

## Proposals for a permission stage and judicial remedies



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## PERMISSION STAGE

### The proposal

- A permission stage for human rights claims
- Claimants to demonstrate they have suffered a “significant disadvantage” in order to bring a claim
- “Overriding public importance” limb for exceptional cases that fail to meet the “significant disadvantage” threshold but where there is a highly compelling reason for the case to be heard

## PERMISSION STAGE

### Stated justification

Command paper refers to:

- A proliferation of human rights claims '*not all of which merit court time and public resources*'
- Loss of trust in justice system when frivolous or spurious cases come before courts, even if ultimately unsuccessful
- Need to ensure that courts focus on genuine and credible claims/cases where a genuine harm or loss has been caused
- Need to ensure unmeritorious claims are filtered earlier

# PERMISSION STAGE

- Which proceedings? All proceedings? What about statutory appeals in the FTT (IAC)?
- What would it add to existing powers/control mechanisms for filtering out unmeritorious, frivolous claims? Not clear how much difference it would make in practice...

## PERMISSION STAGE

### Existing powers/control mechanisms

- Permission stage already exists in judicial review.
- Courts have power to strike out claims which have no reasonable prospects or are abusive.
  - This *includes 'pointless and wasteful litigation'* where it can be demonstrated that the benefit attainable by the claimant in the action is of such limited value that *'the game is not worth the candle'* and the costs of the litigation will be out of all proportion to the benefit to be achieved: *Jameel v Dow Jones and Co* [2005] EWCA Civ 75; [2005] Q.B. 946)
  - Defendant must normally make an application, and applicant bears burden of justifying strike out
  - Command paper – *'wrong that burden is on public bodies to apply to strike out frivolous or spurious claims. A permission stage would shift responsibility to the claimant to demonstrate that a human rights claim does, in practice raise a claim which merits the court's attention and resources'* (para 221)

## PERMISSION STAGE

### “substantial disadvantage”: Article 35 of ECHR

Article 35(3)(b):

*‘The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:*

...

*(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.’*

Introduced by Protocol No 14, in 2010. Stated aim was to enable a more rapid disposal of unmeritorious cases (against a background of an ever-increasing caseload).

## PERMISSION STAGE

### “substantial disadvantage”: Article 35 of ECHR

*‘Inspired by the general principle de minimis non curat praetor, this [criterion] ... rests on the premise that **a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity** to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. **The severity of a violation should be assessed taking into account both the applicant’s subjective perceptions and what is objectively at stake in a particular case.** In other words, **the absence of any “significant disadvantage” can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant.** However, the applicant’s subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds...**A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest ...’***

(*Stravropolous v Greece*, App No 52484/18, para 28)

## PERMISSION STAGE

### “substantial disadvantage”: Article 35 of ECHR

Factors considered by ECtHR in determining whether “significant disadvantage”

- Nature of violated right;
- Gravity of alleged violation; and/or
- Possible consequences of alleged violation on the personal situation of the applicant.

(*Giusti v Italy*, App No 13175/03)

## PERMISSION STAGE

### “substantial disadvantage”: Article 35 of ECHR

- Has not been applied to cases concerning:
  - Article 2 (*Makuchyan & Minasyan v Azerbaijan*, App No 17247/13, para 72)
  - Article 3 (*Y v Latvia*, App No 61183/08, para 44)
  - Article 5 (*Zelcs v Latvia*, App No 65367/16, para 44)
  
- Application of criterion should take due account of importance of the relevant freedom, and be subject to careful scrutiny, in cases concerning:
  - Article 9 (*Stravropolous v Greece*, App No 52484/18, para 29)
  - Article 10 (*Margulev v Russia*, App No 15449/09, para 41)
  - Article 11 (*Obote v Russia*, App No 58954/09, para 31)

# JUDICIAL REMEDIES

## s.8 HRA 1998

*‘(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*

....

*(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.’*

# JUDICIAL REMEDIES

## The proposals

- Strengthening the rule in s.8(3) so as to require claimants to pursue other claims they may have before pursuing a human rights claim.
- Setting out factors for the courts to consider in deciding whether to award damages in a claim against a public authority and how much. The proposed factors are:
  - (i) the impact on the provision of public services;
  - (ii) the extent to which the public authority had discharged its obligations towards the applicant;
  - (iii) the extent of the breach;
  - (iv) the fact that the public authority was trying to give effect to express provisions or the clear purpose of legislation.
- No proposal to remove or soften s.8(4)?

- Number of the proposed factors e.g. (ii) and (iii) are already considered by courts.
- Proposed factor (i) (impact on provision of public services) - a departure?
  - *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, para 56 – ‘in considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as whole’ who ‘have an interest in the continued funding of a public service’.
  - Has not taken off. McGregor on Damages, 50-115 – ‘Lower courts have invoked this factor [i.e. protection of public funds] on occasion, but with decreasing frequency.’
  - Has been controversial. See e.g. *Mott v Environment Agency* [2019] EWHC 1892 (Admin), para 27: ‘fundamentally objectionable as a matter of principle. It amounts to a suggestion that the court should make some arbitrary reduction in the compensation awarded to a citizen for financial loss caused by the unlawful exercise of state power by reason of the assumed laudable purposes that the state sought to pursue.’ *Shilbergs v Russia*, App No 20075/03, para 78: ‘the court finds it anomalous for domestic courts to decrease the amount of compensation to be paid to the applicant for a wrong committed by the State by referring to the latter’s lack of funds...’
  - How would assessment be made? Evidence required? Courts have been willing to assume a degree of impact in this context (see *Anufrijeva*, para 75) and in others (risk of diversion of resources and defensive practice, when restricting duty of care imposed on public authorities in negligence).

# Thank you for listening

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