

Remedies

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ECHR Art. 13 Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

This is not included in the HRA98 which is generally explained in terms of the existence of HRA98 itself providing an effective remedy. If any amendment of HRA98 were contemplated, then consideration would need to be given as to how that impacted on UK obligations under Art. 13 ECHR. To fully realize this right, the Court(s) implementing the NI BoR may need to have the power to directly create remedies for particular situations where existing remedies are ineffective.

In cases where both a HRA98/ECHR right and a NI BoR right are engaged, determining an 'effective remedy' might be a complex decision.

EU Charter of Fundamental Rights & ECJ

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The approach of the ECJ perhaps tends to oppose 'discretion' about remedies when breaches of Community law are involved. It (naturally) favours clear provisions on remedies which can represent a harmonization of domestic provisions enacting EC law. For example, its approach might prefer a 'right to

damages/reparation' rather than a court being granted the discretion to award same. This is perhaps important given the growing role of the EU Charter of Fundamental Rights.

The ECJ has accepted that, in exceptional circumstances, it can restrict the effect of its judgment to the applicant or those who have already initiated proceedings and thus avoid the granting of a particular remedy having too wide-reaching an effect.

Human Rights Act 1998 (HRA98)

A Section 3 type of interpretive provision could probably be applied with respect to Acts of the Assembly.

An equivalent to the HRA98 section 4 power to make declarations of incompatibility could be an important remedy in the particular circumstances of NI. The 'recognition' of rights violation such a provision entails could chime with other concerns about recognition of responsibility during the conflict. Much thought would need to be given as to which court(s) might have this power or the power to strike down NI Assembly legislation. This section of HRA98 has only been invoked about 15 times.

Under the section 8 (1) of the HRA98 each court is given a discretionary power to grant "such relief or remedy, or to make such order, within its powers currently held as it considers just and appropriate". Although seemingly broad, this is power is greatly limited by the 'within its powers currently held' clause.

From DCA 'Review of Implementation of Human Rights Act' (2006)

"If a claimant successfully establishes a violation of Convention rights, he has a possible claim for damages under section 8. However section 8(3) expressly limits the circumstances in which damages may be awarded for a breach of Convention rights. This has been interpreted so strictly by the courts that the general view of legal commentators is that it is now very difficult to obtain damages under the HRA. The House of Lords has held that a finding of breach is generally sufficient redress under the HRA. They therefore declined to award damages even where the consequence of the breach was that a prisoner served an additional 21 days in prison (*R (Greenfield) v Home Secretary* [2005] 1 WLR 673). They also held that the level of damages should be commensurate with the levels of compensation available in Strasbourg – which are generally acknowledged to be lower than those available for domestic law torts. Moreover section 8(4) of the HRA requires domestic courts to take into account the principles applied by the European Court of Human Rights in relation to damages. These include, for example, the fact that in deciding whether to award compensation account may be taken of the conduct and character of the claimant

(*McCann v UK* (1996) 21 EHRR 97). Perhaps as a result of this narrow approach, it appears that damages have been awarded in only three reported cases: *R (Bernard) v Enfield London Borough Council* ([2003] HRLR 111 – £8,000 was awarded to a disabled claimant who was required to live in unsuitable accommodation for 20 months); *R (KB) v Mental Health Review Tribunal* ([2004] QB 936 – £750 to £4,000 for delays to Mental Health Review Tribunal hearings); *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360 (QB) – £50,000 to parents of a witness murdered because of inadequate police protection).”

Report of the NIHRC Bill of Rights Implementation Working Group

The Report divided remedies into two groups—those available before a breach and those available after. The term ‘remedies’ was interpreted broadly to include what the Report termed ‘preventative measures’.

Before a breach:

- Proactive referral procedure where compatibility of draft legislation with the Bill of Rights is in doubt. This presumes that the appropriate body exists to adjudicate on draft legislation, and it is difficult to see options other than a special/constitutional court performing this function. It would become problematic if the proactive procedure were only to apply to certain rights.
- Injunction.

After a breach:

- Statement of vindication of rights (as provided for by the European Court of Human Rights)
- Public apology, including public acknowledgement of the facts and acceptance of responsibility
- An accurate account of the violations which occurred, also to be included in future training and education materials
- Other restorative justice type remedies (eg. tributes to victims)
- Recommendations as to measures which would help to prevent future breaches
- Compensation (different types) or other reinstatement
- Costs (including punitive)
- Voiding laws and decisions, or statement of incompatibility and fast track amendment
- Fair trial safeguards excluding, in principle, evidence taken in violation of rights (can be subjected to exceptions)
- Complex constructive injunctions (requiring that remedial action be taken, eg. US examples of affirmative action and bussing)
- Ensuring public access to information about rights

No indication of preferred choices or reasons in favour of particular remedies being available was expressed. No consideration was presented as to how other issues such as standing or application would impact on the remedies which should or could be available.

Making a Bill of Rights for Northern Ireland (September 2001)

With a keen eye on Art. 13 of the ECHR, the NIHRC suggested the following clause:

Courts shall grant to any person or body whose rights and freedoms under this Bill of Rights have been or may be violated an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate.

The key Issue raised was the need for a clear relation between the remedies and with particular courts: for example, if remedies available were to include striking down legislation or compensation at a level beyond which a court might otherwise have the power to award.

The basic dispute is whether such a clause allows too much innovation, and thus uncertainty, or whether it allows creative means for the enforcement of socio-economic rights in a realistic manner.

Progressing a Bill of Rights for Northern Ireland: An Update (April, 2004)

In this Report the NIRC proposed the following provision on remedies:

Courts shall grant to any person or body whose rights and freedoms under this Bill of Rights have been or may be violated an effective remedy such as they consider just and appropriate. (Section 18 (4))

This clause was designed to ensure ‘a very wide variety of remedies’, but no argument is offered as to why this is necessary or appropriate.

Issues arising

What remedies can reasonably be available depends in large part on which court(s) would be enforcing the NI Bill of Rights.

Is there a need to specify particular remedies in the BoR itself?

What relation might the remedies available under any the NI Bill of Rights Act have to those available under HRA98? Could they differ in principle and in practice?

If there are two Acts with different enforcement mechanisms, does this give shape to the range of remedies available in any NI BoR specific enforcement mechanism?

Are some rights more fundamental than others and thus properly open to a greater (innovative and discretionary) range of remedial action to ensure that the right is effective?

If there is wide applicability, how can available remedies be tailored to this? For example, if HRA98 had applied in YL case, what possible remedy could have addressed a decision by the private company to close the home?

Some remedies could be integrated into particular rights. For example, ECHR art. 5 (4) contains the right of a person to challenge the basis of their detention before a court and possibly have their release ordered.

An equivalent to the HRA98 section 4 power to make declarations of incompatibility could be an important remedy in the particular circumstances of NI. Much thought would need to be given as to which court(s) might have this power or the power to strike down NI Assembly legislation.