

What price a fair trial? This question—or to put it more accurately, and prosaically, “When is an award of damages necessary as just satisfaction for breach of Art 6, and what should be the quantum of the award?”—has recently been considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240. The opinion of their Lordships, delivered by Lord Bingham, authoritatively sets out the approach for dealing with claims for judicial remedies under s 8 of the Human Rights Act 1998 (HRA 1998), resulting from breaches of Art 6 of the European Convention on Human Rights. It also attempts to bring some order to an area in which the Strasbourg jurisprudence is arguably consistent only in its inconsistency.

#### The legislative background

Article 6 of the Convention lays down a number of well known fundamental rights, including the right to determination of criminal charges by an independent and impartial tribunal, and the right to legal representation when charged with a criminal offence. Article 41 provides that if the court finds that there has been a violation of a Convention right it shall, “if necessary, afford just satisfaction to the injured party”.

This is reflected in s 8 of HRA 1998, which sets four pre-conditions to an award of damages by a domestic court: (1) a finding of breach or prospective breach of a Convention right; (2) that the relevant court has power to award damages or order compensation in civil proceedings; (3) that the court is satisfied, taking into account all the circumstances including any other remedy granted, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that such an award is just and appropriate. Section 8(4) provides that in determining whether to award damages, or the amount of an award, the court must take into account the principles applied by the European Court of Human Rights (ECtHR) in relation to the award of compensation under Art 41.

As Lord Bingham commented (at [6]), it is hard to see how a court could conclude that an award of damages is necessary, but not just and appropriate. Accordingly, the debate in the appeal centred upon the third pre-condition, and upon identification of the relevant principles to be found in the jurisprudence of the ECtHR.

# What price a fair trial?

The House of Lords has set out the approach for dealing with claims resulting from violation of the right to a fair trial. It's a ruling that comes down firmly in favour of European Court jurisprudence and relegates awards to 'very rare' status, says **Aidan Casey**

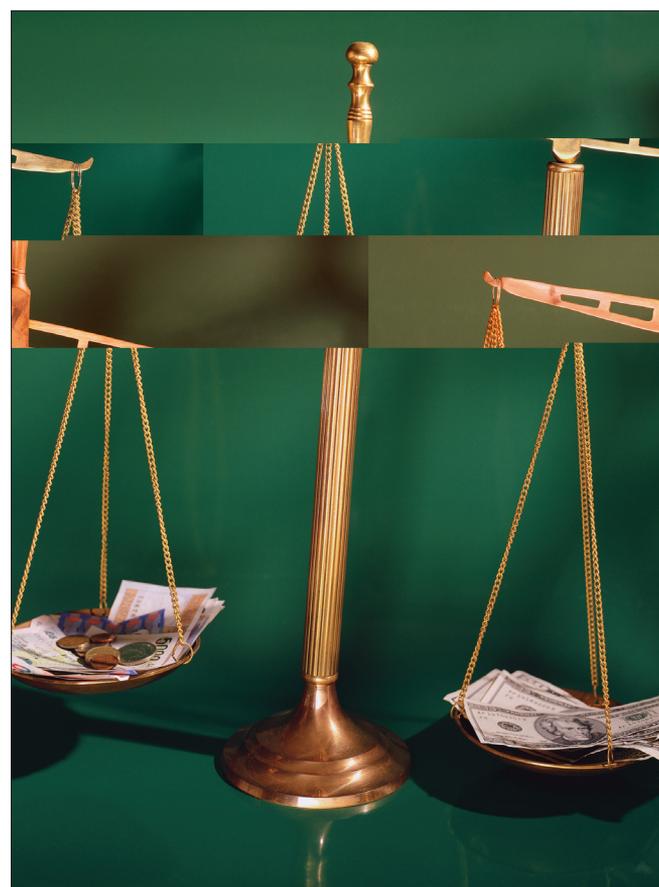
- *R (Greenfield) v SSHD*—the claim for damages
- what scale, and is an award necessary for satisfaction?

#### The circumstances of the appeal

In October 2000, while an inmate at HM Prison, Doncaster (a private prison), Mr Greenfield failed a mandatory drugs test and was charged with a drugs offence under the Prison Rules 1999. It was a defence for him to prove that the drug had been administered to him without his knowledge and he pleaded not guilty, alleging that he had smoked a cigarette that had been spiked with heroin by another prisoner.

He appeared before Mr Parry, a deputy controller with authority under the Prison Rules, as they then stood, to conduct adjudications of this type. Over the course of the proceedings, Mr Parry granted four adjournments and Mr Greenfield was afforded access to legal advice. However, in accordance with earlier Court of Appeal authority, Mr Parry decided that Mr Greenfield should not have legal representation at the substantive hearing in December.

Mr Parry called a fellow prisoner who said he had accidentally given Mr Greenfield a heroin-spiked cigarette. After a further adjournment to allow for investigation of the drug history of the witness, Mr Parry found the charge proved and ordered that Mr Greenfield should serve 21 additional days of imprisonment. That decision was approved by the area manager. Mr Greenfield applied for judicial review, claiming that his Convention rights had been violated in that the hearing had involved the determination of a criminal charge, that Mr Parry was not an independent or impartial tribunal (a complaint of objective or structural bias, as Mr Parry was not independent of the prison authorities), and that he had wrongly been denied legal representation. Those contentions were successfully resisted in the Divisional Court and the Court of Appeal. However, in the House of Lords, as a result of the delivery of the judgments of the ECtHR in *Ezeh and Connors v UK* (2002) 35 EHRR 691, (2003) 39 EHRR 1, the Secretary of



State was constrained to accept them. Thus, the appeal to the House of Lords was limited to consideration of the claim for damages, which the courts below had not had occasion to consider.

#### The decision

It was submitted for Mr Greenfield that when exercising their powers to award damages under s 8 of HRA 1998, courts in England and Wales should apply domestic scales of damages. This argument was not novel—the Law Commission's report on damages under the Human Rights Act 1998 (October 2000, Cm 4853) suggested that the obvious analogy to a claim for damages under HRA 1998 is a claim against a