniary damage attributable to increased building costs over a 10 year period, and compensation for non-pecuniary damage. The Court held that the applicant had failed to establish that, had he been afforded a legal remedy, the domestic court would have afforded him a favourable decision, and refused his claim for pecuniary loss. The claim for non-pecuniary damages was also refused on the basis that the finding of a violation constituted just satisfaction.

6.87 Similar results were reached in a number of other cases brought against the Swedish authorities on the ground of the lack of a judicial procedure to challenge prohibitions and permits issued in respect of land.<sup>138</sup> The Court repeatedly took the view that it was not in a position to speculate as to what the outcome of legal proceedings might have been, if the violation had not occurred, and therefore no

<sup>135</sup> See paras 3.38 - 3.43; 3.58 - 3.69 above.

<sup>136</sup> A 41 (1981), 3 EHRR 592 (just satisfaction).

<sup>137</sup> A 125-B (1987), 10 EHRR 367.

<sup>138</sup> See for example *Allan Jacobsson v Sweden* A 163 (1989), 12 EHRR 56.

causal connection between the pecuniary losses claimed and the violation of Article 6(1) could be established.

**(b) Non-pecuniary loss**

- 6.88 As discussed in Part III, and as the above cases show, the Strasbourg Court frequently refuses to award damages for non-pecuniary loss on the ground that its finding of a violation provides sufficient just satisfaction in the circumstances of the case.<sup>139</sup>
- 6.89 However, awards of damages for non-pecuniary losses for violations of Article 6(1) are sometimes made. They are most common in connection with a violation of the right of access to a court in cases where the family interests of the applicants are at stake. An award may be made even though the applicant cannot prove conclusively that the outcome would have been different had the violation not occurred. A “loss of opportunities” may be enough.
- 6.90 This is indicated by a series of cases involving child-care and child protection proceedings. For example, *W v United Kingdom*<sup>140</sup> concerned the decision of a local authority to place the applicant’s child, who was in the care of the local authority, in a foster home with a view to adoption. The Strasbourg Court found violations of Articles 6(1) and 8, on the basis of the inadequacy of the procedure, and the lack of a judicial remedy. The applicant claimed compensation of £100,000 to cover loss of consortium with his child, mental anguish and distress.
- 6.91 The Court emphasised that the procedural defects were “intimately connected with an interference with one of the most fundamental of rights, namely respect for family life”.<sup>141</sup> Although it acknowledged that the likelihood of a different result was speculative, the Court

... [did] not feel able to conclude that... no practical benefit could have accrued to the applicant if the procedural deficiencies in question had not existed.

<sup>139</sup> See paras 3.38 - 3.43 above.

<sup>140</sup> A 136-C (1988), 13 EHRR 453 (just satisfaction). For the principal proceedings, see *W v United Kingdom* A 121 (1987), 10 EHRR 29. See further para 6.161 below.

<sup>141</sup> *Ibid*, para 12. Compare para 3.27 above. The reasoning is almost identical to that in *H v United Kingdom* A 120 (1987), 10 EHRR 95, discussed in detail in Part III para 3.65. See also *R v United Kingdom* A 136-E (1988), 13 EHRR 457: damages of £100,000 claimed in comparable circumstances: sum of £8, 000 awarded; *O v United Kingdom* A 136-A (1988), 13 EHRR 578: damages of £100,000 claimed, £5, 000 awarded; *R (B) v United Kingdom* (Just satisfaction) A 136-D (1988), 13 EHRR 588: award of £12, 000. See also *Olsson v Sweden (No 2)* A 250 (1992) 17 EHRR 134: violation of Article 8 and Article 6(1) Court awarded 50,000 Swedish krona (£4,680) (see further para 6.162). See also Starmer, *European Human Rights Law* (1999), 2.66, who observes that damages awarded in child-care cases are relatively generous by the Court’s standards, ‘often reflecting the degree of anxiety and distress presumed by the Court.’ See paras 6.159 - 6.164 below where this issue is discussed in relation to violations of Article 8.

It accepted that the nature of his relationship with his child had changed. Accordingly

In these respects he may therefore be said to have suffered some loss of real opportunities as well as mental anguish and distress, warranting monetary compensation.<sup>142</sup>

On an “equitable basis”, the Court awarded the applicant £12,000 for damage sustained.<sup>143</sup>

- 6.92 There are fewer examples of awards under this head in business cases. In *Pudas v Sweden*<sup>144</sup> the Court found that the applicant’s rights under Article 6(1) had been violated by reason of the absence of a judicial procedure for challenging the revocation of a public transport licence by the relevant administrative authority. The Court dismissed the claim for pecuniary loss on causation grounds:

... the evidence submitted does not warrant the conclusion that, had Mr. Pudas been able to challenge the revocation of his licence before a tribunal, the decision would have been in his favour. Neither is it for the Court to inquire into the merits under Swedish law of the revocation.<sup>145</sup>

However, the court made an award of 20,000 Swedish krona for non-pecuniary loss, on an “equitable basis”, saying simply:

... the Court considers that the applicant suffered, by reason of the absence of a court remedy, some non-pecuniary prejudice and that... sufficient satisfaction would not be provided solely by the finding of a violation.<sup>146</sup>

- 6.93 In that case, the Strasbourg Court has no indication of the nature of the non-pecuniary loss which it was compensating. In other cases, however, it is more specific, referring to “the feeling of frustration” or “the prolonged anxiety” caused by the defective court process.<sup>147</sup>

<sup>142</sup> *W v United Kingdom* A 136-C (1988), 13 EHRR 453 (just satisfaction), para 10.

<sup>143</sup> For the potential problems in following the case-law under the HRA, due to the immunity for judicial acts (s 9(3)) see Part IV paras 4.82 - 4.84 above.

<sup>144</sup> A 125-A (1987), 10 EHRR 380.

<sup>145</sup> A 125-A (1987), 10 EHRR 380, para 47.

<sup>146</sup> A 125-A (1987), 10 EHRR 380, para 48.

<sup>147</sup> See *Philis v Greece* A 209 (1991), 13 EHRR 741, para 73. Here, a pecuniary loss claim was rejected on the basis that Strasbourg Court could not speculate on what the outcome of domestic proceedings would have been, had the applicant been able to bring them; but the Strasbourg Court accepted that the feeling of frustration engendered by the applicant’s inability to assume control of the defence of his own interests and the prolonged anxiety he had suffered as to the outcome of the dispute must have caused him some non-pecuniary injury, and, making the assessment on an equitable basis, awarded the applicant 1,000,000 drachmas (£3,055) under this head). See also *Fredin v Sweden* A 192 (1991) 13 EHRR 784.

## **(2) Independence and impartiality**

6.94 Causation is also the main problem for claimants under this head, particularly in relation to pecuniary loss. Again, however, the Strasbourg Court has occasionally recognised a right to damages for “loss of opportunity”. An award is more likely where the violation of Article 6 is linked to a violation of another substantive right under the Convention.

### **(a) Pecuniary loss**

6.95 Where proceedings are successfully challenged because of lack of independence in the original proceedings, the Court’s approach to just satisfaction will take account of the result of any retrial. Thus, in *Piersack v Belgium*,<sup>148</sup> the Court upheld the applicant’s claim that the impartiality of the tribunal which had convicted him was open to doubt. He had, however, been retried in proceedings which complied with the Convention, and given a sentence identical to that originally imposed upon him. Not surprisingly, the Court found that his loss of liberty was not attributable to the breach of Article 6(1), and his claim for loss attributable to the imprisonment failed.<sup>149</sup>

6.96 Even where a re-trial has not taken place, the applicant’s claim for damages is likely to fail because of lack of evidence that an independent tribunal would have arrived at a different decision. For example, in *Hauschildt v Denmark*<sup>150</sup> the applicant complained that he did not receive a fair trial by an independent tribunal because some of the judges involved in the conviction had made pre-trial decisions concerning his detention. The Strasbourg Court ruled out personal bias on the part of the judge, but agreed that the impartiality of the tribunal might have appeared open to doubt. However, this finding did not mean that the conviction was not well-founded, and the Court would not speculate as to the result in the absence of a violation. It therefore found no causal link between the violation and the alleged pecuniary loss. The claim for non-pecuniary damage also failed as the Strasbourg Court held that its finding of a violation was adequate just satisfaction.<sup>151</sup>

6.97 In some cases the court has been prepared to give damages for a “loss of opportunity”.<sup>152</sup> The distinction appears to be a question of degree, depending

<sup>148</sup> A 53 (1982), 5 EHRR 169 (merits), A 85 (1984), 7 EHRR 251 (just satisfaction).

<sup>149</sup> A pecuniary award was made “on an equitable basis” in respect of his costs in the first abortive proceedings, as well as his costs before the Strasbourg Court. See also para 3.33 n 67 above.

<sup>150</sup> A 154 (1989), 12 EHRR 266. See also, for example, *Sramek v Austria* A 84 (1984), 7 EHRR 351; *Langborger v Sweden* A 155 (1989), 12 EHRR 416. Claims for pecuniary loss failed on similar grounds in cases discussed below: *De Cubber v Belgium* A 124-B (1987), 13 EHRR 422 (just satisfaction) (see para 6.98); *Findlay v United Kingdom* 1997-I p 263, 24 EHRR 221 (see para 6.99).

<sup>151</sup> The applicant had also asked the Court to quash his conviction, but the Court affirmed that it was not empowered to quash a judgment or to give any directions. See para 3.31 above.

<sup>152</sup> See the discussion of “loss of opportunity” in Part III paras 3.62 - 3.63 above.

on the seriousness of the violation. Thus, in *Bönisch v Austria*,<sup>153</sup> the Strasbourg Court accepted the applicant's claim that he had been denied a fair trial and equal treatment, in that a court-appointed witness appeared to be biased. The Strasbourg Court found no causal link between the violation of Article 6(1) and the deterioration in the applicant's financial position, and it declined to speculate as to the outcome of the proceedings if there had been no breach:

Nevertheless, the Court does not exclude the possibility that the applicant suffered, as a result of the potential effects of the violation found, a loss of opportunities of which account must be taken, even if the prospects of realising them were questionable...

[The applicant] also undoubtedly suffered non-pecuniary damage. He was left in prolonged uncertainty as to the repercussions of the criminal proceedings brought against him. Above all, the dominant role played by the Director of the Federal Food Control Institute in those proceedings... must have given him a feeling of unequal treatment.<sup>154</sup>

The Court made a global award of 700,000 Austrian schillings (£27,420) for pecuniary and non-pecuniary loss.

#### **(b) Non-pecuniary loss**

- 6.98 The court may be prepared to give damages for non-pecuniary loss, even if the pecuniary loss is not clearly established. *Bönisch v Austria*<sup>155</sup> is an example. Another is *De Cubber v Belgium*.<sup>156</sup> The Court found a violation of Article 6(1), in that the investigating judge had also held the function of first instance judge in the same proceedings. The claim for pecuniary loss failed, because there was nothing to show that the result of the proceedings would probably have been more favourable to the applicant had the violation not occurred. However he was awarded 100,000 Belgian francs (£1,600) to compensate him for "the legitimate misgivings" which he suffered.<sup>157</sup>
- 6.99 In more recent cases, however, such claims have usually failed, the Strasbourg Court holding that the finding of violation amounts to just satisfaction. Thus, in *Findlay v UK*,<sup>158</sup> the applicant was a former British soldier who had fought in the Falklands campaign and who, while suffering from post-traumatic stress disorder, had created an incident in which he had threatened to shoot himself and a number of other colleagues. He was subject to court-martial proceedings

<sup>153</sup> A 103 (1985), 13 EHRR 409 (just satisfaction). See also paras 3.36 and 3.63 above.

<sup>154</sup> A 103 (1986), 13 EHRR 409, para 11.

<sup>155</sup> Para 6.97 above.

<sup>156</sup> A 124 (1987), 13 EHRR 422 (just satisfaction).

<sup>157</sup> See also *De Moor v Belgium* A 292-A (1994), 18 EHRR 372; *Beaumont v France* A 296-B (1994), 19 EHRR 485.

<sup>158</sup> 1997-I p 263, 24 EHRR 221.



at which a single officer was responsible for convening the court-martial, appointing the participants and confirming the applicant's sentence. As a result of these proceedings, his rank was reduced and he was dismissed with a consequential reduction in his pension. His requests for a review of this decision were rejected. The Court upheld the substance of his claim that the court martial did not constitute an independent and impartial tribunal. However, his claim for pecuniary and non-pecuniary loss failed, the Court declining to speculate as to the result in the absence of a violation. The Court held that the finding of a violation was just satisfaction.<sup>159</sup> This pattern is repeated in several recent cases and seems to represent the current approach of the Strasbourg Court.<sup>160</sup>

### (3) Public hearing

- 6.100 Claims for pecuniary and non-pecuniary loss seem invariably to have failed where the only violation of Article 6(1) is that the hearing was not in public. The Strasbourg Court has generally held that there was no evidence that a public hearing would have affected the result; there was no causal link between the violation of Article 6(1) and any pecuniary damage or non-pecuniary damage. Alternatively, it has simply held that the Court's finding of a violation constituted just satisfaction. The applicants in these cases have, however, received awards of costs assessed with reference to the sums expended by them in vindicating their right.<sup>161</sup>
- 6.101 Damages may be awarded where lack of a public hearing is linked to other defects in the proceedings. In *Barberà, Messegué and Jabardo v Spain*,<sup>162</sup> the Strasbourg Court awarded damages for non-pecuniary loss in respect of violations of Article 6(1) because the proceedings did not satisfy the requirement that there be a fair and public hearing. The applicants, charged with terrorism related offences, were unexpectedly transferred from Barcelona to Madrid, the judge presiding over the trial was unexpectedly changed immediately before the trial opened, the trial was extremely short, and in particular important evidence

<sup>159</sup> 1997-I p 263, 24 EHRR 221, para 25. Damages for pecuniary losses were denied on the basis that, inasmuch as the Strasbourg Court could not speculate as to the decision which a properly constituted tribunal would have made, the applicant had failed to establish a causal link between those losses and the violation of his Art 6(1) rights. See also *De Haan v Netherlands* 1997-IV p 1379, 26 EHRR 417; and *Gautrin v France* 1998-III p 1009, 28 EHRR 196; and see *Oberschlick v Austria* A 204 (1991), 19 EHRR 389.

<sup>160</sup> See *De Haan v Netherlands* 1997-IV p 1379, 26 EHRR 417; and *Gautrin v France* 1998-III p 1009, 28 EHRR 196.

<sup>161</sup> See *Engel and Others v The Netherlands (No 2)* A 22 (1976), 1 EHRR 647; *Le Compte, van Leuven and de Meyere v Belgium (Article 50)* A 54 (1982), 5 EHRR 183; *Albert and Le Compte v Belgium (Article 50)* A 68 (1983), 6 EHRR 50; *Campbell and Fell v United Kingdom* A 80 (1984), 7 EHRR 165; *Weber v Switzerland* A 177 (1990), 12 EHRR 508; *Fischer v Austria* A 312 (1995), 20 EHRR 349; *Diennet v France* A 315-B (1995), 21 EHRR 554; *Lobo Machado v Portugal* 1996-I p 195, 23 EHRR 79; *Stallinger and Kuso v Austria* 1997-II p 666, 26 EHRR 81; and *Werner v Austria, Szücs v Austria* 1997-VII p 2496, 26 EHRR 310.

<sup>162</sup> A 285-C (1994).

was not adequately adduced and discussed at the trial in the applicants' presence and "under the watchful eye of the public". The Court found that the applicants had suffered a real loss of opportunities to defend themselves in accordance with the requirements of Article 6(1). Though the applicants had subsequently been retried and acquitted, the Court held that this could only provide partial reparation to the applicants. The first two applicants were awarded 8 million pesetas (£38,810) and the third applicant was awarded 4 million pesetas (£19,410) to cover all the heads of damage claimed.<sup>163</sup>

#### **(4) Equality of arms**

6.102 The principle that there should be a fair balance between the parties is well established in the Strasbourg case-law,<sup>164</sup> but claims for pecuniary or non-pecuniary loss have generally failed.

6.103 In *Dombo Beheer BV v The Netherlands*,<sup>165</sup> the Court explained the principle

The Court agrees with the Commission that as regards [civil] litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.<sup>166</sup>

6.104 The case concerned a claim by a company against a bank, based on an alleged oral agreement. The managing director of the company had not been allowed to give evidence (on the basis of a rule prohibiting evidence from parties to the proceedings), whereas the branch manager of the bank had given evidence. The Court accepted that there had been a violation of the principle of equality of arms. However, it rejected the claim for damages, because it was based on the assumption that admission of the evidence would have produced a different result, and the Court could not make that assumption without hearing the evidence.<sup>167</sup>

6.105 However in some cases the Court, though rejecting claims for pecuniary loss on causal grounds, will award damages for loss of opportunity. In *Delta v France*,<sup>168</sup> the applicant was convicted of robbery on the basis solely of written statements of

<sup>163</sup> Which included loss of earnings and career prospects, though the Strasbourg Court rejected the methods of calculation of that loss which were put forward by the applicants.

<sup>164</sup> This was first recognised in *Neumeister v Austria (No 1)* A 8 (1968) 1 EHRR 91.

<sup>165</sup> A 274-A (1993), 18 EHRR 213.

<sup>166</sup> A 274-A (1993), 18 EHRR 213, para 33.

<sup>167</sup> There are many examples of claims for damages being refused on similar grounds. See *Bricmont v Belgium* A 158 (1989), 12 EHRR 217; *Borgers v Belgium* A 214 (1991), 15 EHRR 92; *Saidi v France* A 261-C (1993) 17 EHRR 251; *Ruiz-Mateos v Spain* A 262 (1993), 16 EHRR 505; *Bulut v Austria* 1996-II p 346, 24 EHRR 84; *Mantovanelli v France* 1997-II p 424, 24 EHRR 370; *Nideröst-Huber v Switzerland* 1997-I p 101, 25 EHRR 709; and *Van Orshoven v Belgium* 1997-III p 1039, 26 EHRR 55.

<sup>168</sup> A 191-A (1990), 16 EHRR 574. See also para 6.144.

the victim and her friend, and after his request to call witnesses had been refused. He claimed 156,698.49 French francs (£16,025) for loss of earnings while in prison, and a further 600,000 French francs (£61,360) for non-pecuniary injury for the feelings of distress induced by the violation and the deprivation of his liberty. The Court awarded him damages of 100,000 French francs (£10,230) (without specifying which of his losses this sum was directed towards), observing that, although it could not speculate as to the outcome of the trial had the violation of Article 6(1) not occurred, it did not find it unreasonable to regard the applicant as having suffered a “real loss of opportunities” in consequence of the breach.

- 6.106 In *Kuopila v Finland*<sup>169</sup> the applicant was convicted of aggravated fraud and embezzlement. When she appealed, the prosecution submitted further evidence at the appeal which was not disclosed to the applicant. The Strasbourg Court found that there had been a violation of Article 6(3). The applicant claimed 200,000 Finnish markka (£20,130) for ‘suffering, distress and feelings of injustice’. The Court awarded her 15,000 markka (£1,510), accepting that

the lack of such guarantees has caused the applicant, who was sentenced to unconditional imprisonment, non-pecuniary damage which cannot be made good by the mere finding of a violation.

#### **(5) Duty to give reasons**

- 6.107 The right to a fair trial under Article 6(1) can include a duty to give reasons. The question of just satisfaction for violation under this head has only been considered in a handful of cases.
- 6.108 In *H v Belgium*,<sup>170</sup> the Court found a violation of Article 6(1) in respect of domestic proceedings which considered the applicant’s readmission to the Bar roll. The proceedings were criticised in two respects. First, it was unclear what amounted to ‘exceptional circumstances’ which might justify the reinstatement of the applicant to the roll (making it difficult for the applicant to argue his case effectively). Secondly the lack of either rules of procedure for the proceedings in question, or a right to challenge the eventual decision, gave the applicant cause to fear that his claim would be dealt with arbitrarily. The lack of any definition of ‘exceptional circumstances’ made it more necessary to give reasons for the decision - but no such reasons were given. The applicant claimed non-pecuniary damages for the “ordeal”, as well as pecuniary damages in respect of the income he would have earned if he had been able to resume his practice. The Court rejected the pecuniary claim for lack of causation as there were “no grounds for taking the disbarment and its consequences into consideration”. However, in respect of non-pecuniary damage, the Court awarded 250,000 Belgian francs (£4,000) on an equitable basis. It did not specify the grounds for the award.

<sup>169</sup> Application no 27752/95, 27 April 2000.

<sup>170</sup> A 127 (1987), 10 EHRR 339.

6.109 In contrast, damages have been denied in two subsequent cases. In *Ruiz Torija v Spain*,<sup>171</sup> the Strasbourg Court found a breach of Article 6(1) in proceedings relating to the termination of the applicant's lease of a bar, in that an appeal had been allowed against him without dealing with one of his submissions in the lower court. The Court declined to speculate as to the result if that submission had been considered, and refused his claim for pecuniary loss. Although it accepted that he might have suffered some non-pecuniary damage as a result of the breach, it held that the judgment provided sufficient just satisfaction. In *Georgiadis v Greece*,<sup>172</sup> the applicant was a Jehovah's Witness who had been detained for refusing to perform military service. Although he was acquitted, his claim for compensation was rejected without reasons and on this basis the Strasbourg Court found a violation of Article 6(1). However, as in the previous case, the claim for pecuniary damage was refused, because the Court could not speculate as to the outcome of the compensation proceedings had they been conducted in accordance with Article 6(1); and the non-pecuniary claim was also rejected because the judgment provided just satisfaction.

#### **(6) Self-incrimination**

6.110 The right to a fair trial as guaranteed by Article 6(1) includes the right to remain silent and the right not to incriminate oneself.

6.111 The issue of just satisfaction in relation to this aspect of Article 6(1) arose in *Funke v France*.<sup>173</sup> The Strasbourg Court found violations of Articles 6(1) and 8, on account of the applicant's conviction for not disclosing documents to the customs authorities, and the search and seizures carried out at his home. He claimed damages of 300,000 French francs (£34,410), on the ground that the breaches of the Convention had had "a serious impact on his person and on that of his wife as well as on their private life."<sup>174</sup> The Court awarded 50,000 French francs (£5,735), accepting that

[he] must have suffered non-pecuniary damage, for which the findings of violations in this judgment do not afford sufficient satisfaction.<sup>175</sup>

It is not clear from the Court's judgment what proportion of the award related to the Article 6(1) breach.

6.112 In contrast, damages were not awarded in *Saunders v United Kingdom*,<sup>176</sup> a case where the sole violation concerned the right not to incriminate oneself. The

<sup>171</sup> A 303-A (1994), 19 EHRR 553.

<sup>172</sup> 1997-III p 949, 24 EHRR 606.

<sup>173</sup> A 256-A (1993), 16 EHRR 297.

<sup>174</sup> A 256-A (1993), 16 EHRR 297, para 61.

<sup>175</sup> A 256-A (1993), 16 EHRR 297, para 62.

<sup>176</sup> 1996-VI p 2044, 23 EHRR 313.

violation arose from the use at the applicant's criminal trial of statements obtained by DTI inspectors under statutory powers of compulsion. The Strasbourg Court rejected the claim for pecuniary losses because a causal link had not been established and the Court could not speculate as to whether or not the outcome of the trial would have been different if the violation had not taken place. The claim for non-pecuniary damage was also rejected, the Court holding that "in the circumstances" its finding of a violation provided sufficient just satisfaction.

### **(7) Unreasonable length of proceedings**

6.113 There are numerous cases concerning breaches of the right to trial within a reasonable time, and awards of damages are regularly made. Italy has been responsible for a significant proportion of these cases.<sup>177</sup> As under other heads, claims for pecuniary loss normally turn on the Strasbourg Court's decision on causation, but awards for non-pecuniary loss are more frequent. The Court seems more likely to award compensation when the proceedings which were unreasonably delayed were civil rather than criminal.

#### **(a) Civil proceedings**

6.114 Substantial awards have been made in cases where the breach of Article 6 has been linked with a breach of Article 1 of Protocol No 1, arising out of unreasonable delay in proceedings relating to property. *Sporrong and Lönnroth v Sweden* and *Scollo v Italy* are examples.<sup>178</sup>

6.115 Even where the claim for pecuniary loss fails on causation grounds, the Strasbourg Court often awards damages for the distress caused by the unreasonable prolongation of the proceedings before domestic courts and tribunals. Indeed, applicants would appear to succeed in their claims for compensation for non-pecuniary damage in the majority of cases.

6.116 In *König v Germany*, for instance, the applicant, a doctor, had challenged the withdrawal of his authorisation to practise medicine and to run a clinic. The proceedings in respect of the clinic lasted for eleven years; in respect of the doctor's own licence, the proceedings lasted seven years. The Strasbourg Court held that there had been a violation of Article 6(1). It rejected the applicant's suggestion that his reputation had been harmed by the fact that the proceedings had extended beyond a reasonable time. However, the Court acknowledged that the applicant had been kept in a state of "prolonged uncertainty", and that this was likely to have led him to have deferred unduly the choice of an alternative career, and to have caused him permanent and deep uncertainty. In addition the Court took account of the fact that the protracted proceedings probably

<sup>177</sup> K Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1998) p 410-1 has a separate section devoted to Italian cases, in her table of cases on "Length of Proceedings".

<sup>178</sup> Discussed below under Article 1 of Protocol No 1, paras 6.231 - 6.232 and 6.233 respectively.

prejudiced the applicant by prompting him to postpone the sale or lease of the clinic, thereby losing opportunities. The Court awarded the applicant 30,000 German marks (£6,490) damages.

- 6.117 In *Darnell v United Kingdom*,<sup>179</sup> the applicant, a doctor, complained that proceedings for unfair dismissal brought by him had extended beyond a reasonable time. He had been suspended in 1982, and dismissed in 1984. After various hearings, and an application to the High Court, his dismissal was finally confirmed by the Secretary of State in 1988. Separate Industrial Tribunal proceedings, commenced in 1984, finally failed before the Employment Appeal Tribunal in April 1993. Before the Court, the Government accepted the Commission's finding of a breach of Article 6(1), and offered an apology. Although there was a dispute as to the starting date for the assessment, the Court proceeded on the basis of an "unreasonable" delay of at least 9 years. The applicant claimed £5,000 in non-pecuniary damages, based on the "considerable stress and strain... [in] fighting legal battles instead of practising medicine." The Court noted that

... his medical competence was not challenged or criticised, but he none the less suffered serious damage to his professional career as a result of time lost from the practice of medicine.<sup>180</sup>

His claim was allowed in full.

- 6.118 In *H v France*<sup>181</sup> the applicant's proceedings against a hospital had been unreasonably delayed. He claimed 200,000 French francs (£21,080) in damages for non pecuniary loss. The Strasbourg Court found that it was not proven that the delays had reduced his chances of proving his case but that the applicant had been forced to live in a prolonged state of distressing uncertainty and anxiety. He was awarded 50,000 French francs (£5,270) in non-pecuniary damages.
- 6.119 As noted above, there have been many Italian cases under this head. A typical example is *Massa v Italy*.<sup>182</sup> The applicant had been married to a school headmistress and, upon her death, had applied to the Department of Education for a reversionary pension. This application was not determined within a reasonable time for the purposes of Article 6(1). The Court found that between the reference to the Court of Audit, and its final judgment, there had been an unreasonable delay of some 6 years, contributed to by two "periods of inactivity attributable to the respondent State" amounting in total to three and a half years. The "excessive workload of the relevant division of the Court of Audit" was not accepted as a justification for the delay since

<sup>179</sup> A 272 (1993), 18 EHRR 205.

<sup>180</sup> A 272 (1993), 18 EHRR 205, para 24.

<sup>181</sup> A 162-A (1989), 12 EHRR 74

<sup>182</sup> A 265-B (1993), 18 EHRR 266.

... Article 6(1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements...<sup>183</sup>

The Court dismissed the claim for pecuniary losses for lack of proof, noting that Italian law provided for full compensation for monetary depreciation and for interest. However, the Court held that the applicant had sustained non-pecuniary injuries which were not sufficiently compensated for by the finding of a violation, and it awarded damages of 10,000,000 Italian lire (£3,980).<sup>184</sup>

- 6.120 However, not all such cases result in awards for non-pecuniary loss. For example, in *Scopelliti v Italy*,<sup>185</sup> civil proceedings against a public body for wrongful occupation of land had taken over 8 years before they resulted in an award in favour of the applicant. The Strasbourg Court accepted that compensation awarded by the domestic courts was sufficient to cover the applicant's pecuniary losses. In respect of non-pecuniary loss, the Court held that the finding of violation was just satisfaction in the circumstances of the case. The Court gave no reasons distinguishing this case from those in which awards for non-pecuniary loss were made.
- 6.121 A change of the party involved in the proceedings may reduce the chances of a successful claim.<sup>186</sup> In *Deumeland v Germany*<sup>187</sup> the Court found unreasonable delay in proceedings relating to a claim for a statutory widow's pension. They had been begun by the applicant's mother, and continued after her death by the applicant. The Court acknowledged that the mother had suffered "some psychological distress" during the period of delay, but, even if she might have recovered some compensation, it "saw no reason" to grant such compensation to the applicant.
- 6.122 Cases under this heading also illustrate the point that the conduct of the applicant is a consideration which the Court will take into account when deciding whether to award damages for breach of the right to a hearing within a reasonable time, and when determining the quantum of any damages. Thus, the Court will take into account the fact, where relevant, that the applicant contributed to the prolongation of the domestic proceedings in respect of which the complaint is made.<sup>188</sup>

<sup>183</sup> A 265-B (1993), 18 EHRR 266, para 31.

<sup>184</sup> See also *Vallee v France* A 289 (1994), 18 EHRR 549; *Frydlender v France* Application no 30979/96, 27 June 2000.

<sup>185</sup> A 278 (1993), 17 EHRR 493.

<sup>186</sup> See para 2.15 above.

<sup>187</sup> A 100 (1986), 8 EHRR 448.

<sup>188</sup> See for example, *Luberti v Italy* A 75 (1984), 6 EHRR 440, discussed in Part III para 3.54. See also *A and others v Denmark* 1996-I p 3264, 22 EHRR 458. The Danish proceedings related to claims for compensation for HIV infection caused by blood transfusions. The Strasbourg Court found that the proceedings had been unreasonably

6.123 An example of an award for non-pecuniary loss being made to a corporate entity is provided by *Comingersoll SA v Portugal*.<sup>189</sup> Here the applicant complained of the length (over 17 years) of proceedings it had brought to enforce a debt. The Strasbourg Court held found that there had been a violation of Article 6(1). The company claimed damages for both pecuniary loss (based on the value of the debt) and non-pecuniary loss (of 5 million Portuguese escudos (£14,925)). Its claim for pecuniary loss was rejected. The Court noted that the enforcement proceedings were still pending and that it was impossible to speculate as to their outcome. However, the claim for non-pecuniary loss was more successful. The Court awarded 1.5 million escudos (£4,480):

In the instant case, the fact that the proceedings in issue continued beyond a reasonable time must have caused Comingersoll SA, its directors and shareholders considerable inconvenience and prolonged uncertainty, if only in the conduct of the company's everyday affairs. The applicant company was in particular deprived of the possibility of recovering its claim earlier ... it is therefore legitimate to consider that the applicant company was left in a state of uncertainty that justified making an award of compensation.

6.124 An interesting example of an award for pecuniary and non-pecuniary losses caused by unreasonable delay is provided by *Guillemin v France*.<sup>190</sup> The applicant's land had been expropriated by order, and compensation set. The applicant brought proceedings and succeeded in having the order for expropriation set aside by the Cour de Cassation. She then commenced proceedings for compensation but seven years later proceedings were still pending. The Court held that there had been breaches of Article 6(1) and Article 1 of Protocol No 1.<sup>191</sup> In the first hearing it held that, as there was a possibility of an agreement between the respondent State and the applicant, the question of pecuniary damage was not ready for decision and must be reserved.<sup>192</sup> However, it awarded her 250,000 French francs (£26,740) for non-pecuniary loss, including "living in a state of uncertainty and anxiety about the outcome of the proceedings". In September 1997, a tribunal de grande instance ordered the Town Council to pay the applicant 1,603,926 French francs (£171,574) for pecuniary and non-pecuniary loss. Ultimately this sum was paid by the Town Council to the applicant's lawyer as a stakeholder, but there was a series of appeals and by September 1998 none of the money had been paid to the applicant.<sup>193</sup> The Court refused to comment on the substance of the proceedings

delayed. In similar French cases it had awarded non pecuniary damages of 200,000 French francs (£23,700). In the Danish cases it awarded 100,000 Danish krone (£10,110) in each case, taking account of ex gratia payments already made, and the fact that the "applicants contributed significantly to the length of the proceedings."

<sup>189</sup> Application no 35382/97, 6 April 2000. See para 3.28.

<sup>190</sup> 1997-I p 149, 25 EHRR 435 (merits), 1998-VI p 2544 (just satisfaction).

<sup>191</sup> See below, para 6.234 below.

<sup>192</sup> 1997-I p 149, 25 EHRR 435 (merits), para 62.

<sup>193</sup> See 1998-VI p 2544 (just satisfaction).



in France, as “it is not its function to give judgment on alleged errors of domestic law or to substitute its own assessment of the facts for that of the national courts”.<sup>194</sup> It held that the failure to pay compensation within a reasonable time amounted to a violation of Article 1 of Protocol No 1 and that, without prejudice to the amount that will finally be paid to the applicant at the end of the proceedings in France, the applicant should be paid 60,000 French francs (£6,420) pecuniary damages “for the loss of availability of the sum already awarded”<sup>195</sup> in domestic proceedings.<sup>196</sup> The Court emphasised that compensation for losses suffered would only be adequate reparation if paid within a reasonable time.

**(b) Criminal proceedings**

- 6.125 In criminal proceedings, an important factor has been whether the delay in the proceedings has made any difference to the actual time spent in prison.
- 6.126 In *B v Austria*,<sup>197</sup> for example, the applicant had been convicted of offences relating to exchange control. He complained that the excessive length of the proceedings had deprived him of the possibility of securing early provisional release, and hence of being able to earn an income. He also claimed damages for non-pecuniary injury, in that he had not been able to lodge an appeal while the judgment was pending. The Strasbourg Court held that there was no causal link between the violation of Article 6(1) and the applicant’s alleged loss of earnings, because the applicant would still have remained in prison, even if the judgment had been served earlier, and that its finding of a violation was sufficient just satisfaction for his non-pecuniary loss.<sup>198</sup>
- 6.127 In some cases, however, the Strasbourg Court awards damages for non-pecuniary loss, even though the claim for pecuniary loss has failed on causation grounds. In *Milasi v Italy*<sup>199</sup> the violation consisted of a 10 year delay in concluding criminal proceedings against the applicant. His claim for pecuniary damage, consisting of lost salary and benefits from potential civil service employment, was rejected on causal grounds. The Court held that the applicant’s failure to be recruited was not attributable to the criminal proceedings, but to his failure to sit the necessary examination. Nevertheless, it found that he had “undoubtedly” suffered non-pecuniary damage, “in that he was left in prolonged uncertainty as to the outcome of the criminal proceedings

<sup>194</sup> See 1998-VI p 2544 (just satisfaction), para 22.

<sup>195</sup> See 1998-VI p 2544 (just satisfaction), para 25.

<sup>196</sup> See paras 3.70 - 3.74 above.

<sup>197</sup> A 175 (1990), 13 EHRR 20.

<sup>198</sup> For a rare example of a (partly) successful claim for pecuniary loss caused by excessive delay in criminal proceedings, see *Foti v Italy* A 69 (1983) 6 EHRR 310.

<sup>199</sup> A 119 (1987), 10 EHRR 333.

and their financial repercussions.” He was awarded 7,000,000 lire (£3,180) on an “equitable basis”.<sup>200</sup>

- 6.128 In complaints relating to criminal proceedings, the gravity of the crime may be set against any claim for damages. In *Eckle v Germany*,<sup>201</sup> after proceedings which the Court held to be unreasonably delayed, the applicants were convicted of serious fraud offences and given substantial prison sentences. Their claims for loss of earnings during the period of delay were dismissed, because there was no causal link between the violation and the losses (which were attributable to his conviction rather than the delay). The claim for non-pecuniary loss also failed; the Court observed that

... it cannot be overlooked that they were charged with serious acts of fraud committed to the detriment of, amongst others, persons lacking substantial financial resources and that the Trier Regional Court imposed heavy prison sentences on them.<sup>202</sup>

### **(8) Presumption of innocence**

- 6.129 The right to be presumed innocent when charged with a criminal offence is one aspect of the right to a fair trial and is specifically provided for by Article 6(2):

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

There are only a few cases in which the Court has considered the question of damages in respect of a breach of Article 6(2).

- 6.130 In *Sekanina v Austria*<sup>203</sup> the claim for damages failed on causation grounds. The applicant was acquitted of the murder of his wife, but his claim for compensation for pre-trial detention was dismissed by the domestic court because there was still suspicion surrounding his involvement in the death. This was held to be a violation of Article 6(2):

<sup>200</sup> See also *Mansur v Turkey* A 321 (1995), 20 EHRR 535 which also involved an infringement of Article 5(3) and was described earlier at para 6.56 above; *Baggetta v Italy* A 119 (1987), 10 EHRR 325; *Milasi v Italy* A 119 (1987) 10 EHRR 333; *Mitap and Müftüoğlu v Turkey* 1996-II p 402, 22 EHRR 209.

<sup>201</sup> A 65 (1983), 13 EHRR 556 (see further para 3.58 above). See also *Abdoella v Netherlands* A 248-A (1992), 20 EHRR 585.

<sup>202</sup> Para 24. See also *Abdoella v Netherlands* A 248-A (1992), 20 EHRR 585: the applicant had been sentenced to 12 years for incitement to murder. The period of unreasonable delay counted towards his sentence, and, although the Court accepted that he may have suffered “some frustration and anxiety” it made no award for non-pecuniary loss.

<sup>203</sup> A 266-A (1993), 17 EHRR 221. See also *Minelli v Switzerland* A 62 (1983), 5 EHRR 554: A private prosecution for criminal defamation against the applicant failed because the limitation period expired, but he was ordered to pay costs; this was held to be a violation of Article 6(2), because of the implicit assumption that, but for limitation period, he would have been convicted. However, the finding of the Strasbourg Court and the award of his costs were held to provided just satisfaction.

The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.<sup>204</sup>

However, his claims for pecuniary loss, including loss of earnings, were rejected

The violation found by the Court does not concern the lawfulness of the detention on remand; there is therefore no direct causal connection...<sup>205</sup>

6.131 A breach of Article 6(2) resulted in a substantial award in *Alenet de Ribemont v France*.<sup>206</sup> The violation arose from the identification of the applicant, at a press conference held by the Minister of the Interior, as an instigator to the murder of an MP.<sup>207</sup> The Strasbourg Court found a violation of Article 6(2) because the statements amounted to a declaration of the applicant's guilt which "encouraged the public to believe him guilty" and "prejudged the assessment of facts by the competent judicial authority". In addition, the Court found a violation of Article 6(1) for the unreasonable delay in the domestic proceedings. The applicant claimed pecuniary and non-pecuniary damages amounting to 10,000,000 French francs (£1,309,600). He claimed that the statements had caused his insolvency and made it difficult for him to find employment, and that he and his family suffered injury to their reputation. The Court made a global award of 2,000,000 French francs (£261,920) under both heads on an "equitable basis". It accepted that there was some pecuniary loss in that the statements

diminished the trust placed in him by the people he did business with and thus made it difficult for him to pursue his occupation.<sup>208</sup>

In relation to non-pecuniary loss it commented adversely on the conduct of the respondent State:

Although the fact that [the deceased] was well known, the circumstances of his death and the stir it caused certainly gave the authorities good reason to inform the public speedily, they also made it predictable that the media would give extensive coverage to the statements about the inquiry under way. The lack of restraint and discretion vis-à-vis the applicant was therefore all the more reprehensible.<sup>209</sup>

<sup>204</sup> A 266-A (1993), 17 EHRR 221, para 30.

<sup>205</sup> A 266-A (1993), 17 EHRR 221, para 35.

<sup>206</sup> A 308 (1995), 20 EHRR 557.

<sup>207</sup> The applicant was charged with aiding and abetting murder but these charges were later dropped and he was released.

<sup>208</sup> A 308 (1995), 20 EHRR 557, para 62.

<sup>209</sup> A 308 (1995), 20 EHRR 557, para 62.

### **(9) Right to be informed of criminal charges**

6.132 Article 6(3)(a) guarantees to everyone charged with a criminal offence, the right:

to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

6.133 In *Brozicek v Italy*,<sup>210</sup> the applicant, who did not understand Italian, was charged with offences in Italy, notified in Italian, and convicted in his absence. There was a dispute as to the extent of his knowledge of the proceedings, but the Strasbourg Court decided that he had not waived his right to participate. Although it acknowledged that it had no power to quash the conviction, and that the applicant must have suffered some degree of non-pecuniary damage, the Court held that that the judgment provided sufficient just satisfaction.<sup>211</sup>

6.134 This may be contrasted with *Pélissier and Sassi v France*.<sup>212</sup> The applicants in this case were originally charged with fraud-related offences in connection with a criminal bankruptcy. Though they were acquitted, an appeal by the prosecution resulted in their conviction for aiding and abetting the concealment of assets. They only learnt of this 're-characterisation' of the charges against them when the court of appeal gave its judgment. The Strasbourg Court found that there had been violations of Article 6(3)(a) and Article 6(1).<sup>213</sup> The applicants were each awarded 90,000 French francs (£8,600) in respect of their pecuniary and non-pecuniary loss;<sup>214</sup> the Court noted that it was not unreasonable to regard the applicants as having suffered a loss of real opportunities.

### **(10) Right to a defence**

6.135 Articles 6(3)(b) and (c) protect an applicant's right to a defence. The relevant provisions state that everyone charged with a criminal offence has the right:

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

#### **(a) Pecuniary loss**

6.136 Claims for pecuniary loss for violations of the right to a defence have in general not been successful. These claims often fail due to the absence of a causal link

<sup>210</sup> A 167 (1989), 12 EHRR 371.

<sup>211</sup> Reading between the lines, one may detect some scepticism about the merits of the case.

<sup>212</sup> Application no 25444/94, 25 March 1999.

<sup>213</sup> On account of the length of the proceedings.

<sup>214</sup> The applicants had each claimed 405,000 French francs (£38,715) for pecuniary loss and 250,000 French francs (£26,290) for non-pecuniary loss.

between the violation found and the pecuniary damage alleged.<sup>215</sup> For example, in *Maxwell v United Kingdom*,<sup>216</sup> the applicant's request for legal aid in order to appeal his conviction was denied and this amounted to a violation of Article 6(3)(c). The Court rejected the applicant's claim for pecuniary damage because it could not speculate as to the outcome of the appeal had legal aid been granted.

**(b) Non-pecuniary loss**

- 6.137 In many cases, the Strasbourg Court has refused to award damages for non-pecuniary injury, stating that the finding of a violation is sufficient just satisfaction for any non-pecuniary damage.<sup>217</sup> In some cases, the Court also justifies its refusal on causation grounds. For example, in *Benham v United Kingdom*,<sup>218</sup> where the applicant had been imprisoned for failure to pay rates, the Court declined to speculate as to whether the order for detention would have been made if the applicant been represented at the hearing.<sup>219</sup>
- 6.138 However, non-pecuniary damages have been successfully recovered in a number of instances.<sup>220</sup> In *Artico v Italy*,<sup>221</sup> the applicant had been imprisoned for fraud offences. He was not legally represented in his first unsuccessful appeal, because his legal aid lawyer refused to act, but he was represented in later proceedings when some of the convictions were quashed. The Strasbourg Court awarded the applicant 3 million Italian lire (£1,370) for non-pecuniary damage, noting that

... the applicant remained without a lawyer, other than nominally, despite his pressing and repeated complaints and representations. In all probability he was left with a distressing sensation of isolation, confusion and neglect.<sup>222</sup>

<sup>215</sup> See *Granger v United Kingdom* A 174 (1990), 12 EHRR 469; *Poitrinol v France* A 277-A (1993), 18 EHRR 130; *Zana v Turkey* 1997-VII p 2533, 27 EHRR 667.

<sup>216</sup> A 300-C (1994), 19 EHRR 97.

<sup>217</sup> See *Pakelli v Germany* A 64 (1983), 6 EHRR 1; *FCB v Italy* A 208-B (1991), 14 EHRR 909; *Lala v Netherlands* A 287-A (1994), 18 EHRR 586; *Pelladoah v Netherlands* A 297-B (1994), 19 EHRR 81; *Maxwell v United Kingdom* A 300-C (1994), 19 EHRR 97; *Boner v United Kingdom* A 300-B (1994), 19 EHRR 246; *John Murray v United Kingdom* 1996-I p 30, 22 EHRR 29. Cf paras 3.38 - 3.43 above.

<sup>218</sup> 1996-III p 738, 22 EHRR 293. See further paras A.10 - A.12 below.

<sup>219</sup> The Strasbourg Court also held that the finding of a violation would amount to sufficient just satisfaction in *Averill v United Kingdom* Application no 36408/97, 6 June 2000, and *Magee v United Kingdom* Application no 28135/95, 6 June 2000, where the applicants, who had been detained on suspicion of terrorism, complained that they had been denied access to a solicitor during the first days of their detention.

<sup>220</sup> In addition to the examples discussed, see further *S v Switzerland* A 220 (1991), 14 EHRR 670; *Zana v Turkey* 1997-VII, 27 EHRR 667.

<sup>221</sup> A 37 (1980), 3 EHRR 1.

<sup>222</sup> A 37 (1980), 3 EHRR 1, para 47.

6.139 In *Goddi v Italy*,<sup>223</sup> the Strasbourg Court also took account of “loss of opportunity” in its award of 5,000,000 lire (£2,200), apparently for pecuniary and non-pecuniary loss. It stated:

The applicant maintained that if he had had an opportunity of having his defence adequately presented, he would certainly have received a lighter sentence and the Court of Appeal would probably have done no more than confirm the judgment of the Forli Regional Court.

The Court cannot accept so categorical an allegation. However, it has to be remembered that the sentence imposed at first instance was substantially increased by the Bologna Court of Appeal; and the outcome might possibly have been different if Mr Goddi had had the benefit of a practical and effective defence. In the present case such a loss of real opportunities warrants the award of just satisfaction.

To this has to be added the non-pecuniary damage which the applicant undoubtedly suffered as a result of the violation of Article 6(3)(c).<sup>224</sup>

6.140 Similarly in *Perks and others v United Kingdom*,<sup>225</sup> another case of imprisonment for non-payment of local taxes, the claims of all but one of the applicants for damages were dismissed on the same basis as in *Benham v United Kingdom*. In the case of Perks himself, however, the Government accepted that given his personal circumstances and health problems, it was unlikely that he would have been imprisoned had these considerations been brought to the attention of the court by a legal representative. The Court awarded him £5,500 non-pecuniary damages.<sup>226</sup>

#### **(11) Examination of witnesses**

6.141 Everyone charged with a criminal offence has, under Article 6(3)(d), the right:

to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

6.142 As in other parts of Article 6, claims for damages under this head raise the issue whether the applicant would not have been convicted if there had been no breach. This issue is best tested by a retrial which complies with the applicant’s

<sup>223</sup> A 76 (1984), 6 EHRR 457.

<sup>224</sup> A 76 (1984), 6 EHRR 457, para 35.

<sup>225</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33.

<sup>226</sup> For anecdotal evidence of the basis of the amount, see Part III para 3.10 n 15 above. See also paras 3.66 - 3.67 above. The case is also discussed in Appendix A at paras A.16 - A.22.

Convention rights. If the applicant is convicted again, the claim for pecuniary damages will be rejected.<sup>227</sup>

6.143 However, the Strasbourg Court has no power to direct a retrial.<sup>228</sup> As a result it has had to evaluate the likelihood of convictions under hypothetical circumstances. This has produced apparently contradictory approaches.<sup>229</sup> In some cases, the Court has shown a willingness to recognise “a loss of opportunity” and award damages. In others, it has refused to speculate as to the outcome in the absence of a violation, and refused an award.

6.144 An example of the former is *Delta v France*,<sup>230</sup> in which the Strasbourg Court found a violation of Article 6(3)(d) taken with Article 6(1), when the applicant’s conviction for robbery was based on the written statements of the victim and her friend, taken in the absence of the defence; the Court awarded damages for loss of opportunity. This reasoning was followed in *Vidal v Belgium*.<sup>231</sup> However, in *Saidi v France*<sup>232</sup> the Court declined to speculate as to what the result would have been in the absence of a violation and therefore refused to award damages.

## **(12) Right to an interpreter**

6.145 Article 6(3)(e) applies where a person is unable to understand the language of the court. It ensures to everyone charged with a criminal offence, the right:

to have the free assistance of an interpreter if he cannot understand or speak the language used by the court.

6.146 The question of damages where this right is infringed was considered by the Strasbourg Court in *Luedicke, Belkacem and Koç v Germany*.<sup>233</sup> The applicants, who did not understand German, were tried in Germany for various criminal offences. Following their convictions, they were ordered to pay the costs of the interpreters that had been used in the criminal proceedings. The Strasbourg Court held that requiring the applicants to pay the costs of interpretation in their

<sup>227</sup> *Windisch v Austria* A 186 (1990), 13 EHRR 281 (merits); A 255-D (1993) (just satisfaction).

<sup>228</sup> See para 3.31 above.

<sup>229</sup> See the discussion in Part III, paras 3.59 - 3.69.

<sup>230</sup> A 191-A (1990), 16 EHRR 574, considered at para 6.105 above.

<sup>231</sup> A 235-B (1992) (merits); A 235-E (1992) (just satisfaction). The Court thought it “not unreasonable” to regard the applicant as having suffered “a loss of real opportunities”; and non-pecuniary damage in the distress caused by the length of the proceedings. In *Unterpertinger v Austria* A 110 (1986), 13 EHRR 175, where the applicant’s conviction was based on the statements of witnesses who did not appear, the state conceded the claim for loss of earnings but disputed the remainder. The Strasbourg Court awarded 100,000 Austrian schillings (£4,970) as compensation for both pecuniary and non-pecuniary damage. See also *Van Mechelen v Netherlands* 1997-III p 691, 25 EHRR 647 (merits); 1997-VII p 2426 (just satisfaction).

<sup>232</sup> A 261-C (1993), 17 EHRR 251.

<sup>233</sup> A 29 (1978), 2 EHRR 149.

criminal trials was contrary to Article 6(3)(e). It ordered the state to reimburse the applicant for the interpretation costs.

## 7. ARTICLE 7

6.147 Article 7(1) of the Convention states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

6.148 There have been few cases in which the Strasbourg Court has needed to consider whether damages are necessary to afford just satisfaction for a violation of Article 7(1).

6.149 In *Welch v United Kingdom*,<sup>234</sup> the applicant, a convicted drug trafficker, was made subject to a confiscation order in an amount of over £50,000, under section 1 of the Drug Trafficking Offences Act 1986.<sup>235</sup> However, as the offences which formed the basis of his conviction predated the enactment of the 1986 Act, the Strasbourg Court held that the imposition of the confiscation order violated Article 7 of the Convention. He failed to establish claims for pecuniary loss under a number of heads, the Strasbourg Court noting that he had not exercised his right to apply for a variation of the order. His claim for non-pecuniary loss also failed, and claims on behalf of his wife and children failed on the grounds that they were not “victims”.<sup>236</sup> The Court did not identify the “circumstances” which influenced its decision. It may have been influenced by the fact that the applicant was a convicted drug trafficker and the fact that the confiscation order had not been, and would not be, enforced.<sup>237</sup>

6.150 Similarly, in *Jamil v France*,<sup>238</sup> the applicant, a convicted drug trafficker, was sentenced to eight years’ imprisonment and a fine, subject to a further two years in default of payment.<sup>239</sup> On the date of the relevant offences, the maximum

<sup>234</sup> A 307-A (1995), 20 EHRR 247 (merits); 1996-II p 386, 21 EHRR CD1 (just satisfaction).

<sup>235</sup> The applicant was also prohibited from “disposing of, diminishing or otherwise in any way dealing with any ... property ... within or without the jurisdiction”. The restraining order was imposed to ensure the effective enforcement of the confiscation order.

<sup>236</sup> See Part II para 2.15 above.

<sup>237</sup> The Strasbourg Court had been given to understand (presumably by the Government) that the order would not be enforced against the applicant. See 1996-II p 386, 21 EHRR CD1, at para 9.

<sup>238</sup> A 320 (1995), 21 EHRR 65.

<sup>239</sup> The warrant of committal for default was subsequently rescinded upon payment of 6,000 French francs (£785) by the applicant to the customs authorities. The applicant maintained that “the conclusion of a friendly settlement with the customs authorities was not unconnected with the fact that he had lodged an application with the Convention institutions.” (A 320 (1995), 21 EHRR 65, para 40).



period of imprisonment in default was four months. In these circumstances, the Strasbourg Court found a violation of Article 7.<sup>240</sup> The Court held that the finding was sufficient just satisfaction, as he did not serve any period of imprisonment under the warrant of committal for default.<sup>241</sup>

6.151 In *Baskaya and Okcuoglu v Turkey*,<sup>242</sup> the Strasbourg Court found that there had been breaches of Article 6 and Article 10. The applicant, the owner of a publishing house, was convicted of disseminating propaganda against the indivisibility of the Turkish State; he was fined and sentenced to five months' imprisonment. The Court held that the composition of the court that convicted the applicant violated Article 6; that the conviction and fine violated Article 10;<sup>243</sup> and that the imposition of the prison sentence violated Article 7. The Court held that the applicant must have suffered distress that could not be compensated solely by the finding of a violation, and awarded him 45,000 French francs (£4,300).

## **8. ARTICLE 8**

6.152 The right to respect for one's private and family life is protected by Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

6.153 Breaches of Article 8 occur in a variety of contexts. As a result, the type of applicant claiming damages and the circumstances in which a claim is made depend very much on the facts of the case.

### **(1) Interference with correspondence**

6.154 A number of cases concern the correspondence of prisoners. The claims tend to be for non-pecuniary damage, such as the distress and frustration encountered in not being able to correspond freely. It is rare for these claims to be successful. The Court normally holds that the judgment itself provides sufficient just satisfaction for the alleged non-pecuniary damage. In some cases, the Court has

<sup>240</sup> A 320 (1995), 21 EHRR 65, para 38.

<sup>241</sup> A 320 (1995), 21 EHRR 65, para 39.

<sup>242</sup> Applications nos 23536/94 and 24408/94, 8 July 1999.

<sup>243</sup> This aspect of the case is discussed in detail at paras 6.198 and 6.203 below.

observed that the non-pecuniary damage was not of such “intensity” as to warrant an award.<sup>244</sup>

- 6.155 The first such case was *Golder v United Kingdom*.<sup>245</sup> The applicant was refused permission by the Home Secretary to consult a solicitor with a view to bringing a libel claim against one of the prison officers. The Court held that this violated the applicant’s right to respect for correspondence as well as his right of access to a court as protected by Article 6(1). However, it made no award,<sup>246</sup> holding that the finding was just satisfaction. No further reasons were given.
- 6.156 The Court also rejected the claim for non-pecuniary damage, on similar facts, in *Silver and others v United Kingdom (Article 50)*,<sup>247</sup> but it expressed its reasoning in more detail:

It is true that those applicants who were in custody may have experienced some annoyance and sense of frustration as a result of the restrictions that were imposed on particular letters. It does not appear, however, that this was of such intensity that it would in itself justify an award of compensation for non-pecuniary damage. As the figures supplied by the Government reveal, the number of letters in respect of which the Court found a violation as regards each of the applicants was very small compared with the number of letters which they were allowed to send.

It also noted that

substantial changes were introduced as a result of the applications in which this case originated and do appear in principle to have led to a significant improvement.<sup>248</sup>

- 6.157 As regards one of the applicants (Mr Carne), the Strasbourg Court seems to have taken account of the conduct of the applicant as a reason for refusing “special damages”:

...whatever Mr Carne’s motives may have been, the subterfuge to which he resorted nevertheless constituted a transgression of the prison regulations which, in this respect, have not been found by the Court to be incompatible with the Convention. Having regard to all

<sup>244</sup> On these points see paras 3.38 - 3.43 and 3.44 above respectively.

<sup>245</sup> A 18 (1975), 1 EHRR 524 considered above, para 3.38.

<sup>246</sup> It is not clear what type of damage the applicant was claiming.

<sup>247</sup> A 67 (1983), 6 EHRR 62. See also para 3.44 above.

<sup>248</sup> A 67 (1983), 6 EHRR 62, 63, para 10. Further illustrations of this approach can be found in *Campbell and Fell v United Kingdom* A 48 (1982), 4 EHRR 293, *Schönenberger and Durmaz v Switzerland* A 137 (1988), 11 EHRR 202, *McCallum v United Kingdom* A 183 (1990), 13 EHRR 597, *Pfeiffer and Plankl v Austria* A 227 (1992), 14 EHRR 692 and *Campbell v United Kingdom* A 233-A (1992), 15 EHRR 137.

the circumstances, the Court considers that it is not necessary to make an award in respect of this claim.<sup>249</sup>

6.158 There are exceptions to the general approach. In *Messina v Italy*,<sup>250</sup> the applicant was detained in connection with allegations of drug offences and involvement with a mafia-type organisation. During his detention, the applicant complained that he experienced problems in receiving his correspondence. The Strasbourg Court found a violation of Article 8 as regards his right to respect for correspondence, and of Article 6(1) in that the criminal proceedings exceeded a reasonable length. The applicant referred to his inability to lead a normal family life and the feelings of bitterness and persecution which resulted. The Court awarded 5,000,000 Italian lire (£1,990) for non-pecuniary damage. The reasons for this exceptional treatment were not explained.<sup>251</sup>

## **(2) Children in public care**

6.159 In a number of cases, violations of Article 8 have been concerned with the taking of children into care by public authorities. In these cases, it is the manner of the decision, rather than the justification for the decision to place the children in care, which is the subject-matter of the dispute. For example, the Court has found violations of Article 8 on account of the undue length of proceedings,<sup>252</sup> or for insufficient involvement of the parents in the decision-making process.<sup>253</sup>

<sup>249</sup> *Silver v United Kingdom* A 67 (1983), 6 EHRR 62 (just satisfaction) para 16.

<sup>250</sup> A 257-H (1993). See also *Herczegfalvy v Austria* A 242-B (1992), 15 EHRR 437, where the Court awarded 100,000 Austrian schillings (£5,790) for the non-pecuniary damages suffered by the applicant as a result of violations of Articles 5(4), Art 8 and Art 10. It is not clear though what portion of the award represents the non-pecuniary damage attributable to the interference with the applicant's correspondence during his detention in a psychiatric hospital.

<sup>251</sup> There is no indication in the judgment of the "intensity" of the interference; indeed there was a dispute as to whether there had in fact been any interference. One distinguishing factor, not referred to expressly, might have been that the applicant was in detention on remand. However, in *Schönenberger and Durmaz v Switzerland* A 137 (1988), 11 EHRR 202, where damages were refused, the applicant was in detention on remand. A factor noted by the Strasbourg Court was that, in contrast to other 'correspondence cases', the applicant complained that he had never received correspondence addressed to him. In most of the cases where damages were not awarded, the applicants were convicted criminals serving prison sentences, and were subject to restrictions on their correspondence, rather than being denied it.

<sup>252</sup> In *H v United Kingdom* A 120 (1987) 10 EHRR 95, the Court emphasised the importance of timely proceedings because children taken into care may subsequently be adopted or placed in foster homes where they will begin to develop bonds with their new families. As a result "there is always the danger that any procedural delay will result in the *de facto* determination of the issue submitted to the court before it has held its hearing". See the discussion of this case in Part III para 3.65 above.

<sup>253</sup> See *W v United Kingdom* A 121 (1987), 10 EHRR 29 (merits), discussed under Article 6 above, at paras 6.90 - 6.91.

- 6.160 As has been noted,<sup>254</sup> these cases seem to form a distinct category. The applicants, who are usually the parents of the children in question, have generally been successful in recovering substantial damages. In making such awards, the Strasbourg Court has acknowledged the considerable distress and in some cases the loss of opportunities suffered, and has shown a greater willingness to speculate than in other types of case.<sup>255</sup> The Court has been prepared in some cases to compensate the applicant for a 'loss of relationship' with his or her child. Perhaps these features of the Court's treatment of the case-law in this area can be attributed to the importance of the right in question and the lasting impact that a decision to place children in care will have on both the applicants and their children.<sup>256</sup>
- 6.161 Many of the cases have been discussed under Article 6.<sup>257</sup> A number relate to the United Kingdom. Typical is *W v United Kingdom*,<sup>258</sup> where the Strasbourg Court awarded £12,000 in damages for the violations of Article 6(1) and Article 8, as a result of the procedures followed by the local authority in making decisions as regards the care of the applicant's child and the insufficiency of remedies available to challenge those decisions. Other cases have resulted in similar awards ranging from £8,000 to £12,000.<sup>259</sup>
- 6.162 The case-law also includes numerous applications brought against Sweden for similar procedural violations arising from care proceedings. In *Olsson v Sweden*,<sup>260</sup> the Strasbourg Court awarded 200,000 Swedish krona (£18,710) for non-pecuniary damage resulting from the violation of Article 8 in the manner in which decisions of the local authority relating to the care of her children were implemented. The applicants' children were placed separately at a great distance from the applicants' home, and restrictions were placed on the applicants' visits to them. The Strasbourg Court noted that these matters caused the applicants considerable inconvenience and substantial anxiety and distress. In *Eriksson v Sweden*,<sup>261</sup> a mother was awarded 200,000 Swedish krona (£18,470) for non-

<sup>254</sup> See Part III para 3.65 above.

<sup>255</sup> See para 3.27 above.

<sup>256</sup> In *H v United Kingdom* A 120 (1987), 10 EHRR 95 para 85, the Court referred to the "importance of what was at stake" and the "particular quality of irreversibility" in relation to the proceedings found to be in violation of Art 8. In considering the application of Art 41 in *H v United Kingdom (Just Satisfaction)* A 136-B (1988), 13 EHRR 449 para 10 the Court laid further emphasis on the importance of the right in question: "Whilst the applicant was thus the victim of a deficiency of a procedural nature, it was all the same a deficiency that was intimately connected with an interference with one of the most fundamental of rights namely that of respect for family life".

<sup>257</sup> See para 6.90 - 6.91 and in particular 6.91 n 141 above.

<sup>258</sup> A 136-C (1988), 13 EHRR 453 (just satisfaction), discussed at paras 6.90 - 6.91 above.

<sup>259</sup> See above para 6.91 n 141. The reasons for the amounts of the awards are not apparent from the judgments.

<sup>260</sup> A 130 (1988), 11 EHRR 259.

<sup>261</sup> A 156 (1989), 12 EHRR 183.

pecuniary damage while her daughter received 100,000 Swedish krona (£9,235). The Strasbourg Court found that they both suffered substantial anxiety and distress as a result of the violations of Article 6(1) and Article 8 found due to the unavailability of judicial remedies for challenging the restrictions imposed on access between the child and her mother. Further, in *Margareta and Roger Andersson v Sweden*,<sup>262</sup> the Strasbourg Court held that restrictions placed on access and correspondence between a mother and her son who was in care violated their right to respect for family life. Mother and son were each awarded 50,000 Swedish krona (£4,680) to compensate for the considerable distress and anxiety which they suffered as a result of the violations.

- 6.163 Restrictions placed on access to the records of children taken into care have also given rise to violations of Article 8. In *Gaskin v United Kingdom*,<sup>263</sup> the applicant had been in public care and foster homes until he reached the age of majority. When he tried to obtain access to his records, he was only permitted to see those for which the contributors had given their consent. The Strasbourg Court held that the absence of a procedure whereby an independent authority could decide whether or not to grant access if a contributor could not be found or refused his or her consent amounted to a violation of the applicant's right to respect for his private and family life. A claim to loss of earnings was rejected for lack of a causal link between the loss claimed and the violation.<sup>264</sup> As regards non-pecuniary damage, the Court acknowledged that the applicant may have suffered some distress and anxiety as a result of the violation and awarded £5,000.
- 6.164 In *McMichael v United Kingdom*,<sup>265</sup> the applicants trying to gain access to records were the parents of a child taken into care. The Strasbourg Court found violations of Article 6(1) and Article 8 and awarded the applicants jointly £8,000 for non-pecuniary damage. The Court acknowledged that these applicants had not suffered the same loss of opportunities as those applicants who were denied access to remedies. However, the Court found itself unable to state with certainty that no practical benefit would have accrued had the violation not occurred. In this respect, part of the trauma and anxiety experienced in the care proceedings was attributable to the breach. For these reasons, the Court made the award.

### **(3) Adoption and custody disputes**

- 6.165 The Strasbourg Court has also been prepared to make significant awards for non-pecuniary loss in relation to adoption and custody disputes. In *Hokkanen v*

<sup>262</sup> A 226 (1992), 14 EHRR 615.

<sup>263</sup> A 160 (1989), 12 EHRR 36.

<sup>264</sup> The Court stated that even if such a procedure has been in place there was no guarantee that the result would have been the release of all the records to the applicant. Further, even if all the records had been released, there was no evidence to support the conclusion that the release of all the records would have had a favourable impact on the applicant's earnings.

<sup>265</sup> A 308 (1995), 20 EHRR 205.

*Finland*<sup>266</sup> the applicant complained that the authorities had failed to enforce his right to custody of his daughter. Instead they had allowed the grandparents to keep her in their care and prevent his access to her in defiance of a number of court orders, and had eventually transferred custody to the grandparents. The Strasbourg Court found that the failure to enforce the applicant's right of access for over three years was a violation of Article 8.<sup>267</sup> The Court noted that there was

no reason to doubt that the applicant suffered distress as a result of the non-enforcement of his access rights and that sufficient just satisfaction would not be provided solely by the finding of a violation.

The applicant was awarded 100,000 Finnish markka (£13,225) for non-pecuniary damage.

- 6.166 In *Keegan v Ireland*<sup>268</sup> the Strasbourg Court found that the secret placement of the applicant's daughter for adoption without his knowledge or consent, which had led to the daughter bonding with the prospective adopters, and to the making of an adoption order, amounted to a violation of Article 8. In addition, the failure to allow the applicant to intervene in the adoption proceedings breached Article 6(1).<sup>269</sup> The Strasbourg Court awarded the applicant 2,000 Irish pounds (£1,970) for pecuniary loss (the costs involved in the guardianship and custody proceedings) and 10,000 Irish pounds (£9,845) for non-pecuniary loss. It noted

...damages are appropriate in this case having regard to the trauma, anxiety and feelings of injustice that the applicant must have experienced as a result of the procedure leading to the adoption of his daughter as well as the guardianship and custody proceedings.<sup>270</sup>

#### **(4) Telephone tapping and searching of premises**

- 6.167 Breaches of Article 8 have been established in cases involving the tapping of telephones and the searching of premises. Many of the applicants in these cases have been convicted of crimes as a result of the evidence so obtained. However, claims for pecuniary or non-pecuniary damages have usually failed on causation grounds, or simply on the basis that the finding of violation is just satisfaction. Although the reasons are not expressed, it seems likely that the criminal conduct

<sup>266</sup> A 299-A (1994), 19 EHRR 139.

<sup>267</sup> The Court held that after 21 October 1993 the competent authorities had acted reasonably in taking account of the daughter's wishes to remain with her grandparents.

<sup>268</sup> A 290 (1994), 18 EHRR 342.

<sup>269</sup> The applicant had brought guardianship and custody proceedings in an unsuccessful attempt to impede the adoption. As the Strasbourg Court noted, by the time these proceedings finished the scales concerning the child's welfare "had tilted inevitably in favour of the prospective adopters". A 290 (1994), 18 EHRR 342, para 59.

<sup>270</sup> A 290 (1994), 18 EHRR 342, para 68.

of the applicant is taken into account as a reason for refusing compensation.<sup>271</sup> The Court does not appear to regard the unlawfulness of the evidence as undermining the conviction.<sup>272</sup>

- 6.168 Thus, in *Kruslin v France*,<sup>273</sup> the Court found a violation of Article 8 in respect of a telephone conversation between the applicant and a third party whose line was tapped. This evidence led to the applicant's conviction for armed robbery. He claimed compensation of 1,000,000 French francs (£102,270) for his prison sentence of 15 years. The Court made no award, holding that in the circumstances the finding of a violation provided sufficient just satisfaction.<sup>274</sup>
- 6.169 In contrast, the applicant in *Halford v United Kingdom*<sup>275</sup> was successful in recovering damages for a violation of Article 8. She was a former Assistant Chief Constable who had brought a claim for sex discrimination against the police. She complained of the taping of phone conversations made from her office and home in order to gather information to use against her. The Court found violations of Article 8 and Article 13, and awarded £10,000 for non-pecuniary loss. The Court noted there was no evidence establishing that the applicant's stress was directly attributable to the breach, rather than by the ongoing conflicts with the police. However, it took account of the improper purpose of the interceptions and the seriousness of the violation.<sup>276</sup>
- 6.170 Violations of the right to respect for private life and for home and correspondence may also occur when state authorities exercise their powers to search an individual's home or office for evidence of a crime. *Funke v France*,<sup>277</sup> *Crémieux v France*,<sup>278</sup> and *Mialhe v France*<sup>279</sup> involved very similar violations of Article 8. French customs officers, supported by police, searched the homes of the applicants and removed evidence of potential offences related to exchange controls. Under the relevant legislation, there was no requirement that a judicial warrant be obtained in advance of the search, and the Strasbourg Court found that Article 8 had been violated. Mr Funke, who claimed compensation on the ground that the breaches of the Convention had had "a serious impact on his person and on that of his wife as well as on their private life", was awarded

<sup>271</sup> See the discussion in Part III, paras 3.54 - 3.57 above.

<sup>272</sup> See *Khan v United Kingdom* Application no 35394/97, 12 May 2000.

<sup>273</sup> A 176-B (1990), 12 EHRR 547.

<sup>274</sup> See also *A v France* A 277-B (1993), 17 EHRR 462, where the Strasbourg Court also gave no reasons for its decision. For more recent decisions in a similar vein, see *Kopp v Switzerland* 1998-II p 524, 27 EHRR 91 and *Valenzuela Contreras v Spain* 1998-V p 1909, 28 EHRR 485.

<sup>275</sup> 1997-III p 1004, 24 EHRR 523, discussed in Part III para 3.50.

<sup>276</sup> Cf above, paras 3.47 - 3.51. An alternative view might be that this is a disguised form of punitive damages.

<sup>277</sup> A 256-A (1993), 16 EHRR 297.

<sup>278</sup> A 256-B (1993), 16 EHRR 357.

<sup>279</sup> A 256-C (1993), 16 EHRR 332 (merits); A 277-C (1993) (just satisfaction).

50,000 French francs (£5,735) for non-pecuniary loss. Mr Mialhe, the Philippine honorary consul, his wife and his mother claimed both pecuniary loss and non-pecuniary loss. The claims to pecuniary loss<sup>280</sup> were rejected for lack of causation. The claims for non-pecuniary loss were more successful. They were made on the grounds (for Mr Mialhe) of the loss of his consular duties (for the two Mrs Mialhe) of the effect on their social position at the material time and the great age of the elder Mrs Mialhe “whose personal souvenirs had been violated without notice and without any consideration for her”. The Strasbourg Court noted simply that “the applicants must have sustained non-pecuniary damage for which the finding of a breach does not on its own afford sufficient reparation”. It awarded Mr Mialhe 50,000 French francs (£5,735), and each of the Mrs Mialhe 25,000 French francs (£2,870). In contrast, claims made by Mr Crémieux for non-pecuniary loss were rejected on the ground that the finding of a violation was sufficient just satisfaction. The judgment does not explain why Mr Crémieux failed where the two other applicants succeeded, though it is notable that Mr Crémieux had apparently not put forward any particular grounds justifying an award of non-pecuniary loss.<sup>281</sup>

- 6.171 In *Niemietz v Germany*<sup>282</sup> the office of Mr Niemietz, a German lawyer, was searched by the German authorities for evidence which might identify a suspect. The Strasbourg Court found that there had been a violation of Article 8: the warrant was framed in particularly wide terms, requiring the search and seizure of documents without any limitation, and the search itself had impinged on professional secrecy to an disproportionate extent. However, the Court rejected a claim for non-pecuniary loss, which was sought to compensate the damage to the reputation of the applicant’s practice, noting that its finding of a violation constituted sufficient just satisfaction.

##### **(5) Immigration cases**

- 6.172 The right to respect for private and family life can be called into question when a person is either denied access to a country or deported from a country where his or her family resides. These circumstances have given rise to breaches of Article 8 in a number of cases. It is difficult to find any defining feature of the Court’s treatment of its discretion to award damages in these cases. However, in two cases where the issue was considered, the Court did award damages.<sup>283</sup>

<sup>280</sup> On the grounds that Mr Mialhe’s bank accounts had been frozen for eight years following asset freezing orders made by the authorities, that he had incurred secretarial expenses in restoring order to his office and the documents seized, and travel expenses; and that his wife and mother had been deprived of papers they needed for day-to-day living and incurred other expenses.

<sup>281</sup> Though the Strasbourg Court considered that he “must” have suffered non-pecuniary damage. Cf para 3.26 above.

<sup>282</sup> A 251-B (1992), 16 EHRR 97.

<sup>283</sup> In *Abdulaziz, Cabales and Balkandali v United Kingdom* A 94 (1985), 7 EHRR 471, the Court did not award damages for a violation of Art 8 taken together with Art 14. There was no violation of Art 8 standing alone. This case is considered in the discussion of Art



- 6.173 In *Berrehab v Netherlands*,<sup>284</sup> the first applicant was a Moroccan national who was refused a residence permit in the respondent State after divorcing from his Dutch wife. Their daughter, who lived with her mother, was the second applicant. The Court held that the first applicant's expulsion from the respondent State violated their right to respect for family life. The Court awarded the applicants 20,000 Dutch guilders (£5,530) for the non-pecuniary damage which they suffered as a result of their separation. In addition, the award provided partial compensation for the travel expenses incurred in visits between the first and second applicant.<sup>285</sup>
- 6.174 In *Moustaquim v Belgium*,<sup>286</sup> the applicant was a Moroccan national who had lived in Belgium with his family from a very young age. As a juvenile, he was convicted of various crimes and, after completing his sentence, he was deported back to Morocco. The Court found a violation of his right to respect for his private and family life under Article 8. He was awarded 100,000 Belgian francs (£1,700) for non-pecuniary loss; but his claim for pecuniary loss, based on the loss of the chance of pursuing a normal occupation in Belgium, was refused on causal grounds.

**(6) Article 8 and sexual orientation and identity.**

- 6.175 Breaches of Article 8 have also been found where the law criminalises the conduct of homosexuals when the equivalent heterosexual conduct would not amount to a criminal offence. In *Dudgeon v United Kingdom*,<sup>287</sup> the Strasbourg Court found that the applicant had suffered a breach of his rights under Article 8 as a result of the existence in Northern Ireland of laws making certain homosexual acts committed in private between consenting adult males criminal offences.<sup>288</sup> Following the judgment of the Court, the law was changed in Northern Ireland to 'decriminalise' such acts. The Court rejected the applicant's claim for non-pecuniary loss, noting that the applicant had achieved his aim of changing the law: in consequence the judgment that there had been a violation could be considered to constitute sufficient just satisfaction.

14, see para 6.218. In *Beldjoudi v France* A 234-A (1992), 14 EHRR 801, the decision to deport had not yet been implemented, and accordingly no loss had been suffered.

<sup>284</sup> A 138 (1988), 11 EHRR 322.

<sup>285</sup> The first applicant also claimed pecuniary damage for loss of earnings because he was dismissed from his former job and was finding it impossible to find work in Morocco. The Court rejected this part of the claim because a causal link had not been established.

<sup>286</sup> A 193 (1991), 13 EHRR 802.

<sup>287</sup> A 45 (1981), 4 EHRR 149 (merits); A 59 (1983), 5 EHRR 573 (just satisfaction), referred to above, para 3.37.

<sup>288</sup> In this case, the applicant had also been the subject of a police investigation with a view to a prosecution being initiated against him though in the event it was decided not to proceed with the investigation. However, damages in respect of the intrusion into the applicant's private life due to the investigation were denied. The Court held that "the additional element of prejudice suffered as a consequence of the police investigation is not such as to call for further compensation by way of just satisfaction". A 59 (1983), 5 EHRR 573 (just satisfaction), para 18.

6.176 The same complaint was made in *Norris v Ireland*.<sup>289</sup> In this case, as in *Dudgeon v United Kingdom*, the applicant complained of legislation penalising homosexual acts in private. Unlike Mr Dudgeon, he had not been the subject of any police investigation. However, the Court accepted that its finding in *Dudgeon* was not dependent upon that factor; the legislation itself constituted a continuing interference with his right to respect for his private life. The Irish Government, unlike the United Kingdom Government in *Dudgeon*, had not yet indicated its intention to change the law. Nevertheless, the Court held that the finding of a violation was sufficient just satisfaction:

As in the *Marckx* case, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provisions and not from individual measures of implementation. It will be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligation under Article 53... For this reason and notwithstanding the different situation in the present case as compared with the *Dudgeon* case, the Court is of the opinion that its finding of a breach of Article 8 constitutes adequate just satisfaction...<sup>290</sup>

6.177 In contrast, in *ADT v United Kingdom*<sup>291</sup> the applicant had been convicted of gross indecency, on the basis of a video containing footage of the applicant and up to four other men engaging in acts of oral sex and mutual masturbation. The acts took place in his home and were not visible to anyone else. He was sentenced and conditionally discharged for two years. The Strasbourg Court found a violation of Article 8:

The activities were... genuinely “private”, and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life.<sup>292</sup>

6.178 The applicant claimed pecuniary loss in respect of the costs of defending the criminal proceedings against him, travel expenses, prosecution costs, and items confiscated and destroyed at the end of the criminal proceedings (totalling £10,929.05). He also claimed £10,000 in respect of non-pecuniary loss. The Government referred to its current review of sex offences, and did not contest these figures and the Court regarded them as “reasonable and in accordance with the principles laid down by its own case-law under Article 41”.

<sup>289</sup> A 142 (1988), 13 EHRR 186.

<sup>290</sup> A 142 (1988), 13 EHRR 186, para 50.

<sup>291</sup> Application no 35765/97, 31 July 2000.

<sup>292</sup> Application no 35765/97, 31 July 2000, para 50, citing *Dudgeon v United Kingdom* A 59 (1983), 5 EHRR 573 (just satisfaction).

6.179 The Strasbourg Court held in *Smith and Grady v United Kingdom*<sup>293</sup> that there had been a breach of Article 8 because of the investigations conducted into the applicants' sexual orientation by the armed forces and as a result of their subsequent discharge from the armed forces on the grounds of their homosexuality. Both applicants made detailed submissions in respect of the loss they claimed to have suffered.<sup>294</sup> The first applicant claimed a total of £590,222.40 for pecuniary loss, in respect of her past loss of earnings, her anticipated future loss of earnings and her loss of pension rights. She also claimed £30,000 for non-pecuniary loss in relation to the humiliation, anxiety and psychological problems she had suffered in consequence of her investigation and discharge from the armed forces. The second applicant claimed £784,714.09 for pecuniary loss for future loss of earnings and loss of pension rights, and £20,000 for non-pecuniary loss.

6.180 In relation to the claims for pecuniary loss, the Strasbourg Court noted that it was impossible to calculate precisely what sums were necessary to make complete restitution to the applicants because of the inherently uncertain character of the damage flowing from the violations: the question was therefore what level of just satisfaction should be awarded to each applicant. It took account of the applicants' successful service careers, exemplary records and the fact that a service career was unique. It noted that the differences between service and civilian life made it difficult for the applicants to find equivalent civilian careers. The first applicant was awarded a total of £59,000 for pecuniary loss for past and future loss of earnings and loss of pension rights. The second applicant was awarded £40,000 for loss of future earnings and pension rights.

6.181 In relation to non-pecuniary loss, the Strasbourg Court noted that

...the investigations and discharges ... were profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. (paragraph 13).

Both applicants were awarded £19,000 for non-pecuniary loss. The Court rejected a claim for interest on that sum, noting that "It does not consider an award of interest on this sum to be appropriate given the nature of the loss to which it relates."

6.182 *B v France*<sup>295</sup> concerned an application by a transsexual, who alleged that the failure of the French authorities to recognise her current status as a woman violated her right to respect for her private life. The Strasbourg Court found that her rights under Article 8 had been violated. The applicant claimed for pecuniary loss suffered due to the difficulties she found in obtaining employment. She also claimed 1,000,000 French francs (£119,410) for non-

<sup>293</sup> Application nos 33985/96 and 33986/96, 25 July 2000 (just satisfaction).

<sup>294</sup> Though they were unable to submit expert evidence in support.

<sup>295</sup> A 232-C (1992), 16 EHRR 1

pecuniary loss. Though rejecting her claims for pecuniary loss for lack of causation, the Strasbourg Court awarded her 100,000 French francs (£11,940), considering that she had suffered non-pecuniary loss as a result of the situation found to be contrary to the Convention but giving no further reasons for its award.

### **(7) Environmental claims**

- 6.183 The Strasbourg Court has been prepared to recognise that applicants' rights under Article 8 have been violated where their life has been disrupted as a result of environmental pollution, or where the State has failed to inform them of the hazards posed by a chemicals factory. In *Lopez Ostra v Spain*<sup>296</sup> a waste treatment plant was built close to the applicant's home. It started to operate without the necessary licence, and, due to a malfunction, released gas fumes, pestilential smells and contamination which caused health problems to many people in the area. The applicant and her family were evacuated and re-housed (free of charge) until the plant was partially shut down,<sup>297</sup> and they moved back to their home where they lived for three years before finally moving out. The Court held that Spanish authorities had violated Article 8 by failing to take any measures to protect the applicant's right to respect for her home by bringing the nuisance to an end. The applicant claimed 25,010,000 Spanish pesetas (£121,340) for pecuniary and non-pecuniary loss. The claim included compensation for distress, anxiety due to her daughter's illness, the inconvenience of the undesired move and the cost of her new house. The Court rejected the greater part of this claim, but noted

[The applicant's] old flat must have depreciated and the obligation to move must have entailed expense and inconvenience. On the other hand, there is no reason to award her the cost of her new house since she has kept her former home. Account must be taken of the fact that for a year the municipal authorities paid the rent of the flat occupied by the applicant and her family in the centre of Lorca and that the waste-treatment plant was temporarily closed by the investigating judge on 27 October 1993.

The applicant, moreover, undeniably sustained non-pecuniary damage. In addition to the nuisance caused by the gas fumes, noise and smells from the plant, she felt distress and anxiety as she saw the situation persisting and her daughter's health deteriorating. (Paragraph 65).

Noting that the heads of damage "do not lend themselves to precise quantification" the Strasbourg Court awarded her 4,000,000 pesetas (£19,410).

<sup>296</sup> A 303-C (1994), 20 EHRR 277.

<sup>297</sup> Though the environmental problems continued: the plant continued to emit "fumes, repetitive noise and strong smells".

6.184 Similarly, in *Guerra v Italy*<sup>298</sup> the applicants lived close to a chemical factory which released large quantities of flammable gas and toxic chemicals in the course of its production process.<sup>299</sup> The applicants complained that the authorities had not taken the appropriate steps to reduce the risk of pollution from the plant, and that the State had failed to take steps to provide information about the risks and how to proceed in the event of a major accident. The Strasbourg Court held that Italy had failed to fulfil its obligation to secure the applicants' right to respect for their private and family life in breach of Article 8. The applicants claimed 20,000,000,000 lire (£7,245,610) for 'biological damage'. This was rejected, on the grounds that the applicants had not shown that they had suffered any pecuniary damage as a result of the lack of information of which they complained. However, the applicants were awarded 10,000,000 lire (£3,620) each for non-pecuniary damage.

### **(8) Miscellaneous cases**

6.185 It may also be helpful to consider the awards made by the Strasbourg Court in where the applicant's rights under Article 8 have been violated in cases which do not fall within the categories discussed above. The cases described below concern violations of the right to private and family life by publication of sensitive medical data, discrimination against illegitimacy, violation of respect for the home, and wrongful use of secret files.

6.186 In *Z v Finland*<sup>300</sup> the applicant was the ex-wife of a man convicted of a number of sexual offences. During the investigation it became clear that he was HIV positive (as was the applicant). He was then charged with attempted manslaughter, and the authorities sought information on the date when he became aware of his HIV status. Medical advisers treating the applicant and her husband were called to testify against him, and the police seized her medical records. On Appeal, the Court of Appeal disclosed the applicant's identity and HIV status in the course of its judgment. Both facts were reported widely in the press. The Court also ruled that the proceedings should be kept confidential for no more than 10 years. The Strasbourg Court held that the disclosure of the applicant's identity and HIV status violated Article 8;<sup>301</sup> and that the release of transcripts of the evidence given by her advisers to the public in ten years would, if implemented, violate Article 8. The applicant claimed substantial non-pecuniary loss. The Strasbourg Court accepted that the applicant must have suffered non-pecuniary loss as a consequence of the disclosure, and that a finding of a violation would not provide sufficient just satisfaction. It rejected

<sup>298</sup> 1998-I p 210, 26 EHRR 357.

<sup>299</sup> A number of accidents affecting local people had already occurred by the time of the application.

<sup>300</sup> 1997-I p 323, 25 EHRR 371.

<sup>301</sup> The Strasbourg Court rejected the applicant's complaints in relation to the seizure of her medical records and the fact that her doctor had been obliged to testify against her.

the arguments of the Finnish government that any award should be less than the amount paid to the four victims of the applicant's husband, noting:

In assessing the amount, the Court does not consider itself bound by domestic practices, although it may derive some assistance from them.

The Court awarded the applicant 100,000 Finnish markka (£10,065).

6.187 *Marckx v Belgium*<sup>302</sup> concerned a challenge by a mother and her illegitimate daughter to various aspects of Belgian law which discriminated against illegitimate children, and in particular the restrictions on their inheritance rights, failure to recognise maternal affiliation in the absence of a formal act or recognition, and limitations on the extent of their family relationships. The Strasbourg Court found that the applicants' rights to respect for the family in Article 8 had been violated, and further that there was a violation of Article 14 taken in conjunction with Article 8. However, the Court rejected the applicants' request that they each be granted one Belgian franc "as compensation for moral damage". Instead, it held that the finding of several violations against the applications amounted to sufficient just satisfaction for them.<sup>303</sup>

6.188 In *Gillow v United Kingdom*<sup>304</sup> the applicants complained that they had been refused both a permanent and a temporary licence to occupy the house they owned on Guernsey, and further that they were prosecuted for occupying it unlawfully. The Strasbourg Court found that Article 8 had been violated. The applicants' claims for pecuniary loss of £114,000 on account of the loss sustained on the sale of their property, the costs of a replacement property, and their loss of earnings, were rejected as being unsubstantiated.<sup>305</sup> However their claims for non-pecuniary loss (or 'moral damage') were more successful. The Court rejected the government's submission that the finding of a violation would be adequate just satisfaction.

For one year, [the applicants] lived with a feeling of insecurity, prompted by uncertainty as to whether they would finally be permitted to stay in their home or be expelled from it. Furthermore, their prosecution for unlawful occupation of their home added to their already precarious situation ... In the outcome, they felt obliged to dispose of their home in Guernsey and must have experienced

<sup>302</sup> A 31 (1979), 2 EHRR 330.

<sup>303</sup> The judgment of the Strasbourg Court on Article 50 was given by a majority of nine judges to six. The minority gave an opinion arguing that an award of compensation for moral damage was necessary to give the applicants just satisfaction in the light of the affront to the feelings of the mother and the discrimination against the daughter. They noted that nothing in the Convention prevented the grant of 'a token satisfaction appropriate to the individual concerned'. Cf para 4.74 n 139 above.

<sup>304</sup> A 109 (1986), 11 EHRR 335 (merits); A124-C (1987) (just satisfaction).

<sup>305</sup> Though the applicants were awarded £735 in respect of estate agents' fees and the cost of a survey.

considerable stress and anxiety in consequence of that in settling elsewhere.

The Strasbourg Court awarded them £10,000.

- 6.189 In *Rotaru v Romania*<sup>306</sup> the Romanian Intelligence Service had a file on the applicant which recorded, wrongly, that he had been a member of a neo-nazi student group. This information was used against the applicant in civil proceedings he brought in connection with a prison sentence he had served under the Communist regime. An action by the applicant against the Intelligence Service for defamation was thrown out, and his attempts to rectify the record were equally unsuccessful. The Strasbourg Court held that the holding and use by the Intelligence Service of information which the applicant had no opportunity to refute violated the applicant's right to respect for his private life. The Court also held that there had been violations of Article 13 and Article 6. The applicant claimed 20,000 million Romanian lei (£651,020) in damages for non-pecuniary loss for the damage to his reputation suffered as a result of the publication of false information about him and the authorities' refusal for several years to correct the error. The Court accepted that the applicant must have suffered non-pecuniary loss and awarded the applicant 50,000 French francs (£4,585), to be converted into Romanian lei at the date of settlement.

## **9. ARTICLE 9**

- 6.190 Article 9(1) of the Convention states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

The Court has dealt with damages for a violation of Article 9 in a number of cases against Greece.

- 6.191 In *Kokkinakis v Greece*,<sup>307</sup> the applicant was convicted for encouraging a person to change her Orthodox Christian beliefs and to join the Jehovah's Witnesses; he was sentenced to three months' imprisonment (converted to a pecuniary penalty of 400 Greek drachmas (approximately £1) per day's imprisonment) and a fine of 10,000 Greek drachmas (£30).<sup>308</sup> The Strasbourg Court held that the conviction violated the applicant's right to manifest his religion. The applicant claimed 500,000 Greek drachmas (£1,370) as damages for non-pecuniary loss. The Court awarded 400,000 Greek drachmas (£1,090). A similar conclusion

<sup>306</sup> Application no 28341/95, 4 May 2000.

<sup>307</sup> A 260-A (1993), 17 EHRR 397.

<sup>308</sup> It is not clear whether the applicant paid the penalty or fine. If he did, it is puzzling that he did not claim an equivalent amount as damages for pecuniary loss.

was reached in *Larissis v Greece*,<sup>309</sup> where the second and third applicants each recovered 500,000 Greek drachmas (£1,370) in damages for non-pecuniary loss. In neither case did the Court identify the nature of the non-pecuniary loss or the basis on which damages were assessed.

6.192 In contrast, in *Manoussakis v Greece*,<sup>310</sup> the applicants were convicted for operating a place of worship without the prior authorisation of the relevant ecclesiastical and governmental bodies. They were each sentenced to three months' imprisonment (converted to pecuniary penalties of 400 Greek drachmas (£1) per day's imprisonment) and fined 20,000 Greek drachmas (£50).<sup>311</sup> The Court held that the convictions violated the applicants' freedom to manifest their religion in worship and observance. The applicants claimed 6,000,000 Greek drachmas (£14,680) as damages for non-pecuniary loss. The Court rejected this claim, holding that the finding of a violation of Article 9 was sufficient just satisfaction. There is no indication in the judgment why this case was treated differently to the others. Another case, *Valsamis v Greece*,<sup>312</sup> concerned a one day suspension of a children of Jehovah's Witnesses for refusing to take part in a school parade. Given the short period involved, the refusal of a monetary award is understandable.

## **10. ARTICLE 10**

6.193 Article 10 of the Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>309</sup> 1998-I p 362, 27 EHRR 329.

<sup>310</sup> 1996-IV p 1346, 23 EHRR 387.

<sup>311</sup> Again, it is not clear whether the applicants paid the penalties or fines.

<sup>312</sup> 1996-VI p 2312, 24 EHRR 294.



**(1) Pecuniary loss**

- 6.194 The Strasbourg Court generally awards damages for pecuniary loss wherever an applicant can demonstrate a sufficient causal link between the relevant loss and the violation of Article 10. In a number of cases the Court has awarded damages on the basis that the applicant has lost opportunities.
- 6.195 Thus in *Lingens v Austria*<sup>313</sup> the applicant, a journalist and magazine editor, was convicted for describing the Austrian chancellor as an immoral, undignified and base opportunist. The applicant was fined 20,000 Austrian schillings (£990) (reduced on appeal to 15,000 schillings (£745)) and ordered to pay the costs of the criminal proceedings. He was also ordered to publish a copy of the court's judgment in *Profil*, the magazine in which the offending material had been published. In these circumstances the Strasbourg Court held that there had been a violation of Article 10.
- 6.196 The Court awarded the applicant a sum equivalent to the fine and costs he had been ordered to pay in the domestic proceedings as pecuniary damages. He also claimed 40,860 Austrian schillings (£2,030) in respect of the costs of publication of the domestic court's judgment in *Profil*, and lost advertising revenue. This was allowed in part:

The Court cannot speculate on the amount of profit Mr Lingens might have derived from any paying advertisements that might hypothetically have been put in the magazine in place of the judgment of 29 October 1981. But it does not rule out that the applicant may thereby have suffered some loss of opportunity which must be taken into account. There are also the costs indisputably incurred for reproducing the judgment in question.

The foregoing items cannot be calculated exactly. Assessing them in their entirety on an equitable basis, the Court awards Mr Lingens compensation of 25,000 Schillings under this head.<sup>314</sup>

- 6.197 In *Open Door and Dublin Well Woman v Ireland*,<sup>315</sup> the applicant, a non-profit organisation that provided counselling services to pregnant women, was made subject to an injunction against providing information about abortion clinics in the United Kingdom. The Court held that the injunction violated Article 10. The applicant claimed 62,172 Irish pounds (£66,840) as damages for pecuniary loss. This sum represented the loss of income flowing from the discontinuance of counselling services. The Government submitted that the claim should be rejected *inter alia* because it was inconsistent with the applicant's status as a non-profit organisation. The Court rejected this argument, holding "that even a non-profit-making company such as the applicant can incur losses for which it should

<sup>313</sup> A 103 (1986), 8 EHRR 407.

<sup>314</sup> A 103 (1986), 8 EHRR 407, para 51.

<sup>315</sup> A 246 (1992), 15 EHRR 244.

be compensated.”<sup>316</sup> It acknowledged that the method by which the applicant had calculated its pecuniary loss was unclear, but accepted that “the discontinuance of the counselling service must have resulted in a loss of income.”<sup>317</sup> It awarded 25,000 Irish pounds (£26,880).

6.198 In *Baskaya and Okçuoglu v Turkey*,<sup>318</sup> the two applicants, who had published a book,<sup>319</sup> were convicted by the Istanbul National Security Court for disseminating propaganda against the indivisibility of the Turkish state. They were sentenced to terms respectively of 20 months and 5 months, and fined. The first applicant was dismissed from his professorship at the University of Ankara, and a request for an order of seizure in respect of the sixth edition of the book was granted. The Strasbourg Court found violations of Articles 6, 7, and 10. By way of pecuniary damages it awarded each of the applicants the same amount as the fines they had paid (41,666,666 Turkish lira, or 7,400 French francs (£700)). Further claims were made, totalling over 1,400,000 French francs (£133,825) for loss of income from expected sales, and loss of earnings. The Court noted that these sums could not be calculated with precision. It awarded the applicants 67,400 French francs (£6,440) and 17,400 French francs (£1,660) respectively, which included the fines, and was assessed on an “equitable basis”. There is no other indication of how these figures were arrived at.<sup>320</sup>

6.199 In *Bergens Tidende v Norway*<sup>321</sup> the applicants, a daily newspaper, its editor-in-chief and a journalist had been ordered to pay substantial damages for defamation to a cosmetic surgeon following a series of articles on operations performed by the surgeon. The Strasbourg Court found that there had been a violation of Article 10.<sup>322</sup> The applicants sought compensation for economic loss, in the form of repayment of the damages, costs and expenses paid to the surgeon. The government did not object, and the full amount sought was awarded. They also sought interest on that sum at the estimated average rates applied by domestic commercial banks at the time. The Court, acknowledging that the period between payment of the damages and the award of just satisfaction would have caused the applicants additional economic loss, awarded the applicants a

<sup>316</sup> A 246 (1992), 15 EHRR 244, para 87.

<sup>317</sup> A 246 (1992), 15 EHRR 244, para 87.

<sup>318</sup> Applications nos 23536/94 and 24408/94, 8 July 1999. See also para 6.151 above, and 6.203 below.

<sup>319</sup> The second applicant, the owner of a publishing house, had published a book by the first applicant, a professor of economics, entitled “Westernisation, Modernisation, Development - Collapse of a Paradigm/An Introduction to the Critique of Official Ideology”.

<sup>320</sup> They were also awarded 40,000 French francs (£3,825) and 45,000 French francs (£4,300) respectively as damages for non-pecuniary loss: see below para 6.203.

<sup>321</sup> Application no 26132/95, 2 May 2000.

<sup>322</sup> It noted that in the circumstances, given that the articles were accurate and the criticisms of the doctor justified, his interest in protecting his reputation was not sufficient to outweigh the public interest in the freedom of the press to impart information on matters of legitimate public concern.

further 745,700 Norwegian kroner (£54,730), expressed to calculated on an equitable basis and by reference to the rates of inflation [sic] in Norway in the relevant period.

- 6.200 There are other cases in which applicants have failed to establish a causal link between an alleged pecuniary loss and the violation of Article 10.<sup>323</sup> For example, in *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria*,<sup>324</sup> the first applicant, the publisher of a magazine entitled *Der Igel*, requested the Minister for Defence to arrange for the distribution of the magazine amongst soldiers together with two other magazines that were periodically distributed.<sup>325</sup> The Minister rejected this request in circumstances that violated Article 10. The applicant claimed 14.8 million Austrian schillings (£858,125) as damages for pecuniary loss. This sum represented lost sales income. The Court rejected this claim, on the grounds that the violation of Article 10 related only to the distribution of *Der Igel*, and, although the Minister could not refuse to distribute *Der Igel*, he was not obliged to buy it.
- 6.201 Similarly, in *Informationsverein Lentia v Austria*,<sup>326</sup> the applicant, Radio Melody GmbH, applied for a licence to operate a local radio station in Salzburg. The application was refused. The Court held that the operation of the licensing regulations violated the applicant's rights under Article 10. The applicant claimed approximately 5.5 million Austrian schillings (£300,000) as damages for loss of income "on the assumption that they would not have failed to obtain the [licence] applied for if the Austrian legislation had been in conformity with Article 10."<sup>327</sup> The Court rejected this claim, holding that the alleged loss was too speculative in view of the wide discretion in the licensing field. The Court rejected an identical claim in *Radio ABC v Austria*.<sup>328</sup>

## (2) Non-pecuniary loss

- 6.202 Generally, the Court has not awarded damages for non-pecuniary loss in Article 10 cases. In *Castells v Spain*<sup>329</sup> the applicant, a senator, was convicted for publishing an article in which he suggested that Government personnel were responsible for a number of murders. His sentence - a term of imprisonment and disqualification from holding any public office - was stayed on appeal. In

<sup>323</sup> In addition to the cases noted here, see for example *Castells v Spain* A 236 (1992), 14 EHRR 445 (see para 6.202 below in relation to non-pecuniary loss); *Thorgeir Thorgeirson v Iceland* A 239 (1992), 14 EHRR 843; *Grigoriades v Greece* 1997-VII p 2575, 27 EHRR 464; *Incal v Turkey* 1998-IV p 1547 (see para 6.203 below); *Hertel v Switzerland* 1998-VI p 2298, 28 EHRR 534; and *News Verlags GmbH & Co KG v Austria* Application no 31457/96, 11 January 2000.

<sup>324</sup> A 302 (1994), 20 EHRR 56.

<sup>325</sup> The second applicant was the distributor of the magazine.

<sup>326</sup> A 276 (1993), 17 EHRR 93.

<sup>327</sup> A 276 (1993), 17 EHRR 93, para 46.

<sup>328</sup> 1997-VI p 2188, 25 EHRR 185.

<sup>329</sup> A 236 (1992), 14 EHRR 445.

*Jersild v Denmark*<sup>330</sup> the applicant was convicted and fined for producing a television documentary in which racists had referred to ethnic minorities in extremely derogatory terms. In *De Haes and Gijssels v Belgium*<sup>331</sup> the applicants were convicted and fined for publishing an article in which they criticised a decision of the Antwerp Court of Appeal to award custody of young children to a suspected paedophile. In each of these cases the Strasbourg Court held that the finding of a violation of Article 10 was sufficient just satisfaction for any non-pecuniary loss that the applicants might have suffered.<sup>332</sup>

6.203 Awards for non-pecuniary loss have been made in cases where the violation resulted in the imprisonment of the applicants.<sup>333</sup> Thus, in *Baskaya and Okcuoglu v Turkey*,<sup>334</sup> the Court awarded the first and second applicants 40,000 French francs (£3,825) and 45,000 French francs (£4,300) respectively as damages for non-pecuniary loss. Similarly, in *Incal v Turkey*,<sup>335</sup> the Court made an award of 30,000 French francs (£3,210) to an applicant who had been imprisoned for a period of approximately seven months for preparing political leaflets that he intended to distribute.

## 11. ARTICLE 11

6.204 Article 11(1) of the Convention states:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

6.205 In cases in which a person is dismissed from his or her employment for refusing to join a trade union, the Court has awarded damages for both pecuniary and non-pecuniary loss.

6.206 In *Young, James and Webster v United Kingdom*,<sup>336</sup> the applicants were dismissed by their employer, British Rail, for refusing to join a trade union. The applicants' dismissals were lawful as a matter of domestic law.<sup>337</sup> In the judgment of the

<sup>330</sup> A 298 (1994), 19 EHRR 1.

<sup>331</sup> 1997-I p 198, 25 EHRR 1.

<sup>332</sup> See further *Barthold v Germany* A 90 (1985), 7 EHRR 383; *Weber v Switzerland* A 177 (1990), 12 EHRR 508; *Oberschlick v Austria* A 204 (1991), 19 EHRR 389; *Piermont v France* A 314 (1995), 20 EHRR 301; *Bowman v United Kingdom* 1998-I p 105, 26 EHRR 1; and *News Verlags GmbH & Co v Austria* Application no 31457/96, 11 January 2000.

<sup>333</sup> In addition to the cases immediately following, see *Steel v United Kingdom* 1998-VII p 2719, 28 EHRR 603, noted at para 6.36 above.

<sup>334</sup> Applications nos 23536/94 and 24408/94, 8 July 1999: see paras 6.151 and 6.198 above.

<sup>335</sup> 1998-IV p 1547.

<sup>336</sup> A 44 (1981), 4 EHRR 38 (merits); A 55 (1982), 5 EHRR 201 (just satisfaction). See further *Sigurjonsson v Iceland* A 264 (1993), 16 EHRR 462.

<sup>337</sup> The Trade Union and Labour Relations Act 1974 permitted an employer to dismiss an employee for refusing to join a specified trade union.

Court, however, the dismissals violated the applicants' right of free association. The applicants sought damages for loss of earnings, loss of pension rights and loss of travelling privileges. Mr Young claimed £24,708, Mr James claimed £57,280 and Mr Webster claimed £6,914.<sup>338</sup> The Court accepted the claims, but it reduced the amounts for Mr Young (£17,626) and Mr James (£45,215) on the basis of figures proposed by the Government. The judgment does not make clear why the reduced figures were adopted.<sup>339</sup> The applicants also sought damages for non-pecuniary loss, citing "the harassment and humiliation... stress and anxiety" suffered.<sup>340</sup> The Court noted that the matters cited by the applicants did not lend themselves to a process of calculation; and on an "equitable basis" (without further explanation) awarded Mr Young £2,000; Mr James £6,000; and Mr Webster £3,000.

- 6.207 By contrast, in *Ezelin v France*<sup>341</sup> no award was made. The applicant was an advocate who was reprimanded for participating in a political demonstration against a judgment. He claimed for non-pecuniary loss on the basis that his reputation had been injured by the publicity given to the reprimand in legal journals. The Court refused the claim, holding that the finding was just satisfaction.
- 6.208 Two Turkish cases concerned the dissolution of political associations. In *United Communist Party of Turkey v Turkey*,<sup>342</sup> the Party ("TBKP") was dissolved by the Turkish Constitutional Court; its assets were confiscated and transferred to the Turkish Treasury.<sup>343</sup> The second and third applicants, who were respectively the Chairman and Secretary of the Party, were prohibited from holding a similar office in any other political party. The Court held that the dissolution of the first applicant and the prohibitions imposed on the second and third applicants violated their right of association.
- 6.209 The party sought 20,000 French francs (£2,140) as pecuniary damages, based largely on the public aid it expected to receive as a political party. This was dismissed:

The Court notes that the claim in issue is based on an imaginary application of the provisions in the law on political parties governing the grant, subject to certain conditions, of public aid to political parties as well as on an estimation of what contributions from the

<sup>338</sup> Mr Webster claimed an additional sum of £6,200 for personal expenses. The Court dismissed this claim, observing that it was unsupported by any evidence.

<sup>339</sup> The Court was probably influenced by Mr Young's statement that he was "reasonably satisfied" with the Government's offer, and the fact that Mr James "did not lay stress on the differences in question": A 55 (1982), 5 EHRR 201, para 11.

<sup>340</sup> A 55 (1982), 5 EHRR 201, para 12.

<sup>341</sup> A 202 (1991), 14 EHRR 362.

<sup>342</sup> 1998-I p 1, 26 EHRR 121.

<sup>343</sup> A puzzling feature of this case is the TBKP's failure to claim, as a separate head of pecuniary loss, damages in respect of the confiscated assets.

TBKP's members and supporters would have been. The Court cannot speculate on the effect of those provisions as applied to the TBKP or on the amount of any contribution it might have received. Consequently, the application must be dismissed, there being no causal link between the violation found and the alleged damage.<sup>344</sup>

It also rejected the claims by the individual applicants for damages for non-pecuniary loss, to reflect their exclusion from any form of political activity, on the basis that the finding of a violation was sufficient compensation.<sup>345</sup>

- 6.210 In *Socialist Party v Turkey*,<sup>346</sup> the facts were very similar. The Socialist Party ("SP") was also dissolved by the Turkish Constitutional Court; its assets were confiscated and transferred to the Turkish Treasury;<sup>347</sup> and the Chairman and former Chairman were prohibited from holding a similar office in any other political party. Again the Court found a violation of Article 10, but rejected the claims for pecuniary loss. However, in this case the claims for non-pecuniary loss on behalf of the Chairman and former Chairman were accepted in the sums of 50,000 French francs (£5,350) each. The Court distinguished the *United Communist Party of Turkey v Turkey*.<sup>348</sup>

As to non-pecuniary damage, the Court notes that, unlike the TBKP, the SP's constitution and programme were approved by the Constitutional Court and the party was active for four years before being dissolved by it. Perinçek and Kirit therefore sustained definite non-pecuniary damage.<sup>349</sup>

The distinction therefore appears to be that in the latter case the applicants had lost an established position, and the element of speculation was therefore less.

## **12. ARTICLE 12**

- 6.211 Article 12 of the Convention states:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

- 6.212 The only case in which the Court has considered the availability of damages for a breach of Article 12 is *F v Switzerland*.<sup>350</sup> In December 1983, the applicant, who had been married and divorced on three occasions, was prohibited from

<sup>344</sup> 1998-I p 1, 26 EHRR 121, para 69.

<sup>345</sup> See further *Sidiropoulos v Greece* 1998-IV p 1594, 27 EHRR 633.

<sup>346</sup> 1998-III p 1233, 27 EHRR 51.

<sup>347</sup> A puzzling feature of this case is the SP's failure to claim, as a separate head of pecuniary loss, damages in respect of the confiscated assets.

<sup>348</sup> 1998-I p 1, 26 EHRR 121, discussed at paras 6.208 - 6.209 above.

<sup>349</sup> 1998-III p 1233, 27 EHRR 51, para 67. The TBKP had never been active.

<sup>350</sup> A 128 (1987), 10 EHRR 411.

remarrying for a period of three years. In May 1986, his partner was free to marry, but the relevant authorities refused to publish the banns necessary for a marriage to proceed until the expiry of the prohibition order in December. He was not able to marry until January 1987. He claimed 5,000 Swiss francs (£2,055) as non-pecuniary damages for having to “cohabit unmarried for several years with the person he wished to marry...”.<sup>351</sup> His claim was refused.<sup>352</sup> The Court held that the applicant’s rights under Article 12 had been violated, but observed that “even if the applicant [had] suffered non-pecuniary damage, it was at most during... a period of eight months.”<sup>353</sup>

### 13. ARTICLE 14

6.213 Article 14 of the Convention states:

The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 does not, as such, prohibit discrimination on the grounds set out, but it requires that enjoyment of other Convention rights shall be without such discrimination. This does not mean that there must be an actual infringement of some other Article, but that once the matter is within the potential area of operation of an Article, there must be no discrimination in its application.<sup>354</sup>

6.214 The Court has considered whether damages are necessary to afford just satisfaction for a violation of Article 14 in a number of cases.<sup>355</sup> These cases are not susceptible to convenient generalisations. They pertain to discriminatory taxation, social security, inheritance and immigration regimes, discriminatory application of retrospective laws, and discriminatory civil procedure rules. It will

<sup>351</sup> A 128 (1987), 10 EHRR 411, para 44.

<sup>352</sup> The applicant had also demanded that Switzerland should abolish the prohibition on remarriage in Article 150 of the Swiss Civil Code. The Strasbourg Court noted that the Convention does not give it jurisdiction to order Switzerland to alter its legislation. Cf para 3.31 above.

<sup>353</sup> A 128 (1987), 10 EHRR 411, para 45. The Court may have doubted the applicant’s sincerity. In describing the circumstances surrounding his third marriage and divorce, the Swiss Federal Court characterised the applicant’s attitude as “capricious”.

He pressed his mistress to marry him despite the shortness of their acquaintance [a little over a month] and then only a few days after the ceremony said he wanted a divorce without giving any valid explanation. By this capricious attitude he showed that he was making a mockery of the institution of marriage.

<sup>354</sup> Lord Lester of Herne Hill and D Pannick (eds), *Human Rights Law and Practice* (1999), 4.14.4.

<sup>355</sup> In addition to the cases discussed here, see *Marckx v Belgium* A 31 (1979), 2 EHRR 330 (see para 6.187 above); *Inze v Austria* A 126 (1987), 10 EHRR 394 and *Schuler-Zraggen v Switzerland* A 263 (1993), 16 EHRR 405 (merits), A 305-A (1995), 21 EHRR 404 (just satisfaction) discussed at para 3.73 above; *Thlimmenos v Greece* Application no 34369/97.

be seen that the Court regularly awards damages for pecuniary losses for breaches of Article 14, provided the necessary causal link can be shown, and the Court usually reaches this result without resort to “loss of opportunity” reasoning. In respect of non-pecuniary losses, the Court is likely to hold that the finding of a violation provides just satisfaction.

### **(1) Discriminatory taxation regimes**

6.215 In *Schmidt v Germany*,<sup>356</sup> the male applicant was required to pay a fire service tax; a similarly situated woman was exempt from this tax. The Strasbourg Court held that this difference in treatment violated Article 14 of the Convention taken together with Article 4. The applicant claimed 225 German marks (£90) as damages for pecuniary loss. The Court allowed the applicant’s claim in its entirety.<sup>357</sup>

6.216 *Schmidt v Germany* can be contrasted with *Van Raalte v Netherlands*.<sup>358</sup> In the latter case the applicant – an unmarried, childless man aged sixty-three years – was obliged to contribute to the General Child Benefits Scheme; a similarly situated woman was exempt from such contribution. The Strasbourg Court held that this difference of treatment violated Article 14 of the Convention taken together with Article 1 of Protocol No 1. The applicant claimed 1,959 Dutch florins (£590) as damages for pecuniary loss. This sum represented the contributions paid by him to the General Child Benefits Scheme. The Government argued that men and women would have been equally liable to pay contributions, so that the applicant would have had to pay them in any case; and that it had in fact abolished the exemption.<sup>359</sup> The Strasbourg Court noted that the finding of a violation did not entitle the applicant to retrospective exemption from contributions under the scheme in question, and held that the applicant had not, therefore, substantiated his claim.<sup>360</sup> The Court also rejected the claim for non-pecuniary loss, holding that the finding of a violation was sufficient just satisfaction.<sup>361</sup>

### **(2) Discriminatory social security regimes**

6.217 In *Gaygusuz v Austria*,<sup>362</sup> the applicant, a Turkish national living in Austria, applied for an advance on his pension in the form of emergency assistance. The benefits authority rejected the application, citing section 32(2)(a) of the

<sup>356</sup> A 291-B (1994), 18 EHRR 513.

<sup>357</sup> See further *Darby v Sweden* A 187 (1990), 13 EHRR 774 (see para 3.71 above).

<sup>358</sup> 1997-I p 173, 24 EHRR 503.

<sup>359</sup> 1997-I p 173, 24 EHRR 503, para 48.

<sup>360</sup> Judge Foighel dissented on the grounds that this decision was inconsistent with *Schmidt v Germany*. See 1997-I p 173, 24 EHRR 503, 522.

<sup>361</sup> The Strasbourg Court may have been influenced by the fact that, in the absence of discrimination in violation of Article 14, the applicant would not have had to pay less – others would have been obliged to pay more.

<sup>362</sup> 1996-IV p 1129, 23 EHRR 364.



Unemployment Insurance Act 1972 which restricted payment of emergency assistance to Austrian nationals. The prospect of living without means prompted the applicant to return to Turkey. The Court held that the restriction in the section violated Article 14, taken with Article 1 of Protocol No 1. The applicant claimed 800,000 Austrian schillings (£44,010) as damages for pecuniary loss, arguing that this sum corresponded to the amount of emergency assistance he should have been paid during the period 1987 to 1993. The Court noted that the applicant left Austria in September 1987, after he was refused emergency assistance. It declined to speculate about the applicant's situation after that date, but took into account the fact that his departure was caused by non-payment of emergency assistance, which would have amounted to 235 Austrian schillings (£15) per day. On an "equitable basis" the Court awarded him 200,000 Austrian schillings (£11,000) as damages for pecuniary loss. Judge Matscher, dissenting, thought the award was so excessive as to be inexplicable

... unless the Court wishes to adopt the practice which exists in American law of awarding "punitive damages". That practice is rightly not provided for in European law.<sup>363</sup>

### **(3) Discriminatory immigration regimes**

6.218 In *Abdulaziz, Cabales and Balkandali v United Kingdom*,<sup>364</sup> a number of men applied for leave to enter or remain in the United Kingdom on the basis of their marriage, or intended marriage, to the applicants, women permanently resident in the United Kingdom. These applications were refused. However, they would have been treated more favourably if the applicants had been men permanently resident in the United Kingdom. The Government argued that at the times of their marriages the applicants knew that they could not live together in the UK, and further that they could have lived together in Portugal or Turkey. The Court held that the difference in treatment constituted a breach of Article 14 of the Convention taken together with Article 8. However, it rejected the applicants' claims for non-pecuniary loss:

By reason of its very nature, non-pecuniary damage of the kind alleged cannot always be the object of concrete proof. However, it is reasonable to assume that persons who, like the applicants, find themselves faced with problems relating to the continuation or inception of their married life may suffer distress and anxiety. Nevertheless, having regard in particular to the factors relied on by the Government in their alternative submission, the Court considers

<sup>363</sup> "The sum of 200,000 Austrian schillings which the Court has awarded him is more than twice as high as the pecuniary damage he can possibly have sustained; that is manifestly contrary to all the principles governing compensation for pecuniary damage": 1996-IV p 1129, 23 EHRR 364, 385. The calculations on which he based these comments do not appear from the judgment.

<sup>364</sup> A 94 (1985), 7 EHRR 471.

that in the circumstances of these cases its finding of violation of themselves constitutes sufficient just satisfaction.<sup>365</sup>

**(4) Discriminatory application of retrospective laws**

- 6.219 In *Pine Valley Developments Ltd v Ireland*,<sup>366</sup> the second applicant - a holding company that was wholly-owned by the third applicant - had purchased a development site at Clondalkin in reliance on an outline planning permission granted by the Minister of Local Government. The Irish Supreme Court subsequently held that this and other planning permissions were *ultra vires*. A 1982 statute retrospectively validated permissions affected by the Supreme Court's decision, but not the applicant's permission. The Court held that this difference in treatment violated Article 14 of the Convention taken together with Article 1 of Protocol No 1.
- 6.220 The applicants claimed compensation for pecuniary loss. The applicants sought to recover the difference between the values of the site with and without the outline planning permission on the date on which the 1982 Act came into force ('the relevant date'). The applicants and the Government agreed that, without outline planning permission, the Clondalkin site had a market value of 65,000 Irish pounds (£55,270) on the relevant date.<sup>367</sup> However, they disagreed on the market value of the site with planning permission. The applicants suggested a sum of 2,200,000 Irish pounds (£1,870,750), the Government a sum of 550,000 Irish pounds (£467,690). Making its assessment on an equitable basis, the Court awarded the applicants a global sum of 1,200,000 Irish pounds (£1,141,120) for pecuniary loss. That sum included interest payable from the relevant date.<sup>368</sup> It held that the appropriate rate was not a commercial rate, which was more appropriate to a claim based on lost development profits, but the rate applicable to Irish court judgments.
- 6.221 The third applicant also claimed substantial, but unquantified, damages to compensate him for

<sup>365</sup> A 94 (1985), 7 EHRR 471, para 96.

<sup>366</sup> A 222 (1991), 14 EHRR 319 (merits); A 246-B (1993), 16 EHRR 379 (just satisfaction).

<sup>367</sup> It was also common ground that 13,500 Irish pounds (£11,260) fell to be deducted from the from the applicants' compensation. This sum represented the potential rental income of the site from 28 July 1982 to June 1988, the date on which the site was sold by the second applicant's receivers.

<sup>368</sup> The judgment is of interest in the unusual degree of detail with which the issue of pecuniary loss was considered. The Court referred to the evidence of the purchase price of the land in 1978 and increases in value since then; sale prices of comparable land; the likely costs of infrastructure improvements; likely delays in obtaining detailed permission; and the fact that the limited period of the retrospective permission would have limited the potential market: A 246-B (1993), 16 EHRR 379, para 11. On the interest point, see para 3.71 above.

the effects which the violation found by the Court had had on his personal circumstances, namely loss of status, prospects and enjoyment of life, inability to obtain employment, and bankruptcy.<sup>369</sup>

The Court accepted the claim and awarded 50,000 Irish pounds (£47,550):

Even assuming that, as [the Government] suggested, Mr Healy's personal difficulties originated in problems encountered with other development projects with which he was involved, there is no reason to suppose that the inability to proceed with the Clondalkin development did not compound and aggravate those difficulties. The violation of the Convention therefore caused him non-pecuniary damage and, in the Court's view, the finding in the principal judgment does not of itself constitute just satisfaction therefore.<sup>370</sup>

#### **(5) Discriminatory civil procedure rules**

6.222 In *Canea Catholic Church v Greece*,<sup>371</sup> the applicant initiated proceedings to recover damages from a third party for the destruction of a church wall. The Court of Cassation dismissed the proceedings on the ground that the applicant had not been properly registered as a legal personality. This registration requirement did not apply to the Greek Orthodox Church. The Court held that this difference in treatment violated Article 14 of the Convention taken together with Article 6. The applicant claimed damages of 5,000,000 Greek drachmas (£10,760) to cover the costs of rebuilding the surrounding wall as before and to compensate for consequential loss following the Court of Cassation's judgment, which had caused the Crete Court of Appeal to dismiss an action to regain possession of a building the Church had let.<sup>372</sup> The Court awarded the full amount claimed, describing it as pecuniary damage "on account of its inability to take legal proceedings to secure the rebuilding of the surrounding wall".<sup>373</sup>

#### **14. ARTICLE 1 OF PROTOCOL NO 1**

6.223 Article 1 of Protocol No 1 states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control

<sup>369</sup> A 246-B (1993), 16 EHRR 379, para 16.

<sup>370</sup> A 246-B (1993), 16 EHRR 379, para 17.

<sup>371</sup> 1997-VIII p 2843, 27 EHRR 521.

<sup>372</sup> 1997-VIII p 2843, 27 EHRR 521, para 52.

<sup>373</sup> 1997-VIII p 2843, 27 EHRR 521, para 55. The award of the full amount is surprising, since it makes no allowance for the uncertainty of the legal proceedings, had they been allowed to continue.

the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

6.224 The Strasbourg Court generally awards damages for pecuniary loss provided that the applicant demonstrates a sufficient causal link between the loss and the violation of Protocol No 1.<sup>374</sup> There are several examples of substantial awards under this Article, sometimes combined with violations of other Articles.<sup>375</sup> The Court accepts and reviews detailed expert evidence on valuation issues, although it is not well-equipped to resolve disputes, and often resorts to an “equitable basis” of compensation. Substantial awards are also made for non-pecuniary loss, particularly to reflect the uncertainty and frustration of prolonged disputes with Government.<sup>376</sup>

### **(1) Expropriation**

6.225 In *Papamichalopoulos v Greece*,<sup>377</sup> the applicants were dispossessed of their land by the military dictatorship. The land was put at the disposal of the Navy who constructed a naval base and holiday resort for officers. When democracy was restored, the State acknowledged the applicants’ grievances, but determined that they could not be restored to their land because it formed part of the State’s military infrastructure. Decisions of the national courts were ignored and the applicants were not compensated. In these circumstances, the Court held that there had been a violation of Article 1 of Protocol No 1 and that the applicants were entitled to damages. The Strasbourg Court pointed out that the case involved more than a lawful expropriation without compensation; it amounted to an unlawful dispossession.<sup>378</sup> The compensation was not limited to the value of the land at the date on which it was *de facto* expropriated.<sup>379</sup> The Court held that the Government should pay the applicants

for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence of the buildings and the construction costs of the latter.<sup>380</sup>

<sup>374</sup> In addition to the cases noted in the following paragraphs, see *AO v Italy* Application 22534/93, 30 May 2000.

<sup>375</sup> See also *Pine Valley Developments Ltd v Ireland* A 222 (1991), 14 EHRR 319 (merits); A 246-B (1993), 16 EHRR 379 (just satisfaction). In this case there was a breach of Article 14 taken in conjunction with Article 1 of Protocol No 1, and substantial awards were made for both pecuniary and non-pecuniary loss. See above, paras 6.219 - 6.222.

<sup>376</sup> For examples not described in detail here, see *Raimondo v Italy* A 281-A (1994), 18 EHRR 237 and *AO v Italy* Application 22534/93, 30 May 2000.

<sup>377</sup> A 260-B (1993), 16 EHRR 440 (merits); A 330-B (1995), 21 EHRR 439 (just satisfaction).

<sup>378</sup> A 330-B (1995), 21 EHRR 439, para 36.

<sup>379</sup> A 330-B (1995), 21 EHRR 439, para 37. For a similar approach, see *Hentrich v France* A 296-A (1994), 18 EHRR 440 (merits); A 322 (1995), 21 EHRR 199 (just satisfaction).

<sup>380</sup> A 330-B (1995), 21 EHRR 439, para 39.

6.226 This might seem to be more than the applicants had lost, as when the land was taken the buildings had not been constructed, but the Court was careful to emphasise that the damages referable to the value of the buildings formed part of the *restitutio in integrum*, compensating the applicants for the loss of enjoyment of the disputed land.<sup>381</sup> In reaching this conclusion, the Court had regard to principles established by the (then) Permanent Court of International Justice, in the *Chorzow Factory* case:

...reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by a restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>382</sup>

To assess the damages, the Strasbourg Court considered diverging expert reports from each side, and arrived at figures of 4,000,000 Greek drachmas (£10,920) for the land and 1,351,000 Greek drachmas (£3,690) for the building.<sup>383</sup> In addition it awarded a total of 6,300,000 Greek drachmas<sup>384</sup> (£17,195) for non-pecuniary loss to compensate for “feelings of helplessness and frustration” due to the refusal of the Government authorities to comply with judicial rulings.

6.227 In *Vasilescu v Romania*<sup>385</sup> the applicant’s necklace and earrings made of gold coins had been taken without compensation some thirty years before. The Strasbourg Court stated that the best way to “put the applicant as far as possible in a situation equivalent to the one she would have been in had there not been a breach of Article 1 of Protocol No 1” would be for the items to be returned; but as the Government claimed to be unable to locate them, the applicant would be awarded damages assessed on an equitable basis of 60,000 French francs (£6,420) for pecuniary damage.<sup>386</sup> As the Court could not “exclude that the applicant, who [had] been deprived of her property for more than 30 years, [had]

<sup>381</sup> A 330-B (1995) 21 EHRR 439, para 40 (read in conjunction with para 38). Cf paras 4.77 and 5.5 above.

<sup>382</sup> (1928) PCIJ Series A no 17, p 47.

<sup>383</sup> With interest at 6%, running from 6 months after the date of the decision until payment. See para 3.75 above.

<sup>384</sup> 450,000 Greek drachmas (£1,230) to each of the fourteen applicants.

<sup>385</sup> 1998-III p 1064, 28 EHRR 241.

<sup>386</sup> 1998-III p 1064, 28 EHRR 241, para 61.

experienced some distress on this account”, it also awarded 30,000 French francs (£3,210) for non-pecuniary loss.<sup>387</sup>

## **(2) Frustrated Court judgments**

- 6.228 In *Stran Greek Refineries and Stratis Andreadis v Greece*,<sup>388</sup> the Government enacted legislation that invalidated an arbitration award made in favour of the applicant, in circumstances that violated Article 1 of Protocol No 1. The Strasbourg Court held that the applicant was entitled to recover a sum equivalent to the arbitration award plus interest.<sup>389</sup>
- 6.229 In *Pressos Compania Naviera SA v Belgium*,<sup>390</sup> the applicants were shipowners and shipping insurance associations whose vessels were involved in collisions in Belgian or Netherlands territorial waters. In legal proceedings in respect of the damage caused by the collisions several actions were brought against the Belgian State, on the ground that the collisions were due to the negligence of Belgian pilots employed by the State. Belgium passed a law which retrospectively extinguished any claim that the applicants might have had against the Belgian State. For one of the applicants,<sup>391</sup> this meant that its third party proceedings against Belgium were finally dismissed and it was ordered to pay 9,686,039 Belgian francs (£212,500) to the owner of a jetty damaged in the collision. In the case of the other applicants, no final ruling had been given when an application was made under the Convention. In these circumstances, the Court held that there had been a violation of Article 1 of Protocol No 1.
- 6.230 The twenty-fifth applicants claimed a sum of 9,686,039 Belgian francs (£212,500) for the damages they had paid to the owners of the jetty.<sup>392</sup> The Government contested this claim, arguing that it was not clear that the third party proceedings would have succeeded, and that the applicants should at most receive damages for loss of opportunity. The Court treated these competing arguments as follows:

<sup>387</sup> 1998-III p 1064, 28 EHRR 241, para 64. She was also awarded costs and expenses; and interest would be payable on any sums not paid to her within three months of judgment: see paras 66 - 67.

<sup>388</sup> A 301-B (1994), 19 EHRR 293. See also para 3.72 above.

<sup>389</sup> On the question of interest, the Court noted that “the adequacy of the compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as the fact that 10 years have elapsed since the arbitration decision was rendered”. Simple interest was awarded at 6% from 27 February 1984 to the date of the judgment (A 301-B (1994), 19 EHRR 293, paras 82 - 83). Cf paras 3.70 - 3.74 above.

<sup>390</sup> A 332 (1995), 21 EHRR 301 (merits); 1997-IV p 1292, 24 EHRR CD 16 (just satisfaction).

<sup>391</sup> The twenty-fifth.

<sup>392</sup> The Strasbourg Court held that it was not appropriate to apply Article 50 to the other applicants until the Belgian courts had given a final ruling on the disputes in question.

The amount of damage is not disputed. However, the apportionment of liability is uncertain. Accordingly, making an assessment on an equitable basis, the Court considers it reasonable for the respondent State to bear one half of the damage resulting from the accident concerned. Consequently, it awards [the applicant] 4,843,019.50 Belgian francs [£106,260].<sup>393</sup>

### **(3) Delayed proceedings**

- 6.231 In some cases, the breach of this Article has been linked to a violation of Article 6, due to unreasonable delay in civil proceedings. In *Sporrong and Lönnroth v Sweden*,<sup>394</sup> the Court upheld the applicants' complaint of breaches of Article 6(1) and Article 1 of Protocol No 1 of the Convention. They were owners of property in an area subject to planned redevelopment, and both properties were subject to expropriation permits issued by the Government at the request of the local authority, together with prohibitions on construction. The properties were never expropriated, and the permits were cancelled after 23 years and 8 years respectively, while the prohibition notices lapsed after 25 years and 12 years respectively. The applicants had not been not compensated for any of their losses during the relevant periods.
- 6.232 The Court considered that 4 years should have been sufficient for the authorities to reach a decision. Accordingly, the periods for which damages should be calculated were 19 and 4 years respectively. The applicants had not proved that the return from the properties had diminished as a result of the excessive duration of the expropriation permits, or that the value of the properties in real terms had fallen. However, they had been prejudiced by their inability to dispose of the properties, and left in a state of complete uncertainty as to the fate of their properties. Although both parties submitted detailed evidence, the Court considered neither method satisfactory, and made its own "overall assessment" of the relevant factors including the limitations on the use of the properties, loss of opportunity of entering into any scheme of development, difficulties in selling the properties or of obtaining loans, and the prolonged state of uncertainty. It made awards of 800,000 Swedish krona (£76,080) and 200,000 Swedish krona (£19,020) respectively, together with costs.
- 6.233 *Scollo v Italy*<sup>395</sup> was another case involving violations of both Article 6(1) and Article 1 of Protocol No 1. The applicant, who was 71 per cent disabled, had sought eviction of the tenant of a flat owned by him. He was granted an eviction order, but it was suspended four times. Eventually the tenant left the flat of his own accord 11 years and 10 months after the eviction order. The Court found a violation of the applicant's right to peaceful enjoyment of his possessions, and held that his case had not been heard within a reasonable time. He claimed pecuniary damages of 13,634,280 lire (£5,560) representing bailiff's fees and

<sup>393</sup> 1997-IV p 1292, 24 EHRR CD16, para 20. Cf para 3.68.

<sup>394</sup> A 85 (1984), 7 EHRR 256. See also para 3.24 above.

<sup>395</sup> A 315-C (1995), 22 EHRR 514.

lawyers' fees in the enforcement proceedings, together with 30,000,000 lire (£12,220) for non-pecuniary damage, referring to the prolonged period during which he had been unable to recover the flat and the fact that he and his family had been forced to lodge with his mother-in-law throughout that time. The Court rejected the Government's arguments based on lack of causation, and upheld the claim for both pecuniary and non-pecuniary damage in full.<sup>396</sup>

- 6.234 The Strasbourg Court may award damages for delay in obtaining compensation even if it appears that the national courts will ultimately grant it. In *Guillemin v France*,<sup>397</sup> the facts of which were given earlier,<sup>398</sup> the Court at first reserved the question of pecuniary loss because a settlement appeared likely, though it awarded the applicant non-pecuniary damages for "uncertainty and anxiety" about the outcome of the proceedings in France. In subsequent proceedings, after a French court had made an award but the applicant had still not received any of the money, the Strasbourg Court, without prejudice to the amount that would finally be paid to the applicant at the end of the proceedings in France, awarded 60,000 French francs (£6,420) pecuniary damages "for the loss of availability of the sum already awarded"<sup>399</sup> plus the full cost of a lawyer to defend her interests. It emphasised that compensation under Article 1 Protocol No 1 must be paid within a reasonable time to be adequate reparation.<sup>400</sup>

#### **(4) Destruction of property**

- 6.235 The Strasbourg Court has dealt with a number of cases in which it has been faced with valuing property wrongfully destroyed by government forces. Often the properties were in rural areas and there were not always accurate records of their size, and inspection by experts was not possible. In such cases, the Strasbourg Court has been willing to make an "equitable assessment" of the value of the property destroyed. Thus in *Akdivar v Turkey*<sup>401</sup> the court awarded damages based on the records which did exist and, where there were no records, on 50 per cent of the size claimed by the applicants.<sup>402</sup> The applicants were also awarded damages for loss of livestock and loss of household possessions, but not for loss of the land as this still belonged to them. However, as they could not live or work on the land, they were also awarded loss of income and the cost of

<sup>396</sup> See also *Salesi v Italy* A 257-E (1993), 26 EHRR 187; and see *Guincho v Portugal* A 81 (1984), 7 EHRR 223; *Lechner and Hess v Austria* A 118 (1987), 9 EHRR 490; *Martins Moreira v Portugal* A 133 (1988), 13 EHRR 517 (see para 3.62 above); *Unión Alimentaria Sanders SA v Spain* A 157 (1989), 12 EHRR 24; *Silva Pontes v Portugal* A 286-A (1994), 18 EHRR 156; and *Matos e Silva Lda v Portugal* 1996-IV p 1092, 24 EHRR 573.

<sup>397</sup> 1997-I p 149, 25 EHRR 435 (merits), 1998-VI p 2544 (just satisfaction).

<sup>398</sup> See para 6.124 above.

<sup>399</sup> 1998-VI p 2544 (just satisfaction), para 24. Cf paras 3.70 - 3.74 above.

<sup>400</sup> 1998-VI p 2544 (just satisfaction), para 24.

<sup>401</sup> 1996-IV p 1192, 23 EHRR 143 (merits), 1998-II p 711 (just satisfaction).

<sup>402</sup> A similar approach was used in *Selçuk and Asker v Turkey* 1998-II p 891, 26 EHRR 477.



alternative accommodation, as well as non-pecuniary loss.<sup>403</sup> The Strasbourg Court rejected a claim by the applicants for punitive damages.

## **15. ARTICLE 2 OF PROTOCOL NO 1**

6.236 Article 2 of Protocol No 1 states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religion and philosophical convictions.

6.237 The availability of damages for a violation of this Article was considered in *Campbell and Cosans v United Kingdom*.<sup>404</sup> In that case, the applicants' sons attended schools that utilised corporal punishment as a form of discipline. The Court held that the local education authority's refusal to exempt Mrs Campbell's son from corporal punishment violated the second sentence of Article 2 of Protocol No 1. Similarly, the Court held that the authority's refusal to allow Mrs Cosans' son to return to school after suspension, because he would not agree to submit to corporal punishment, violated both sentences. The Court held that the finding of a violation was sufficient just satisfaction for any non-pecuniary loss suffered by Mrs Campbell and Mrs Cosans.<sup>405</sup>

6.238 Jeffrey Cosans claimed £25,000 as moral damage, reflecting the alleged effects on his education and future employment opportunities, as well as the embarrassment suffered.<sup>406</sup> The Court accepted that he had suffered non-pecuniary loss:

In addition to initial mental anxiety, he must have felt himself to be at a disadvantage as compared with others in his age-group. Furthermore, his failure to complete his schooling perforce deprived him of some opportunity to develop his intellectual potential.<sup>407</sup>

With regard to "material damage" the evidence was that Jeffrey's schooling would probably have led to no more than "a limited qualification"; and further he bore some responsibility for his situation, since he did not appear "to have pursued to the full the possibility of undertaking further study and training", and had "remained for a considerable period unregistered with the local employment exchange".

<sup>403</sup> See also *Loizidou v Turkey* 1998-VI p 1807, 26 EHRR CD5 (just satisfaction).

<sup>404</sup> A 48 (1982), 4 EHRR 293.

<sup>405</sup> In respect of Mrs Campbell, the Court might have been influenced by a newspaper report that her son was attending a fee-paying secondary school that also utilised corporal punishment (a report which was not denied by Mrs Campbell).

<sup>406</sup> A 48 (1982), 4 EHRR 293, para 23. In fact, between 1976 and 1982, Jeffrey had been in gainful employment for little more than twelve weeks.

<sup>407</sup> A 48 (1982), 4 EHRR 293, para 26.

The Court therefore concludes that, whilst the suspension may well have contributed to the material difficulties which Jeffrey encountered, it cannot be regarded as the principal cause thereof.<sup>408</sup>

Taking these and other factors together on “an equitable basis”, the Court awarded just satisfaction assessed at £3,000.<sup>409</sup>

## **16. ARTICLE 3 OF PROTOCOL NO 1**

6.239 Article 3 of Protocol No 1 states:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

6.240 In *Labita v Italy*,<sup>410</sup> the Court awarded damages for non-pecuniary loss for numerous violations of the Convention, including this Article.<sup>411</sup> The applicant had been arrested on suspicion of being a member of the Mafia (and related offences). Though he was eventually acquitted, he was made subject to ‘preventative’ measures which included his disenfranchisement. He was awarded 75 million lire (£23,180) in compensation for the non-pecuniary loss he had suffered in relation to all the violations of the Convention, but it is not clear what part of that award, if any, is referable to the violation of Article 3 of Protocol No 1.<sup>412</sup>

<sup>408</sup> *Ibid.*

<sup>409</sup> *Ibid.*

<sup>410</sup> Application no 26772/95, 6 April 2000.

<sup>411</sup> The Court found violations of Articles 3, 5(1), 5(3), 8, Article 3 of Protocol No 1 and Article 2 of Protocol 4. See further para 6.57 above.

<sup>412</sup> The Court also found a violation of Article 3 of Protocol No 1 in *Matthews v United Kingdom* Application no 24833/94, 18 February 1999, 28 EHRR 361. However, there the applicant limited his claim under Article 41 to costs and expenses.

(Signed) ROBERT CARNWATH, *Chairman, Law Commission*

HUGH BEALE

DIANA FABER

CHARLES HARPUM

ALAN WILKIE

MICHAEL SAYERS, *Secretary*

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NORMAN RAVEN, *Secretary*

21 August 2000

# APPENDIX A

## DAMAGES FOR JUDICIAL ACTS

### 1 INTRODUCTION

- A.1 The HRA does not permit damages to be awarded in respect of any judicial act done in good faith, other than “to compensate a person to the extent required by Article 5(5) of the Convention.”<sup>1</sup> This exception reflects the special feature of Article 5, that – uniquely among the Convention rights<sup>2</sup> – it has a self-contained provision for compensation. Article 5(5) provides:

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Under the HRA, such an award is made, not against the Court itself, but against the Crown; and provision is made for the appropriate Minister or Government Department to be joined as a party to the proceedings.<sup>3</sup>

- A.2 In considering the application of Article 5 to detention by judicial order, it has to be borne in mind that Article 5 involves a “double test”: the order must both comply with the substantive and procedural requirements of the Convention, and also be “lawful” under domestic law.<sup>4</sup> The latter test arises from the general requirements, which apply to each paragraphs of Article 5(1),<sup>5</sup> that the detention must be “lawful” and “in accordance with a procedure prescribed by law”.
- A.3 Liability in damages for judicial violations of Article 5 may arise under either test. Some examples will be found in Part VI. Since this paper is concerned with damages, rather than liability, we do not consider in detail the circumstances in which a judicial order may fail the second test.<sup>6</sup> However, the application of the first test – “lawfulness” under domestic law – deserves special attention because of the potential difficulty of applying the Strasbourg case-law in the domestic courts. As will be seen, an order is not “unlawful” in this context merely because it is overturned for error of law or even on *Wednesbury*<sup>7</sup> grounds. The court

<sup>1</sup> HRA, s 9(3).

<sup>2</sup> Article 3 of the 7th Protocol (not so far included in the Convention rights under the HRA) has a separate provision for compensation for wrongful conviction.

<sup>3</sup> HRA, s 9(4)(5).

<sup>4</sup> *R v Governor of H M Prison Brockhill ex p Evans*, HL, unreported, 27 July 2000, per Lord Hobhouse citing *Benham v United Kingdom* 1996-III p 738, 22 EHRR 293 and *Tsirlis and Kouloumpas v Greece* 1997-III p 909, 25 EHRR 198.

<sup>5</sup> The text of Article 5 is set out at para 6.27 above.

<sup>6</sup> The most likely source of problems is the refusal of bail on grounds not falling within Article 5(1)(c): see Bail and the Human Rights Act 1998 (1999) Law Commission Consultation Paper No 157, Part IV.

<sup>7</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

must have gone beyond its “jurisdiction”.<sup>8</sup> The difficulty is in defining the limits of that term in English administrative law, in which, for most purposes, the differences between jurisdictional and non-jurisdictional errors have disappeared.<sup>9</sup>

## 2 JUDICIAL IMMUNITY IN THE UNITED KINGDOM

- A.4 To understand the Strasbourg case-law on this issue, it is necessary to refer to the pre-1990 law in this country relating to magistrates’ immunities.<sup>10</sup> Since 1990,<sup>11</sup> magistrates in England and Wales have enjoyed the same protection as judges of higher courts against actions for damages in respect of acts or omissions in good faith in the purported execution of their duties. Prior to that, however, a magistrate’s immunity (unlike that of the higher courts) had been confined to “any matter within his jurisdiction”.<sup>12</sup> As will be seen, the Strasbourg Court has treated the case-law relating to that criterion as relevant also to Article 5. The pre-1990 case-law will therefore be relevant when considering claims for damages under section 9(3), although the claims will be against the relevant Department, rather than against magistrates personally.
- A.5 Two cases are of importance: *Re McC (A Minor)*<sup>13</sup> and *R v Manchester City Magistrates’ Court ex p Davies*.<sup>14</sup> In *Re McC*, Lord Bridge, giving the leading speech in the House of Lords, explained that the word “jurisdiction” had been

<sup>8</sup> See paras A.12(2) and A.24 below.

<sup>9</sup> See paras A.13 - A.14 below.

<sup>10</sup> Although the Strasbourg case-law considered below is concerned specifically with England, it is likely that similar principles will apply in Scotland. Judicial immunity in Scotland, apart from the HRA, was equivalent to that in England prior to the Courts and Legal Services Act 1990: see per Lord Bridge, *Re McC* [1985] 1 AC 528, 547H. Judges of the higher courts and sheriffs, being responsible directly to the Crown, have always enjoyed absolute immunity for things done “in their judicial capacity”: *McCreadie v Thomson* 1907 SC 1176, 1182. “Judicial capacity” is a wide term. An error of law, or even wholly unreasonable conduct, will not remove the immunity: see *Russell v Dickson* 1998 SLT 96, where the Sheriff’s immunity was not affected by his action in refusing bail, previously described by the High Court as “an excessive and unreasonable step” (*Russell v Wilson* 1994 SLT 660, 661). “Inferior” judges (such as justices in the District Court) formerly enjoyed only qualified immunity, being liable for acts in excess of jurisdiction, and malice: Summary Jurisdiction (Scotland) Act 1908 s 59. However, since 1995, potential liability for inferior judges is confined to cases where, in addition to the quashing of (for example) a sentence of imprisonment, “malice and want of probable cause are specifically averred and proved by the person suing”: Criminal Procedure (Scotland) Act 1995, s 170.

<sup>11</sup> Courts and Legal Services Act 1990, s 108. Section 109 extends similar immunity to Northern Ireland.

<sup>12</sup> Justice of the Peace Act 1979, s 44. However, the damages were limited to 1 penny, if *inter alia* the act, though in excess of jurisdiction, was nevertheless in execution of the magistrate’s office as a justice of the peace: *ibid* s 52. For a modern application of this difficult distinction see, for example, *R v Waltham Forest Justices ex p Solanke* [1986] QB 983.

<sup>13</sup> [1985] AC 528.

<sup>14</sup> [1989] QB 631.

used “with ... many different shades of meaning” in different areas of law.<sup>15</sup> In the present context, it was not to be interpreted in the “extended” sense applicable, since *Anisminic*,<sup>16</sup> in judicial review generally.<sup>17</sup> Lord Bridge identified three categories of case in which justices can properly be regarded as having acted outside, or in excess, of their jurisdiction.<sup>18</sup> The first category consists of cases where the justices do not have jurisdiction to entertain the proceedings at all.<sup>19</sup> The second category consists of cases where, although the justices have duly entered upon the summary trial of a matter within their jurisdiction, “something quite exceptional” occurring in the course of the proceedings ousts that jurisdiction.<sup>20</sup> Thus, justices would be acting without, or in excess, of jurisdiction if

in the course of hearing a case within their jurisdiction they were guilty of some gross and obvious irregularity of procedure, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence, or of the rules of natural justice, as for example if the justices refused to allow the defendant to give evidence.<sup>21</sup>

The third category consists of cases where, although the justices have jurisdiction of the case and conduct the trial impeccably, the determination of the matter

<sup>15</sup> [1985] AC 528, 536.

<sup>16</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Cf below note 20 and para A.14 n 42.

<sup>17</sup> [1985] AC 528, 542-544, 546.

<sup>18</sup> See *R v Manchester City Magistrates' Court ex p Davies* [1989] 1 QB 631, 641 (CA).

<sup>19</sup> *Re McC (A Minor)* [1985] AC 528, 546. This aspect of jurisdiction is usually referred to as “jurisdiction of the cause”.

<sup>20</sup> [1985] AC 528, 546. In this respect, Lord Bridge stated that:

an error (whether of law or fact) in deciding a collateral issue on which jurisdiction depends will not [oust the justices' jurisdiction]. Nor will the absence of any evidence to support a conviction... It is clear, in my opinion, that no error of law committed in reaching a finding of guilt would suffice, even if it arose from a misconstruction of the particular legislative provision to be applied, so that it could be said that the justices had asked themselves the wrong question.

[1985] AC 528, 546. This narrow approach can be contrasted with Lord Diplock's wide interpretation in *O'Reilly v Mackman* [1983] 2 AC 237, 278 of the “breakthrough” made by *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 in recognising

that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported “determination”, not being “a determination” within the meaning of the empowering legislation, was accordingly a nullity.

<sup>21</sup> *Re McC (A Minor)* [1985] AC 528, 546-547.

before them “does not provide a proper foundation in law” for any sentence imposed or order made.<sup>22</sup>

- A.6 In *Re McC* itself, the magistrates’ error was the breach of a statutory requirement to inform a minor of his right to apply for legal aid, before imposing a sentence of imprisonment. It was held that this was the breach of a “statutory condition precedent, necessary to give justices jurisdiction” to pass the sentence; it was not “a mere procedural irregularity”.<sup>23</sup> Accordingly, the magistrates were not immune from action for damages.
- A.7 In *R v Manchester City Magistrates’ Court ex parte Davies*,<sup>24</sup> the magistrates had committed the applicant to prison for failure to pay a rate demand. Before making such an order, the court was required by the statute to conduct an “inquiry” as to whether the failure to pay was “due either to his wilful refusal or to his culpable neglect”.<sup>25</sup> The magistrates had concluded that the applicant was guilty of culpable neglect in failing to take his accountant’s advice to close his business and go bankrupt; but they had omitted to consider whether there was any causal connection between that failure and the failure to pay rates. The committal order was therefore quashed, and the applicant sought damages for his imprisonment (for almost 2 months).
- A.8 The Court of Appeal held, by a majority, that, following *Re McC (A Minor)*,<sup>26</sup> the magistrates had failed to make the inquiry required by the statute, and that such an inquiry was a statutory condition precedent to their jurisdiction. Accordingly, they were not protected against a claim for damages. The majority characterised the magistrates’ error as overlooking altogether the requirement of the statute,<sup>27</sup> or “finding an answer to the wrong question”.<sup>28</sup> Sir Roger Ormrod, dissenting, described the error as “misdirect[ing] themselves completely as to the terms and meaning” of the section:

They seem to have treated the question as disjunctive, ie “was there a failure to pay and was the defendant guilty of culpable neglect?”<sup>29</sup>

<sup>22</sup> [1985] AC 528, 549. Lord Bridge cited as a modern example of this category *O’Connor v Isaacs* [1956] 2 QB 288. In that case, the magistrates made an order against the claimant that depended on a finding of “persistent cruelty”, although they had expressly found the allegation of persistent cruelty not proved. They subsequently committed him to prison for non-compliance with the order. Subject to a limitation point, the claimant’s action for damages would have succeeded.

<sup>23</sup> *Re McC (A Minor)* [1985] AC 528, 552.

<sup>24</sup> [1989] QB 631.

<sup>25</sup> General Rate Act 1967, s 103.

<sup>26</sup> [1985] AC 528.

<sup>27</sup> [1989] QB 631, 638 *per* O’Connor LJ.

<sup>28</sup> [1989] QB 631, 643 *per* Neill LJ.

<sup>29</sup> [1989] QB 631, 647.

In his view, that was “an error of law in a matter within their jurisdiction”, and therefore not an error which deprived them of immunity.<sup>30</sup>

### 3 STRASBOURG CASE-LAW

- A.9 There have been two important decisions of the Strasbourg Court on the application of Article 5(5) in respect of decisions of magistrates’ courts. They are *Benham v United Kingdom*<sup>31</sup> and *Perks and others v United Kingdom*.<sup>32</sup> Both were concerned with the requirement, in Article 5, that detention by order of a court must be “lawful” and “in accordance with a procedure prescribed by law”.

#### (1) *Benham v United Kingdom*<sup>33</sup>

- A.10 Mr Benham had been committed to prison for 30 days for failure to pay community charge. He was released on bail by the High Court 12 days later, and subsequently his appeal by case stated was allowed. As in *R v Manchester City Magistrates’ Court ex p Davies*,<sup>34</sup> the relevant legislation required the court, before imposing a prison sentence, to conduct an inquiry as to whether the failure to pay was “due to his wilful refusal or culpable neglect”.<sup>35</sup> The magistrates had found that although the appellant had no assets or income during the relevant period, he had the potential to earn money, and accordingly found him guilty of culpable neglect. In the Divisional Court it was held that this conclusion could not be sustained on the evidence, because -

before such a finding could be sustained, at the very least there would have to be clear evidence that gainful employment, for which he was fit, was on offer to the debtor and that he had rejected or refused that offer. There was no such evidence in this case.<sup>36</sup>

Furthermore, the Justices ought to have considered alternatives to prison.

- A.11 Although Mr Benham’s appeal was allowed, he had no claim under English law for damages, in the absence of evidence of bad faith. Accordingly he applied to Strasbourg, claiming that his detention was not “lawful” within the meaning of Article 5(1), and that the lack of a remedy in damages was contrary to Article 5(5). The Commission upheld his claim,<sup>37</sup> but the Court disagreed. The difference between the Commission and the Court turned not on the issues of

<sup>30</sup> [1989] QB 631, 649. See further para A.30 n 69 below.

<sup>31</sup> 1996-III p 738, 22 EHRR 293.

<sup>32</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33.

<sup>33</sup> 1996-III p 738, 22 EHRR 293.

<sup>34</sup> [1989] QB 631.

<sup>35</sup> Community Charges (Administration and Enforcement) Regulations 1989, SI 1989 No 438, reg 41(3).

<sup>36</sup> *R v Poole Justices ex p Benham* [1991] 4 Admin LR 161, 167, per Potts J.

<sup>37</sup> 1996-III p 738, 22 EHRR 293, pp 304 - 318..



principle, but on their application to the facts. The reasoning of the Court needs to be set out in full:

40. The main issue to be determined in the present case is whether the disputed detention was “lawful”, including whether it complied with “a procedure prescribed by law”. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness.

41. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 (1) failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with.

42. A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law.

43. It was agreed by those appearing before the Court that the principles of English law which should be taken into account in this case distinguished between acts of a magistrates’ court which were within its jurisdiction and those which were in excess of jurisdiction. The former were valid and effective unless or until they were overturned by a superior court, whereas the latter were null and void from the outset.

It was further submitted that the appropriate test under English law for deciding whether or not the magistrates acted within their jurisdiction was laid down by the House of Lords in [*Re McC (A Minor)*]. The third limb of that test was relevant to the instant case, namely that magistrates exceeded their jurisdiction when they made an order which had no foundation in law because of failure to observe a statutory condition precedent.

44. ... Potts J in the Divisional Court found that the magistrates had carried out some inquiry as to whether B’s failure to pay the community charge was due to his culpable neglect. However, he concluded that their finding of culpable neglect could not be sustained on the evidence available to them.

45. In the view of the Court, there are undoubtedly similarities between this decision and that of the Court of Appeal in *Manchester City Magistrates’ Court ex parte Davies*, but there are also notable differences. In the latter case, the Court of Appeal held that the magistrates had failed altogether to carry out the inquiry required by

law as to whether the debtor's failure to pay was the result of culpable neglect. In the instant case, however, the Divisional Court found that the magistrates had addressed themselves to this question, although their finding of culpable neglect could not be sustained on the available evidence.

46. Against the above background, it cannot be said with any degree of certainty that the judgment of the Divisional Court was to the effect that the magistrates acted in excess of jurisdiction within the meaning of English law. It follows that the Court does not find it established that the order for detention was invalid, and thus that the detention which resulted from it was unlawful under national law. The mere fact that the order was set aside on appeal did not in itself affect the lawfulness of the detention.

47. Nor does the Court find that the detention was arbitrary. It has not been suggested that the magistrates who ordered Mr Benham's detention acted in bad faith, nor that they neglected to attempt to apply the relevant legislation correctly [footnotes omitted].

A.12 A number of important points appear from this passage:-

- (1) The question whether the detention is "lawful" is to be determined in accordance with national law, and, in the first instance, by the national courts.
- (2) Detention pursuant to a court order may be "lawful", even if it is subsequently found on appeal that the court erred in fact or law. The issue of "lawfulness" under Article 5 is one of jurisdiction.
- (3) In the context of English law, (apparently, following agreement between the parties) this issue was treated as equivalent to the issue of jurisdiction raised by the pre-1990 law on justices' immunity.
- (4) The court felt able to distinguish *R v Manchester City Magistrates' Court ex p Davies*<sup>38</sup> on the basis that there the magistrates had "failed altogether" to carry out the inquiry required by law, whereas in the present case the magistrates had addressed that question but had reached a finding which could not be sustained on the evidence.
- (5) The court did not purport itself to rule on the position under English law, but reached its conclusion on the basis that it had not been established "with any degree of certainty" that the English court had found an excess of jurisdiction under English law.

<sup>38</sup> [1989] QB 631.

## (2) Void/voidable

- A.13 One passage in the court's judgment is open to question. This is the comment (in paragraph 43) on the supposed distinction in national law between acts within jurisdiction and in excess of jurisdiction:

The former were valid and effective unless or until they were overturned by a superior court, whereas the latter were null and void from the outset.<sup>39</sup>

- A.14 In the modern law of judicial review, such a clear-cut distinction is difficult to draw.<sup>40</sup> The current (7th) edition of Wade and Forsyth: Administrative Law (published in 1994)<sup>41</sup> refers to the distinction between void and voidable, as one which "could *formerly* be applied without difficulty" (emphasis added) to the distinction between action which is ultra vires and action which is liable to be quashed for error of law. They go on to discuss the changed position since "the House of Lords declared all error of law to be ultra vires."<sup>42</sup> They conclude:

<sup>39</sup> This paragraph refers back to a discussion of the same distinction earlier in the judgment (paragraph 24), although no source was given. Study of the papers before the court suggests that the most likely source for this statement was a reference in one of the submissions (prepared in May 1993), to the following passage in W Wade, *Administrative Law* (6th ed 1988) p 349:

'Void or voidable' is a distinction which applies naturally and without difficulty to the basic distinction between action which is ultra vires and action which is liable to be quashed for error on the face of the record. *Action which is ultra vires is unauthorised by law, outside jurisdiction, null and void, and of no legal effect. But an order vitiated by error on its face is ... intra vires and within jurisdiction, but liable to be quashed ... An order which is merely voidable ... has legal effect up to the time when it is quashed, and in respect of that period it remains a valid order even after being quashed.* (Emphasis added)

In *R v Governor of HM Prison Brockhill ex p Evans*, HL, unreported, 27 July 2000, Lord Hobhouse (obiter) adopted a similar distinction, when he referred to *Benham* as illustrating "The basic distinction between an *ex facie* invalid order and an order *prima facie* valid but which is liable to be set aside". However, establishing the precise dividing-line in relation to judicial orders was not an issue in that case.

<sup>40</sup> A similar distinction has survived (not without difficulty) in the law of *habeas corpus*: see *R v Home Secretary ex p Cheblak* [1991] 1 WLR 890, 894 *per* Lord Donaldson MR. This "narrow view" was strongly criticised by the Law Commission as out of line with *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 in *Administrative Law: Judicial Review and Statutory Appeals* (1994) Law Com No 226, paras 11.14 - 11.16; but has since been re-affirmed, in the face of those criticisms: see *R v Oldham Justices ex p Cawley* [1996] 1 All ER 464, 478 *per* Simon Brown LJ. The Bowman Committee, of which Simon Brown LJ was a member, treated the law as settled, but recommended that *habeas corpus* should now be "subsumed" within the more flexible procedure of judicial review: Review of the Crown Office List: A List to the Lord Chancellor (March 2000), Appendix B, section 26 and Appendix G.

<sup>41</sup> See W Wade and C Forsyth *Administrative Law* (7th Ed 1994) p 340.

<sup>42</sup> W Wade and C Forsyth *Administrative Law* (7th Ed 1994) pp 340-344. The immediate stimulus for the change in the text seems to have been *R v Hull University Visitor ex p Page* [1993] AC 682, affirming the widest interpretation of *Anisminic Ltd v Foreign Compensation Commission* case [1969] 2 AC 147.

The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the void order remains effective and is in reality valid.<sup>43</sup>

A.15 In one respect, therefore, the Strasbourg Court's understanding of the significance of jurisdictional error, in English law, may have been unduly (if understandably) simplistic. Since, as the court emphasised, the issue was primarily one of English law, it would in theory be open to an English court, in the context of the HRA, to re-visit the issue. We will return further to this aspect, having considered the other relevant Strasbourg case.

### **(3) Perks and others v United Kingdom<sup>44</sup>**

A.16 These were eight separate cases, relating to applicants who had been imprisoned (for periods ranging from "several hours" to 9 days) following failure to pay sums due in respect of community charge. In each case, the committal order had been quashed on judicial review. The applicants sought compensation under the Convention, alleging breaches of Articles 5 (1) and (5) and Article 6. Before the Strasbourg Court the Government accepted that there had been violations of Article 6 but successfully resisted claims of violations of Article 5.

A.17 The violations of Article 6, which related to the lack of legal advice or representation before the magistrates, are not directly relevant to the present issue. In only one case, that of Mr Perks himself, did the claim result in an award of damages. In that case, the judge had found that it was unlikely that the magistrates would have committed Mr Perks if they had known more about his personal circumstances, and it was accepted that a reasonably competent solicitor would have drawn the magistrates' attention to those circumstances. He had spent 6 days in detention. "On an equitable basis" the Strasbourg Court awarded £5,500 for non-pecuniary damage.<sup>45</sup> In the other cases it found "no basis to speculate" as to the outcome of the proceedings before the magistrates' courts, had there been legal representation; and it made no award.

A.18 In relation to the claim under Article 5, the Court repeated the statement of principle in the passage quoted above from *Benham v United Kingdom*,<sup>46</sup> including the references to *Re McC (A Minor)*<sup>47</sup> and *R v Manchester City*

<sup>43</sup> W Wade and C Forsyth *Administrative Law* (7th Ed 1994) p 342 - 343.

<sup>44</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33.

<sup>45</sup> As to how the figure may have been arrived at, see the reference to this case in Part 3 para 3.10 note 15 above.

<sup>46</sup> 1996-III p 738, 22 EHRR 293.

<sup>47</sup> [1985] AC 528.

*Magistrates Court ex p Davies*.<sup>48</sup> It was noted that, under those cases, an inquiry into whether the non-payment was due to wilful refusal or culpable neglect was treated by the domestic courts as a condition precedent to their power to commit. The issue was whether the same could be said of the failures which had led to quashing of the decisions in the present cases.

- A.19 For this purpose, the judgments of the High Court, quashing the individual decisions, were analysed in some detail. For example, in *Perks* itself, Harrison J had held that the justices had “failed to take into account a material consideration”, because they had ignored evidence as to the applicant’s health.<sup>49</sup> The Strasbourg Court commented -

... the magistrates’ failure to enquire into the change of the applicant’s circumstances was seen as a failure to take notice of a relevant piece of evidence and draw the ensuing conclusions, rather than as neglecting an express statutory condition precedent to their jurisdiction. ... In these circumstances the Court does not find it established, with any degree of certainty, that the magistrates’ decision to issue a warrant against Mr Perks suffered from a defect other than unreasonableness within the meaning of the *Wednesbury* doctrine.<sup>50</sup>

- A.20 In the other cases, the legal error had been failure to consider alternatives to imprisonment. The Strasbourg Court had regard to the wording of the judgments in the particular cases, and concluded:

[T]he High Court apparently left open the possibility that the imprisonment orders were within the magistrates’ jurisdiction, their defect being only a fettered exercise of discretion, and that the use of the word “unlawful” in some of the judgments cannot be regarded as finding of a failure to observe a condition precedent. It cannot be excluded that these orders were “flawed” or “unlawful” in the sense of being an unreasonable exercise of discretion within the *Wednesbury* doctrine, but nevertheless fell within the jurisdiction of the courts by which they were made.

Furthermore the Court agrees with the Commission that there is no sufficiently strong indication that the consideration of alternatives to imprisonment in community charge proceedings, as in the applicants’ cases, was regarded as a jurisdictional issue under English law.<sup>51</sup>

- A.21 The Strasbourg Court’s overall conclusion was stated thus:

Against the above background, the Court finds that it cannot be said with any degree of certainty, in respect of any of the seven applications, that the judgments of the national courts quashing the

<sup>48</sup> [1989] QB 631.

<sup>49</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33 at para 15.

<sup>50</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33 para 64.

<sup>51</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33 para 67.

magistrates' imprisonment orders were to the effect that the magistrates had acted in excess of jurisdiction within the meaning of English law. The Court, therefore does not find it established that the imprisonment orders were invalid, and thus that the detention which resulted from it was unlawful under national law.<sup>52</sup>

- A.22 Under the heading of "Arbitrariness" the court accepted that the purpose of the orders was to secure the payment of community charge and therefore compatible with the objectives of Article 5(1)(b); that there was no suggestion of bad faith; and finally:

While it is not excluded that a fettered exercise of discretion or failure to have regard to a relevant piece of evidence may render arbitrary an otherwise formally lawful decision, the Court does not find it established that in any of the cases of the seven applicants the magistrates' orders amounted to arbitrariness.<sup>53</sup>

#### 4 COMMENTARY

- A.23 These two Strasbourg decisions show clearly the respect which was paid by that Court to the reasoning of the English judges in their judgments quashing the committal orders. Unfortunately, the Strasbourg Court's search in those judgments for a clear indication as to whether the errors were regarded as "jurisdictional" was probably mis-directed. There would have been no reason for the English court to decide any such question, nor to distinguish between the different heads under which the decision could be quashed on judicial review. The guidance in *Re McC(A Minor)*<sup>54</sup> was wholly irrelevant to the issues then before the English courts.
- A.24 However, these issues are likely to arise for consideration by the domestic courts under the HRA in similar cases in the future.<sup>55</sup> The Strasbourg judgments no doubt will be seen as defining the basic concept. That is, that for an order of a court to be treated as "unlawful" for the purpose of Article 5, there must be a defect going to "jurisdiction"; and that this implies something more fundamental than an error of law, or even *Wednesbury* unreasonableness.
- A.25 *Re McC(A Minor)*<sup>56</sup> represents authoritative guidance of the House of Lords on a similar issue in a similar context. It is easy to see, therefore, why it was relied on by the parties in *Benham v United Kingdom*.<sup>57</sup> One would expect it to be at least the starting-point for any discussion in the English courts. However, its specific

<sup>52</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33, para 68.

<sup>53</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33, para 70.

<sup>54</sup> [1985] AC 528.

<sup>55</sup> It is understood that the new Rules under s 7 of the HRA will include a Practice Direction for the court in such a case to make a specific finding whether the Convention rights have been infringed.

<sup>56</sup> [1985] AC 528.

<sup>57</sup> 1996-III p 738, 22 EHRR 293.

adoption by the Strasbourg Court has to be seen as a reflection of their understanding, guided by the parties, of the position in English law, rather than as an independent determination of an issue of Convention law.

- A.26 There is no difficulty about the first of Lord Bridge's categories - the "narrow and original sense". If justices are "not entitled to enter on the inquiry in question",<sup>58</sup> any order they make will be clearly "unlawful" in Convention terms.
- A.27 Lord Bridge's second category - "gross and obvious irregularity" in procedure<sup>59</sup> - raises a question of overlap with Article 6 (right to fair trial). It is noteworthy that in *Benham v United Kingdom*<sup>60</sup> and *Perks v United Kingdom*,<sup>61</sup> the court kept the issues under Article 5 and Article 6 separate. Thus, although a breach of Article 6 was found in all cases, it was not held that this by itself constituted "unlawfulness" for the purpose of Article 5. This separation of the articles may be important in the context of the HRA. A breach of Article 6 would not be sufficient to provide a basis for a claim for damages in respect of judicial action. Such a claim is confined expressly by section 9(3) to what is required by Article 5(5). Thus, for example, it appears that the award made by the Strasbourg Court to Mr Perks the breach of Article 6 would not be made under the HRA.
- A.28 It is likely to be seen as an issue of degree.<sup>62</sup> Lord Bridge envisaged that it would only be in extreme cases that a procedural breach would affect jurisdiction. There is a possible parallel in the approach of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*.<sup>63</sup> It was held that the judge had failed to observe -

a fundamental rule of natural justice; that a person accused of an offence should be told what he is said to have done plainly enough to give him an opportunity to put forward any explanation or excuse that he may wish to advance.<sup>64</sup>

<sup>58</sup> See for example *R v Waltham Forest Justices ex p Solanke* [1986] QB 983, where the claimant was imprisoned by magistrates for default under a High Court maintenance order; but the magistrates had no jurisdiction because the order had not been registered in the magistrates' court. (Damages were, however, limited to 1 penny, under Justices of the Peace Act 1979 s 52: see para A.4 n 12 above)

<sup>59</sup> It has been suggested that the irregularities must be "such as to strike at the very root of the judicial process rendering the trial little more than a 'sham'": See *Clerk & Lindsell on Torts* (17th Ed 1995) para 16-12.

<sup>60</sup> 1996-III p 738, 22 EHRR 293.

<sup>61</sup> Application nos 25277/94 et al, 12 October 1999, 30 EHRR 33.

<sup>62</sup> The Strasbourg Court itself appears to recognise differences of degree in the application of Article 6. In *Drozd and Janousek v France and Spain* A 240 (1992), 14 EHRR 745, para 110, the Court indicated that a Contracting State should refuse to extradite a person in any case where the underlying criminal conviction resulted from "a flagrant denial of justice" violating Article 6 of the Convention.

<sup>63</sup> *Maharaj v A-G of Trinidad and Tobago* [1979] AC 385 See Part IV paras 4.16 - 4.18 above

<sup>64</sup> *Ibid* at p 391D.

This amounted to a contravention of his right, under section 1(a) of the Constitution of Trinidad and Tobago, not to be imprisoned other than “by due process of law”, for which he was entitled to monetary “redress”.<sup>65</sup>

A.29 The Privy Council, however, emphasised the limits of their decision -

... no mere irregularity in procedure is enough even though it goes to jurisdiction;<sup>66</sup> *the error must amount to a failure to observe one of the fundamental rules of natural justice.*<sup>67</sup> (Emphasis added)

A.30 It is more problematic to define the limits of Lord Bridge’s third category, that of a determination which fails to provide “a proper foundation in law” for the order made. *R v Manchester City Magistrates’ Court ex p Davies*<sup>68</sup> provides only limited assistance. The reasoning of the majority is not easy to reconcile with Lord Bridge’s exposition.<sup>69</sup> Their view, as Sir Roger Ormrod observed,<sup>70</sup> makes it very difficult to distinguish this kind of error from the other traditional grounds of judicial review. In any event, the case does not purport to be more than an application of *Re McC* to its own rather unusual facts.

## 5 CONCLUSION

A.31 The purpose of this Appendix has been to highlight an important issue relating to the application of Article 5 to judicial acts. Because of the special exception, provided by section 9(3), to the general immunity for the courts from claims to damages, it is an issue which may have to be reconsidered in the domestic courts. They will not technically be bound by the reasoning of the House of Lords in *Re McC*, because the statutory context was different. However, its high authority and its effective adoption by the Strasbourg Court make it likely that it will in practice be followed. The first and second categories defined by Lord Bridge do not raise serious questions of principle. The boundaries of the third category are less clear-cut, particularly if regard is had to its application in *R v Manchester City Magistrates’ Court ex p Davies*. However, it may properly be seen as confined to

<sup>65</sup> Constitution of Trinidad and Tobago of 1962, s 6(1).

<sup>66</sup> This reference to “jurisdiction” may be seen as another example of “the many different shades of meaning” of that word (see per Lord Bridge para A.5 above), rather than as throwing any doubt on the first of Lord Bridge’s categories.

<sup>67</sup> [1979] AC 385, 399.

<sup>68</sup> [1989] QB 631.

<sup>69</sup> O’Connor LJ, relying on Lord Bridge’s description of the error in *Re McC (A Minor)* (see para A.6 above), treated it as non-fulfilment of “a statutory condition precedent... essential to the imposition of a sentence of imprisonment...” (p 638G). However, this seems overlook the fact that in *Re McC (A Minor)*, as in *O’Connor v Isaacs*[1956] 2 QB 288 (see para A.5 n 22 above), there was a total failure to observe the condition precedent. In *R v Manchester City Magistrates’ Court, ex p Davies*, as Neill LJ, as well as Sir Roger Ormrod (dissenting), appeared to accept, the magistrates’ error was in substance simply to have asked themselves the wrong question in law, a form of error which, in *McC*, was not treated as going to jurisdiction (see para A.5 note 20 above).

<sup>70</sup> [1989] QB 631, 651.



cases where there has been a total failure<sup>71</sup> to comply (rather than merely defective compliance) with a statutory condition upon which jurisdiction depends. On this basis, defective compliance with a statutory pre-condition may result in a committal order being quashed under domestic law, but will not make it unlawful for the purposes of Article 5(5), or give rise to a claim for damages under section 9(3).

<sup>71</sup> As the Strasbourg Court interpreted *R v Manchester City Magistrates' Court, ex p Davies*: see para A.12(4) above.

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