

17. Claims Against Public Authorities alleging Serious Wrongdoing etc

3C-144

17.1 Scope of Section 8

1. ~~Although s~~Section 8 is entitled “Claims against Public Authorities alleging Serious Wrongdoing etc”. ~~T~~This part of the Code only covers a limited range of the various types of claim that can be made against public authorities such cases. Section 8 of the Code only applies to applications for Legal Representation for proceedings against public authorities which:
 - (a) concern serious wrongdoing, abuse of position or power or significant breach of human rights (see section 17.2 below); and
 - (b) do not fall within the scope of judicial review claims as defined in section 7 of the Code; and
 - (c) do not fall within the scope of housing claims as defined in section 10.
2. Guidance on the scope of judicial review claims is contained in section 16.1 of the guidance. That section applies where the court will be exercising an administrative law jurisdiction in deciding, as a matter of public law, whether a public authority has acted lawfully. By contrast, claims falling within section 8 of the Code will almost invariably concern private law claims for damages against the public authority, although these will sometimes be combined with non-money remedies such as injunctions. Claims falling within section 8 of the Code may be dealt with by either the High Court or the county court, but will not usually be referred to the Administrative Court.
3. Section 8 only applies where the client is proposing or bringing a claim against a “public authority”. This is defined in the Code by reference to the definition of “public authority” in the Human Rights Act 1998. This provides that a public authority includes a court or tribunal and any body certain of whose functions are of a public nature (see Human Rights Act 1998, section 6). However, in relation to a particular act, a body which has some public functions is not a public authority if the nature of the act in question is private. This means that some bodies, such as the Government and local authorities, are public bodies for all purposes, whereas other bodies which carry out both public and private functions, for example the rail company Railtrack, are treated as a public authority only when they are carrying out acts of a public nature.

4. Note that although a court is a public authority, appeals against court decisions are not “claims” within the meaning of section 8 of the Code. Legal Representation to bring an appeal should be dealt with under the section of the Code relevant to the subject matter of the case.
5. All cases within section 8 of the Code are within Scope (paragraph 7(b) of the Lord Chancellor’s direction on Scope set out at section 3.3).

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17.2 Serious Wrongdoing or Abuse of Position or Power

1. In order to show that a case concerns “serious wrongdoing” or “abuse of position or power” it is necessary to show that the case concerns something more than a straightforward claim against a public authority, such as a simple claim for negligence or breach of contract. “Serious wrongdoing” must involve either allegations of deliberately causing harm to the client or behaviour by a public authority which goes well beyond simple liability for negligence or breach of contract and which could objectively be considered to be really serious. “Abuse of position or power” arises where the public authority, having responsibility for protecting or serving the public, acts in a way which falls so far short of the standards which could
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reasonably be expected of that body that its conduct amounts to an abuse of its position.
2. Whether an act or omission amounts to serious wrongdoing will depend on all the circumstances of the case, including the nature, purpose and importance of the duty owed, and the extent of the harm caused (see *G v LSC, CO/4272/2003, 11 February 2004*).
3. To constitute abuse of position or power it will usually be necessary to show that there has been a deliberate and dishonest wrongful abuse of the powers given to a public officer, who either knows that the client or some other person will suffer loss as a result, or is recklessly indifferent whether or not harm is suffered.
4. Examples of types of case which normally fall within section 8 of the Code are given in section 17.3 below. Some proceedings, by their nature, almost inevitably come within section 8. For example a malicious prosecution case necessarily concerns allegations of serious wrongdoing or abuse of position or power. Other types of claim, for example damages claims against the police for personal injury or damage to goods, may well involve a range of allegations, some of which may constitute abuse of position or power whilst others are simple allegations of negligence. As explained below, the first issue to

consider in such cases is whether the case is within scope. If it is, the next decision is whether the case should be considered under section 8.

5. It may be necessary to consider how plausible and sustainable the allegations of serious wrongdoing and abuse of position or power are. If such allegations are speculative or otherwise unlikely to succeed, so that in reality the case is really about simple negligence and is likely to stand or fall on that basis, the case should not be considered under section 8 of the Code. A case cannot be brought within section 8 merely by adding a claim that it amounts to a serious wrongdoing or abuse of position of power, unless those allegations are themselves reasonably likely to succeed.
6. Schedule 2 of the Access to Justice Act excludes personal injury proceedings from scope, but the Lord Chancellor's directions (at paragraph 7(b) of section 3.3 of this guidance) provide that claims against public authorities falling within the definition given within section 8 of the Code are brought back into scope.
7. If a thief case involves serious wrongdoing, etc. and other personal injury allegations that are out of scope, the case must be considered as a mixed claim. Guidance on the approach to such cases is set out in section 3.4. A case which includes significant allegations of serious wrongdoing may well satisfy the conditions for funding as a mixed claim if the various allegations need to be pleaded in the alternative so that it would not be practicable to issue proceedings alleging serious wrongdoing alone and those allegations have reasonable prospects of success.
8. Guidance on the meaning of "significant human rights issues" is set out at section 16.3.

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17.3 Examples of Cases under Section 8

1. Actions against the police are the most common claims within section 8. As explained above, not every case in which the police are the opponent comes within section 8. For example a road traffic accident caused by a police car would not normally be covered. Similarly, cases concerning personal property allegedly not properly looked after by the police would not come within section 8 unless there was something about the case to suggest that the property had been intentionally lost or destroyed or otherwise the allegations in the case amount to serious wrongdoing. However, the following varieties of police claim would typically fall within section 8:
 - (a) cases concerning assault or trespass by the police;
 - (b) wrongful arrest;

- (c) false imprisonment.
2. Malicious prosecution cases against either the police or prosecuting authorities also come within section 8. However, in applying the Criteria in the Code, anxious scrutiny must be given as to whether there is evidence of malice as opposed to mere negligence or incompetence in the course of reaching the decision to commence or continue a prosecution. This was emphasised by the court in the case of *Thacker v. Crown Prosecution Service* [Times 27 December 1997]. In the absence of evidence to support the allegation of malice, it will be difficult to show that a malicious prosecution case has prospects of success which are better than poor.
 3. Claims for damages against a local authority by persons alleging child abuse while in local authority care also come within section 8. The case should be considered under section 8 of the Code if it involves abuse of position or power by a public servant, even though the public authority itself is merely alleged to have been negligent.

The Lord Chancellor has also issued a Direction which provides that any claim arising out of an allegation of abuse of a child or vulnerable adult is in scope, whether or not the defendant is a public authority. If the Defendant is not a public authority, the case will be considered under the General Funding Code. If an action is brought against both an individual abuser and a public authority, the case as a whole will be considered under section 8.

4. Claims for misfeasance in public office also fall within section 8. Indeed the test for misfeasance is very similar to the guidance at paragraph 2 of section 17.2 above. See the case of *Three Rivers District Council & Others v. The Governor and Company of The Bank of England* [1996] 3All ER 558.

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17.4 Criteria for cases in section 8

1. Where a case falls to be considered under section 8 of the Code, the Criteria differ from the General Funding Code in a number of respects.
2. For Investigative Help, the minimum damages level (£5,000 in the General Funding Code) does not apply. However, this does not mean that claims against public authorities may be investigated without regard to their size. Under Criterion 5.6.4 in the General Funding Code, which applies to claims dealt with under section 8, Investigative Help may only be granted if there are reasonable grounds for believing that when investigative work has been carried out the claim will be strong enough, in terms of prospects of success and cost benefit, to satisfy the relevant Criteria for Full Representation. If a claim is likely to be

worth less than £5,000, it will be difficult to satisfy Criterion 5.6.4 unless the wrongdoing complained of in the case is sufficiently serious that the cost benefit test for Full Representation will be satisfied, or the case has a significant wider public interest.

3. Applications under section 8 will always be refused if prospects of success are poor, although if prospects are unclear Investigative Help may be appropriate. Most claims against public authorities will only be funded if prospects of success are at least 50%. However, some cases within section 8, especially damages claims against the police, have prospects of success in the borderline category because the case concerns disputed evidence between the client and the police. Where prospects of success are borderline, funding may only be provided if any of the following three conditions apply:
 - (a) the case has a significant wider public interest (see guidance in section 5);
 - (b) the case has overwhelming importance to the client (see guidance at section 4.10);
 - (c) the case raises a significant human rights issue (see guidance in section 6).
4. All cases under section 8 are subject to the proportionality test which provides that likely costs of the proceedings must be proportionate to the likely benefits having
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- regard to the prospects of success and all other circumstances. Guidance on this test is set out at section 4.9 and see also 17.6 and 17.7 below.
5. Cases under section 8 of the Code are not subject to refusal on the grounds of CFA availability unless the application relates to a multi-party action (Criterion 8.3.5). Group litigation concerning children in care is the most common type of case in this category. When considering criterion 8.3.5 the issue will usually not be whether funding should be refused entirely, but what the appropriate balance should be between public and private funding. In many cases it will be appropriate for legal aid to cover the generic costs while the individual costs are dealt with under CFAs. See further section 15.10 of the guidance.

- ~~6.~~ 6. Claims against public authorities are subject to standard criterion 5.4.3, which allows an application for legal representation to be refused, if there are Ombudsmen schemes or forms of alternative dispute resolution which should be tried before litigation is pursued. This is particularly important in relation to proceedings against public bodies given the Government's commitment to use ADR processes whenever appropriate. Guidance to encourage mediation and other forms of ADR is set out in section 7. In addition, funding for

potential claims against the police are subject to extra criteria to ensure that appropriate use is made of the Police Complaints System as explained below.

7. For applications for funding made on or after 1 April 2010 the criteria for funding Multi-party Actions under the General Funding Code were amended to exclude funding for non-lead claims in such actions which are valued at under £5,000 (criteria 5.6.3 and 5.7.6). These criteria also apply to Multi-party Actions brought under section 8, subject to important exceptions for actions based upon allegations of abuse of children or vulnerable adults or allegations of Discrimination. The relevant section 8 criteria are at 8.2.3 and 8.3.6 – guidance on the criteria for funding Multi-party actions is at section 15.3.

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17.5 **Police, Prison and Probation -Complaints**

1. Under criteria 8.2.2 and 8.3.4 legal representation may be refused if it is more appropriate for the client to pursue a police, prison or probation complaint or to refer the matter to the Prisons and Probation Ombudsman, against the policee than to litigate. These criteria are an example of (but are without prejudice to) the more general Code criterion at 5.4.3 which requires all applications to consider any available complaint or ombudsman scheme before litigation is pursued. Guidance on the general power and details on relevant schemes are set out at section 7.3 Although these criteria are only directly relevant to complaints against the police, a similar approach should apply in relation to use of the complaints systems of other public bodies in the context of standard criterion 5.4.3. These criteria are important in ensuring that cases are resolved at the earliest opportunity and that litigation is reserved for those cases where it is the only appropriate remedy for the individual client.

2. 2.—An improved Police Complaints system was established for England and Wales from 1 April 2004 under the supervision of the Independent Police Complaints Commission (IPCC). This system aims to be more open and transparent in responding to complaints concerning police conduct and in very serious cases the IPCC can deploy its own investigators. The majority of complaints are initially dealt with locally by the relevant police force, with certain rights of review to the IPCC. Compensation cannot be awarded under the complaints system. To that extent pursuing a complaint is not a substitute for litigation but is often an appropriate first step to investigate a matter so that a better-informed decision can be made as to whether litigation is the appropriate route. The degree of direct involvement by the IPCC itself in any police complaint does vary. In the most serious cases the IPCC's own independent investigators will investigate the case themselves. In other serious cases an investigation is more likely to be carried out by the police themselves (albeit sometimes by a different force) under the management or supervision of the IPCC. However in the majority of cases the police will carry out the investigation without any involvement by the IPCC (except after the event following an

appeal by the complainant). The degree of involvement by the IPCC in any case is a factor that should be taken into account when deciding whether it is more appropriate to use the complaints mechanism.

3. The Prison Complaints system covers a wide range and high volume of prisoner complaints (some 215,000 were considered in 2008/09). The procedure is governed by Prison Service Order (PSO) 250. The system is accessible as complaints forms are widely available on prison wings and Stage 1 of the system encourages resolution with the prisoner's wing officer. If not resolved, Stages 2 and 3 allow for complaints to be pursued to management and ultimately the prison governor, thereafter there is recourse to the Prisons and Probation Ombudsman scheme. Further details are available at www.ppo.gov.uk.

43. Criteria 8.2.2 and 8.3.4 are discretionary. The private client test will be considered in each case. The question for the Commission is: would a reasonable client of moderate means be prepared to pay solicitors privately to investigate a potential claim before first pursuing a formal complaint against the public authority Police and considering the response received? However there are many cases where litigation may be considered but the subject matter falls outside the scope of the complaints procedure. The police complaints procedure essentially deals with issues of alleged misconduct by police officers, rather than matters of force policy. For example, if a potential claim was based solely on a legal argument as to the legality of an aspect of police procedure, where there was no material dispute as to the conduct of the officers in question, it is unlikely that referral to the complaints system would be helpful. However, most potential litigation against the police does involve some allegations of misconduct, very often combined with legal issues or challenges to policy. The criteria must be considered in such mixed cases.

54. Refusal under these criteria would also not be appropriate if legal proceedings needed to be issued as a matter of urgency, for example because of a limitation deadline, and a satisfactory explanation has been provided for any delay in making the application. Any funding granted in such circumstances is likely to be limited to the issue of protective proceedings only. Similarly, a limited grant of Investigative Help might be justified if a potential claim might be severely prejudiced by awaiting the outcome of the complaints procedure. For example, such a grant might cover obtaining a statement from a key witness who was known to be departing overseas.

65. Other than in exceptional cases such as those mentioned above, Legal Representation should not be granted until the complaints procedure has been given an opportunity to reach a conclusion. It is potentially wasteful for complaints and claims to be pursued in parallel. Any support for the client during the complaints process should generally be restricted to the Legal Help scheme, whether or not such costs might ultimately be recoverable in any subsequent claim.

76. The detailed rules on police complaints are set out in the Police (Complaints and Misconduct) Regulations 2004 (SI 2004 No 643). Regulation 3 lists some situations where complaints need not be investigated. Usually the complaint must be made within 12 months of the incident complained of, but there is a discretion to extend this if there is good reason for the delay or if the delay is unlikely to cause injustice. Even if 12 months have elapsed since the incident the police should in general be given an opportunity to investigate a complaint before an application for funding is made, and when funding is applied for a clear explanation for any delay must be given.

87. There is no requirement to pursue police complaints to the IPCC before funding applications are considered. In cases where a police force has provided a formal written response to the client, which the client is not satisfied with, the private client test must be applied as described above to decide whether taking the matter to the IPCC is an appropriate next step, rather than pursuing legal remedies. In any case where the complaints has been pursued in good faith and the client has co-operated in the provision of any necessary information, if no satisfactory formal response has been made to the complaint 6 months after it has been made it is likely to be appropriate for legal representation to be granted if other merits criteria are satisfied. Similarly prison complaints do not have to be pursued through every possible stage before funding is provided for litigation – private client principles must be applied in deciding how far and for how long any available complaint or ombudsman scheme is pursued.

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17.6 Damages in Police Cases

1. In assessing the level of damages likely to be awarded in any particular case, suppliers and Regional Offices should have particular regard to the guidance provided by the Court of Appeal in *Thompson & Hsu v Commissioner of Police of the Metropolis* [1998] QB 498. However, the guideline figures in *Thompson* may need adjustment in the light of inflation and subsequent authorities. The case involved two appeals, specifically brought by the Commissioner, with the intention of clarifying the directions which a judge should include in a summing up to assist the jury as to the amount of damages it is appropriate for them to award when a claimant is successful in an action against the police in respect of unlawful conduct. The two cases that were the subject of these appeals were ones where it was accepted that the

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conduct of the police officers involved was “outrageous and totally inconsistent with their responsibilities”.

2. The judgement (which was the of the whole court) lays down detailed guidance, which can be briefly summarised as follows:

General

Where a claimant succeeds on liability the only remedy available is an award of damages. Save in exceptional situations, such damages can only be awarded to compensate the plaintiff for any injury or damage suffered.

Compensatory damages are of two types: ordinary or basic damages and aggravated damages. Aggravated damages can only be awarded where the plaintiff specifically claims them and where there are aggravating features about the defendant’s conduct to justify them.

The Court recognised that the circumstances of an individual case can vary dramatically and that the figures provided below should not be applied in a mechanistic manner.

Basic Damages

The level of basic damages will depend on the circumstances and the degree of harm suffered by the claimant. The Court suggested that in a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the claimant is deprived of his or her liberty. After the first hour an additional sum could be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the claimant is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline, the Court considered that a claimant who has been wrongly kept in custody for twenty four hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale.

Similarly, in a case of malicious prosecution, the Court considered that the figure should start at about £2,000 for a prosecution continuing for as long as two years. If the case is taken to the Crown Court, an award of about £10,000 could be appropriate. If a malicious prosecution results in a conviction which is only set aside on an appeal, the Court considered that this would justify a larger award to reflect the longer period during which the claimant has been in peril and has been caused distress.

Aggravated Damages

The Court recognised that aggravated damages could be awarded where there are aggravating features about the case which would result in the claimant not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.

Where aggravated damages are awarded, they should be awarded separately from the basic damages award. The Court considered that, where it is appropriate to award aggravated damages, the figure would be unlikely to be less than £1,000. While the Court recognised that it was not possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case, they considered that, ordinarily, it would not be expected the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest.

The Court emphasised that the total figure for basic and aggravated damages should not exceed what was fair compensation for the injury that the plaintiff has suffered.

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Exemplary Damages

The Court recognised that, although it is not normally possible to award damages with the object of punishing the defendant, in exceptional cases this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers that deserves the exceptional remedy of exemplary damages. However, they stressed that exemplary damages should be awarded if the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants.

The Court commented that an award of exemplary damages is in effect a windfall for the claimant and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public. As such, they emphasised that the sum awarded by way of exemplary damages should be sufficient to mark disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose.

The Court went on to comment that where exemplary damages are appropriate they are unlikely to be less than £5,000, any lower amount indicates that the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as

£25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.

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17.7 Damages under the Human Rights Act 1998

4. Claims for compensation under the Human Rights Act 1998 based on maladministration by a public body should be made according to the procedure set out in the Lord Chief Justice's reasoned judgment in the case of *TA v Ala Anufrijeva & anor v London Borough of Southwark* [2003] EWCA Civ 1406. *Ala Anufrijeva & anor v London Borough of Southwark* [2003] EWCA Civ 1406. *Ala Anufrijeva & anor v London Borough of Southwark* [2003] EWCA Civ 1406.
5. The decision relates to three appeals concerning the treatment of asylum seekers. In one case, the appellant was the personal representative of a deceased member of the asylum seeker's family. She argued that the nature of the accommodation the family had been allocated breached the deceased's right to family life under Article 8. Another had been affected by a mistake in the processing of his application for asylum, which led to hardship, in turn causing a depressive illness. His lawyers argued that his private life was so impaired as to breach his rights under Article 8. The third, who had been accepted as a refugee, complained of delay in processing his family's application to enter the UK and join him. Again, his lawyers argued, the delay had amounted to a breach of Article 8. Before the Court of Appeal none of the claimants succeeded in establishing that there had been any breach of the Convention.
6. The Lord Chief Justice expressed concern about the 'truly horrendous' costs of the appeals before him, and said 'the situation is made even more worrying by the fact that all the parties are funded out of public funds' (paragraph 76). He went on to say: 'The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to other substantive relief, if tried in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded ... there will often be no certainty that an entitlement to damages will be established at all' (paragraph 77).
7. To prevent other cases being brought at disproportionate expense, he said:
 - (a) an attempt to recover damages for maladministration by any procedure other than judicial review in the Administrative Court should be looked at critically;
 - (b) since a claim for damages on its own, independent of an application for another order, may not be brought by way of judicial review, any such proceedings should be brought in the Administrative Court by way of an ordinary claim; and

- (c) in this kind of case, the Administrative Court will give permission to apply for judicial review only after it has been explained why a complaint procedure, such as those operated by the Parliamentary or Local Government Ombudsman, is not more appropriate (paragraph 78).
8. Regional Offices and suppliers should not grant certificates for representation in proceedings for compensation for breach of a Convention right unless this procedure is followed. In particular, the client must be able to demonstrate that only the court, not an Ombudsman, internal complaints procedure or other alternative means of dispute resolution, can adequately deal with the claim. Additionally, suppliers and Regional Offices need to be satisfied that, following the principles set out in this judgment and the tests in the Funding Code, the compensation the client would recover would justify the expense of the proceedings.
 9. The court's reasoning in *Anufrijeva* re-emphasises the general principle set out in *Frank Cowl & ors v Plymouth City Council* [2001] EWCA Civ 1935: that the courts should not permit proceedings against public authorities to go ahead if the parties can resolve a significant part of the issues between them outside the litigation process.
 10. The *Anufrijeva* decision puts forward the basis for adjudicating on compensation claims for breach of Articles 3 (the right not to be subjected to inhuman or degrading treatment), 5 (liberty and security), and 8 (respect for private and family life). For clients who are concerned about a possible breach of Article 2, the right to life, following a family member's death in custody, or in some other circumstances involving a public official or organisation, the natural occasion for the effective judicial enquiry which Article 2 requires is a coroner's inquest at which the family is represented (if necessary), not court proceedings: *R (on the application of Mohammed Farooq Khan) v Secretary of State for Health* [2003] EWCA Civ 1129. Regional Offices and suppliers should not grant certificates for proceedings in which the client's objective is to find out more about how the death came about, if it would be more appropriate to apply, under s 6(8)(b) of the Access to Justice Act 1999, for a certificate covering representation at the inquest.