HRA Claims: Where Are We Now?

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Introduction

1. 2017 has been a key year for guidance from senior courts on the scope and management of claims under the Human Rights Act 1998 ('HRA'). This document is intended to be a concise update on the state of HRA claims and to offer some broad guidance on practical steps to be taken where a potential HRA claim arises. That there are viable claims to be pursued is in no doubt. The real question is how such claims are to be run, and by whom.

2. Given the one-year primary limitation period, there is often a need to act quickly in order to preserve a cause of action under the HRA and avoid any possible claims for professional negligence.

Recommended Reading

- ***London Borough of Hackney v Williams & Williams*** **[2017] EWCA Civ 26** ('***Hackney v Williams***');
- ***Re SW & TW (Human Rights Claim: Procedure) (no. 1)*** **[2017] EWHC 450 (Fam)** ('***Re SW & TW***');
- ***Re CZ (Human Rights Claim: Costs)*** **[2017] EWFC 11** ('***Re CZ***'); and
- ***H (A Minor) v Northamptonshire County Council & The Legal Aid Agency*** **[2017] EWHC 282 (Fam)** ('***H v Northamptonshire***').

Re-Cap

3. Within the context of care proceedings, the senior courts have ruled that the following acts (or omissions) have been unlawful:
    a. Failing for an unacceptably long time to:
        i. conduct a proper assessment of the needs of a child;
        ii. prepare and put in place a proper care plan for a looked after child;

iii. meet the assessed needs of a looked after child; and
iv. issue proceedings.

b. Failing to:
i. identify and put in place appropriate support for a looked after child;
ii. promote contact between a looked after child and their siblings and/or parents;
iii. involve the child's parents in its decision-making process and inform them of its decisions;
iv. review its decision-making in proceedings;
v. analyse and disclose relevant evidence; and
vi. via the independent reviewing service, to challenge the authority's conduct.

4. At a time when local authority resources are stretched to—if not beyond—breaking point, the potential for cases to fall between the cracks has not been greater. For valuable resources to be diverted from social care will only worsen the problem, but this must be balanced against adequately compensating private individuals where there is a proven or admitted violation of their Convention rights. The approach exhorted by Cobb J may see the burden of satisfying judgments for breach of the HRA shift from social services care budgets to local authorities' insurers.

5. Subject to any further amendments to the European Union (Withdrawal) Bill, the current draft provides for any direct EU legislation retained for the purposes of the HRA to be treated as primary legislation, and not subordinate legislation (Sch. 8, Pt. II, Para. 19(1) (Bill 5)).

Procedure

6. There exist two routes for HRA claims.

7. First, *per* Munby J (as he was) in ***Re L (Care Proceedings: Human Rights Claims)*** **[2004] EWCA Civ 54**:
    a. That there is no need for any free-standing application;
    b. That claims should be heard within proceedings before the tribunal seized of the matter, irrespective of in which court or division they are being heard;
    c. A HRA argument does not of itself necessitate a transfer to the High Court (but if it does then the whole case should be transferred);
    d. If a HRA claim is raised following the conclusion of care proceedings, then the claim should be issued in the High Court

8. It is impossible to ignore that the ***Re L*** decision is now some thirteen years old. It is not suggested here that the decision is wrong, or that it is impossible to bring a claim within proceedings, though the question remains as to whether any such action could be brought validly and with sufficient funding cover and/or costs protection.

9. Second, and most recently, *per* Cobb J in ***Re SW & TW***, who began his exposition of the pitfalls of the approach taken in that case at paragraph 3 of his judgment:

> *In order to set a context for what follows, I consider that it may be helpful if I identify at the outset of this judgment some essential procedural points about claims of this kind. This is a case which in some respects has veered 'off the rails'; in material respects it was never 'on the rails' in the first place.*

10. His Lordship continued at paragraph 27:

> *I do not believe that Munby J intended his comments in* ***Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam); [2003] 2 FLR 160*** *to have the effect of substituting a different regime of*

procedural rules, as contended for in this case. Re L was a case in which a mother sought an order that the local authority should be compelled to change its care plan, on the basis that the plan before the court (for adoption) was unlawful and violated her ECHR rights. Munby J referred at [25] of Re L (see below) to the appropriateness of the court, while exercising its CA 1989 jurisdiction, being in a position to offer an "appropriate remedy within the care proceedings themselves" under section 7(1)(b)

11. Before commenting at paragraphs 37 and 38:

Once it became apparent that the HRA 1998 claim on behalf of the children had been conducted on a procedurally defective basis (namely with the Children's Guardian appointed within the Part IV proceedings purporting to be a Part 21 litigation friend), Ms Grief QC and Mr. Edwards, who had been advising and representing the guardian throughout, withdrew from the case, and Mr. Tughan QC appeared on the next hearing date, pro bono, on behalf of the children to try to salvage the application, and steer it in the direction of a satisfactory conclusion. In spite of his best efforts, I considered that I could not take any further step in the case without the children being properly represented by a litigation friend other than a Cafcass guardian, and in spite of a helpful suggestion that I could appoint a panel solicitor local to the children (who had indicated his willingness so to act), I felt it right to issue an invitation to the Official Solicitor (who had been forewarned) to be litigation friend the children in this case pursuant to Part 21.6. I did so primarily because it seemed to me that not only would the Official Solicitor be able to assist these young people in this litigation, but it would also give him the opportunity to address – if so advised – some of the issues which have arisen in this case, in an attempt to ensure that the problems are not repeated.

This procedural difficulty has delayed the conclusion of the proceedings, a frustration aggravated by the fact that the Children's Guardian and legal team appointed in the CA 1989 proceedings had bona fide (albeit without proper authority under the rules) purported to agree with the Local Authority the quantum of damages in the HRA 1998 proceedings, and this awaits my approval. There is also agreement as to the issue of inter partes costs.

12. The key points to take from ***SW & TW*** are:

    a. HRA claims are governed by the Civil Procedure Rules 1998;
    b. Whether heard within proceedings or as a freestanding claim, claims for declarations and/or damages should be—
        i. Issued formally under Pt. 8 of the CPR;
        ii. Not on Form C2; and
        iii. Not introduced via a skeleton argument or position statement.
    c. A child is a protected party under CPR Pt. 21 and requires a litigation friend—
        i. The Children's Guardian does not fulfil the CPR Pt. 21 requirements by virtue of FPR rule 16;
        ii. The Children's Guardian, appointed in specified proceedings, may give advice about the appropriateness of pursuing a HRA claim but may not act as litigation friend of 'front' the HRA claim itself;
        iii. Cafcass cannot authorise its officers to act as litigation friends to minor claimants (see section 12 of the Criminal Justice and Court Services Act 2000);
        iv. Cafcass' general policy does not support Children's Guardians acting as litigation friend; and
        v. Compare the 2017 *Cafcass Guidance – Use of Professional Time to Benefit Children*, which would appear to support this contention.
    d. The requirements for a litigation friend are set out in CPR Pt. 21; and

e. The LAA may issue a public finding certificate for declarations only (not damages) which may affect:
    i. Remuneration for work done pursuing damages;
    ii. The amount of costs a successful claimant can recover from the LAA; and
    iii. The LAA's ability to levy the charge against damages for work done without the scope of a funding certificate.

Merits

13. Local authorities responsible for safeguarding children carry a heavy obligation to ensure they perform their statutory duties at all times in a manner compatible with the Convention (***Re CZ***). The HRA can be an extremely effective social work tool if used well. Unfortunately, that is not always the case.

14. In order to succeed in a claim for declarations and/or damages, the claimant must:
    a. Prove that the local authority (or other public body) has acted, or failed to act, in a way which is incompatible with a Convention right;
    b. Prove that they are the 'victim' of that unlawful act; and
    c. Persuade the Court that declarations (and damages moreover) are 'necessary' to afford them 'just satisfaction'.

15. The making of declarations for breaches does not mean that an award in damages will follow (see ***P v South Gloucestershire Council* [2007] EWCA Civ 2**). It is a discretionary remedy.

16. There is perhaps no better insight into the senior courts' approach than ***Hackney v Williams***. The appeal turned on the construction of section 20(7) of the Children Act 1989 and, in particular, whether a parent subject to bail conditions not to have any unsupervised contact with their children was prevented for the purposes of section 20(1)(c) from providing suitable

accommodation for them. In finding for Hackney LB on appeal, Sir Brian Leveson's reasoning cleaves good practice guidance from liability under the HRA. Paragraphs 62, 63 and 77 reads:

> *Having now reviewed the existing case-law, all of which post-dates the removal of Mr and Mrs Williams' children in 2007, it is necessary to determine what, as a matter of law, as opposed to subsequently identified good practice, was required before the local authority were permitted to accommodate the Williams children under s. 20 of the 1989 Act.*
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> *The starting point must be the wording of the statute itself…*
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> *.. The focus of the court in the present appeal is on the bottom-line legal requirements that are established by s 20 and within which a local authority must act. The guidance given in the family court, which has built upon that bottom-line in the period since the Williams' children were removed, identifies clear, cooperative and sensible ways in which a voluntary arrangement can be made between a parent and a local authority when a child may need to be accommodated; it is, in short, good practice guidance and a description of the process that the family court expects to be followed. For reasons of good administration, the practice guidance should continue to be followed, notwithstanding the limits of the underlying legal requirements in s 20 that I have identified but a failure to follow it does not, of itself, give rise to an actionable wrong, or found a claim for judicial review.*

17. Following ***Williams v Hackney***, it may be prudent to consider HRA claims viable where, on the specific facts of that case, actions in negligence or for breach of statutory duty also lie. Claimants may now struggle to establish a breach of their Convention rights without also establishing a breach of a legal

requirement upon a local authority by reason of primary or secondary legislation.

Costs & The First Charge

18. The issue of costs is an important one. Not only because of the applicability of the proportionality of the Civil Procedure Rules but also because of the 'statutory charge'.

19. ***CZ*** is a cautionary tale. As Cobb J's judgment explains, for a damages claim worth an agreed £3,750 per claimant:

> *When CZ was exactly one week old (13 November 2015) and still at hospital following his birth, Kirklees Council issued an application under Part IV of the CA 1989 seeking public law orders in relation to him; on the same day, after a court hearing at which the parents were neither present nor represented, an interim care order was made and CZ was removed from his parents' care at the hospital. He was placed with his paternal grandparents. On 29 January 2016, CZ was returned to his parents' care where he has lived successfully ever since.*
>
> *…*
>
> *On 11 April 2016 the father made an application for a declaration that his rights under Article 6 and Article 8 of the ECHR had been breached, and seeking an order for damages. The Children's Guardian (on behalf of CZ) and the mother followed suit with similar applications issued on 29 April 2016. These applications were brought within the CA 1989 proceedings in accordance with the guidance offered by Munby J (as he then was) in* ***Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam)*** *at [31]-[38], an approach which was endorsed in* ***Re V (Care Proceedings: Human Rights Claims) [2004] EWCA Civ 54****…*

Notwithstanding the limited nature of the dispute, the ordinary requirements of the Family Procedure Rules 2010 and Civil Procedure Rules 1998, and my specific exhortation to the parties to take a realistic view of the case, bundles for the hearing exceeding in total 2,000 pages were filed (Rule 27.6 of the FPR 2010, and the Bundle Practice Direction (PD27A) seem to have been totally ignored notwithstanding the mandate that they "must be followed"), together with an authorities' bundle containing over 30 authorities (even then omitting some of the key authorities). No reading list was provided, and only the sketchiest agreed note of the points of agreement. I was advised at the hearing on 8 February 2017 that the overall cost of the two associated claims was in excess of £120,000, all of which – one way or another – are to be paid from public funds, unless I make an order against the lawyers responsible. I am dismayed that the preparation of this case has been undertaken in a way which was not only contrary to my formal direction, but was wholly disproportionate to the issues. I deprecate the unwarranted expenditure.

There is no doubt in my mind, indeed it is admitted, that Kirklees Council breached the ECHR rights of a baby boy and his parents in purported fulfilment of its safeguarding duties, but in this case – as in all others of its kind – a careful and realistic eye has to be kept on proportionality of the process by which relief is sought, and on outcome.

20. Due to the applicability of the 'statutory charge' under section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, those awards were at risk of being absorbed entirely without an order for costs. Considering the re-issued 2016 Practice Direction on just satisfaction issued by the President of the ECtHR, Cobb J resolved to award only a small proportion of the claimants' costs referable to the found/admitted violations. Those costs incurred following the round table settlement meeting were not allowed.

21. There is an apparent tension between the approaches of judges at Divisional level. Keehan J's order in ***H v Northamptonshire*** avoids the pyrrhic result in ***CZ*** where a successful claimant is left without an award in damages by making a third party costs order directly against the Lord Chancellor together with an invitation to amend section 25 and the Civil Legal Aid (Statutory Charge) Regulations 2013.

22. In ***H v Northamptonshire***, liability under the HRA for misuse of section 20 of the Children Act 1989 was admitted, with the question for determination at trial being quantum. The issue of the applicability of the 'statutory charge' was listed for two days, and the LAA confirmed its intention to intervene and indicating that the HRA claim was 'connected' and any award in damages would be subject to the charge.

23. In a stunning about turn two days before the contested hearing, the LAA wrote to say that it no longer considered the proceedings as 'connected' and that the statutory charge would not apply. His Lordship had little hesitation in making a third party costs order against the Lord Chancellor.

24. As Keehan J was at pains to highlight (at paragraphs 86 and 88):

> *…I am at a loss to understand why the LAA cannot make a determination of whether the statutory charge is applicable to any award of damages. The issue for the LAA, pursuant to s.25 LASPO, is whether the factual basis of the HRA claim is 'connected with' the factual basis of the concurrent publicly funded care proceedings and thus whether the statutory charge is applicable. The quantum of any damages awarded in respect of the HRA claim, pursuant to s.25 LASPO and the Civil Legal Aid (Statutory Charge) Regulations 2013 ('CLA(SC)R'), is immaterial to a determination of the applicability of the statutory charge in any particular case.*

…

I go further. It is essential, in my judgment, that a court determining the quantum of a claimant's HRA damages, where liability is admitted on an agreed basis, and determining any consequential orders for costs, must and should know the stance of the LAA on the applicability of the statutory charge.

25. The following points from Keehan J's judgment should be noted carefully (see paragraph 117):

    a. Alleged breaches of Convention rights must be set out with particularity in a LBC as soon as possible;
    b. Every effort should be made to settle the issues of liability and quantum without the need to issue proceedings;
    c. Where that is achieved, a claim should be issued under Pt. 8 of the Civil Procedure Rules 1998 for the settlement to be approved by the court;
    d. The local authority should, save for exceptional circumstances, pay the reasonable costs of the claimant's HRA claim;
    e. If it is necessary to issue a formal claim, proceedings should be issued separately with the benefit of a separate funding certificate; and
    f. The LAA should be invited to make a decision as to whether the first charge applies to any award of HRA damages.

26. Unless and until there is clarification from the Court of Appeal or a change in the legislation, it is likely that obtaining a clear view from the LAA will be less than entirely straightforward. Whilst issuing a separate Pt. 8 claim covered by a separate funding certificate will increase the likelihood of the statutory charge not biting, it does not appear to act as a guarantee. Caution is required.

Quick-Reference Guide

27. Given the rapid pace at which this area of law continues to develop, there is no substitute for bespoke, focused advice on each potential HRA claim. An opportunity to bring a claim may be lost through inaction.

28. Helpful, pragmatic steps you can take include:
    a. Seeking advice at the earliest opportunity, often assisted by the following documents—
        i. A forensic chronology from the care proceedings;
        ii. Children's Guardian's analysis and recommendations;
        iii. Care plans;
        iv. Court orders;
        v. LAC/CIC meeting minutes; and
        vi. Any correspondence relevant to the HRA claim.
    b. Identifying the relevant limitation period(s);
    c. Confirming the extent of your funding;
    d. Confirming the extent of your insurance cover;
    e. Considering disclosure (including an order permitting disclosure of the papers in the care proceedings to the Official Solicitor);
    f. Ensuring validity of instructions or the appointment of a CPR compliant litigation friend; and
    g. Attempting (subject to merits, funding and costs protection) alternative dispute resolution.

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Law is correct as at 5th September 2017