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Human Rights Damages and 'Just Satisfaction': The 'Mirror' Approach

[H]eard assumptions are strong, but those unheard are stronger.

T Weir, 'Errare Humanum Est' in P Birks (ed), Frontiers of Liability, Vol 2 (OUP, 1994) 107.

IN THE LEADING case of *Greenfield* Lord Bingham, speaking for a unanimous House, rejected counsel's submissions that, inter alia, English courts are free to depart from scales of awards applied by the European Court of Human Rights (ECtHR) in its remedial jurisdiction under Article 41 and apply domestic scales in awarding damages under the Human Rights Act 1998 (HRA), and that in calculating awards for non-pecuniary loss English courts should use domestic damages awards as a comparator.[1] In addition to the assertion that the HRA is not a tort statute his Lordship gave two principal reasons. First, drawing on a passage in the HRA White Paper,[2] Lord Bingham said that the aim of incorporating the Convention 'was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg'.[3] Second, and crucially, he opined that the requirement in section 8(4) of the HRA, that courts take into account those principles applied by the ECtHR in awarding 'just satisfaction' under Article 41, was the clearest indication possible 'that courts in this country should look to Strasbourg and not to domestic precedents' in deciding both whether to make an award and quantum.[4] The Law Lords' decision effectively disapproved previous guidance from the Court of Appeal that,

[1] *R (Greenfield) v SOSHD* [2005] 1 WLR 673, [18]–[19]. The mirror approach has subsequently been approved at House of Lords or Supreme Court level in: *R (Wilkinson) v IRC* [2005] 1 WLR 1718, [25]–[28]; *Watkins v SOSHD* [2006] 2 AC 395, [64]; *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, [80]–[88]; *R (Faulkner) v SOSJ* [2013] 2 AC 254; *Osborn v Parole Board* [2014] AC 1115, [114]–[115]; *R (Haney) v SOSJ* [2015] 2 WLR 76; *Shahid v Scottish Ministers* [2015] 3 WLR 1003, [87]–[90].

[2] *Rights Brought Home: The Human Rights Bill*, Cm 3782 (1997) [2.6] [White Paper].

[3] *Greenfield* (n 1) [19].

[4] ibid.

in assessing quantum, courts could seek guidance from the levels of awards made in tort and recommended by bodies such as the Ombudsman.[5]

The effect of *Greenfield* has been that English courts apply a 'mirror' approach to assessing HRA damages: English courts seek to ensure that domestic jurisprudence reflects Strasbourg practice in terms of how the discretion to award damages is exercised and levels of awards. The corollary has been that guidance that could be derived from common law has been side-lined, and that a parallel approach to remedies is developing under the Act.

For example in *Van Colle* the Court of Appeal, in assessing damages for fear and distress suffered by a victim in the lead up to his murder in the context of a breach of the positive obligation to protect life under Article 2, refused to consider scales applied in domestic personal injury cases.[6] Given *Greenfield*, 'the guide to quantum is to be found in Strasbourg cases rather than English decisions'.[7] Similarly, in assessing damages for grief suffered by the victim's relatives the Court refused to consider amounts awarded under the Fatal Accidents Act 1976.[8] The same approach was taken by the Supreme Court in the subsequent Article 2 case of *Rabone*.[9] In the important Supreme Court decision in *Faulkner*, the Court, in assessing damages for breach of Article 5(4) for deprivation of liberty and distress looked to Strasbourg only, having no recourse to domestic damages jurisprudence.[10] It construed the damages remedy under the HRA as 'an entirely novel remedy' drawn from the supranational plane, which is 'not tortious in nature'.[11] The Court of Appeal, which had drawn on false imprisonment, had been 'wrong to take as its starting point the treatment of wrongs under the common law'.[12]

Whether courts adopt a tort-based or mirror approach makes a difference. As discussed in chapter 3, there is no concept of normative damage at Strasbourg, so that only proven and causally connected material losses may possibly be recovered. The ECtHR also exercises an extremely broad discretion as to whether to make a monetary award, so that even where consequential losses are suffered awards may be denied. For example the

[5] *Anufrijeva v Southwark LBC* [2004] QB 1124, [74], [77]–[78]. See also *R (KB) v South London and South and West Region MHRT* [2004] QB 936, [50]–[54]; *R (Bernard) v Enfield LBC* [2003] LGR 423, [59]–[60].

[6] *Van Colle v Chief Constable Hertfordshire Police* [2007] 1 WLR 1821, [120] [*Van Colle* CA] (overturned on liability: [2009] 1 AC 225).

[7] *Van Colle* CA ibid [104].

[8] ibid [121].

[9] *Rabone* (n 1) [80]–[88]. In contrast the Court of Appeal had considered the amounts awarded under domestic legislation: *Rabone v Pennine Care NHS Foundation Trust* [2011] QB 1019, [112] [*Rabone* CA].

[10] *Faulkner* (n 1).

[11] ibid [29].

[12] ibid [96].

Court 'frequently holds that the finding of a violation is sufficient satisfaction without any further monetary award',[13] including where consequential loss is acknowledged to have been suffered;[14] as such the Court 'does not routinely award compensation to successful applicants',[15] albeit practice may vary according to the nature of the violation. English courts have followed ECtHR practice and denied awards in many cases.[16] As the courts acknowledge, and indeed emphasise,[17] Strasbourg scales are 'ungenerous'[18] by English tort standards. Awards for non-pecuniary loss in particular are modest 'even in the most serious cases'.[19] In *Faulkner* Lord Reed, giving the lead judgment, considered the effect of *Greenfield* had been that '[d]icta in earlier cases, suggesting that awards under section 8 should not be on the low side as compared with tortious awards and that English awards should provide the appropriate comparator, were implicitly disapproved'.[20] In consequence awards under the Act have been *very* low relative to English scales. On top of this, aggravated, punitive and nominal damages are unlikely to be available under a mirror approach given the ECtHR refuses to make such awards.[21]

Apart from the practical difference that claimants will recover awards under the HRA less often and far lower than in tort for wrongful interference with similarly basic interests, the mirror approach gives rise to other serious concerns. For example, it is leading to emergence of a domestic jurisprudence which mirrors many of the problematic features of the Strasbourg Court's Article 41 jurisprudence. These include inconsistency and incoherence, parsimonious and opaque reasoning, absence of detailed rules and principles and guidance as to scales, and decision-making influenced by highly subjective concerns and, possibly, unstated political or moral concerns. As we shall see, lower court judges have struggled with the mirror approach, routinely recording that they are unable to derive any meaningful guidance from Strasbourg.

This chapter argues that the mirror approach ought to be rejected. Section 1 contends that arguments adopted by the courts to justify the mirror approach are patently inconsistent with the terms of the Act, while the

[13] *A v UK* (2009) 49 EHRR 29, [250].
[14] See ch 7.I.
[15] R Clayton and H Tomlinson, *The Law of Human Rights* 2nd edn (OUP, 2009) [21.60].
[16] For discussion of this practice see ch 7.I.
[17] *Greenfield* (n 1) [17]–[19]; *Watkins* (n 1) [73]; *Faulkner* (n 1) [13](14), [27], [68], [96]; *R (Pennington) v Parole Board* [2010] EWHC 78, [13](i), [20], [22]; *Dobson v Thames Valley Utilities Ltd* [2009] 3 All ER 319, [52]; *DSD v Commissioner for Police* [2015] 1 WLR 1833, [41]; *R (Parratt) v SOSJ* [2014] EWCA Civ 1478, [42]. And see the comparisons made in ch 3.I.E.
[18] *Watkins* (n 1) [26].
[19] J Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) [7-103].
[20] *Faulkner* (n 1) [27].
[21] See ch 3.I.C.

Act clearly does not *mandate* such approach. With no clear mandate in the Act, the normative basis for such approach is obscure. Those arguments that might support application of a mirror approach to interpreting substantive rights pursuant to section 2(1) HRA have no application in the damages context.

Section 2 argues that the mirror approach should be abandoned for both reasons of principle and practice. First, there is no requirement in international law that domestic courts must follow the Strasbourg Court's remedial approach, nor does that Court intend domestic courts to follow its approach; indeed the ECtHR has encouraged domestic institutions to develop remedies according to their own legal traditions.

Second, the approach of the Strasbourg Court, a supranational, subsidiary and supervisory institution, to the award and assessment of 'just satisfaction' is not an appropriate model for domestic courts, which have primary responsibility for provision of an 'effective remedy'.

Third, the mirror approach should be rejected as it requires domestic courts to follow a European jurisprudence lacking principle, coherence and consistency, with the result that a problematic domestic jurisprudence is emerging. Further, the lack of guidance that may be discerned from Strasbourg jurisprudence has arguably led English courts to source rules and/or principles from outside that jurisprudence, calling into the question the credibility of the mirror approach and demonstrating the artificiality of seeking to develop human rights damages in isolation from common law damages.

Section 3 questions the robustness of the methodology employed by higher courts to give effect to the mirror approach, and argues that different courts have employed different methodologies—these differences affecting conclusions as to availability of damages—without recognising or offering reasons for such variations. Further, the mirror method imposes significant costs on courts and parties, which are not counterbalanced by any discernible benefits.

Section 4 considers the future of the mirror approach in the light of Delphic judicial pronouncements in the Supreme Court's *Faulkner* decision and Governmental proposals for a British Bill of Rights.

In light of the patent and serious problems with the mirror approach, and the lack of any sound normative justification for such approach, one may come to question whether the higher courts' adoption of and persistence with such flawed approach is based in unstated normative concerns, such as safeguarding government funds.

SECTION 1. THE TERMS OF THE HRA

Aspects of the analysis in *Greenfield* and its progeny are patently inconsistent with the terms of the HRA. In *Greenfield* Lord Bingham considered

that there could be 'no clearer indication' than section 8(4) that 'courts in this country should look to Strasbourg and not to domestic precedents'.[22] While that section does direct domestic courts to consider principles applied by the ECtHR, there is nothing in its terms to suggest that this should be to the exclusion of considering English damages law. Section 8(4) requires only that domestic courts 'take into account' the Strasbourg 'principles' in deciding whether to make an award and quantum.[23] The provision makes Strasbourg principles a relevant consideration, not a sole determinative one. This is far from being the clearest indication possible that domestic courts ought solely to look to Strasbourg. As Laws LJ has said, '[t]he expression "take into account" simply does not mean "follow" or "treat as binding" (or something close to it)'—the plain words of the statute 'cannot surely bear such a weight'.[24]

In the subsequent case of *Faulkner* the Supreme Court interpreted Lord Bingham as having 'construed' sections 8(3) and (4) as

> introduc[ing] into our domestic law an entirely novel remedy … which is described as damages but is not tortious in nature, inspired by article 41 … Reflecting the international origins of the remedy and its lack of any native roots, the primary source of the principles which are to guide the courts in its application is said to be the practice of the international court that is its native habitat.[25]

This reasoning proceeds in two steps: (1) section 8 introduced an entirely novel remedy into domestic law, of international origin; (2) it is therefore to the international case law that courts must look.

The chain of reasoning breaks down from the off. The only basis for the claim in (1) is given by Lord Bingham in *Greenfield*: section 8(4) directs domestic courts to Strasbourg principles. But this provision in fact tells against the claim that the international remedy has been plucked from its 'native habitat' and transposed into domestic law. To require domestic courts to take principles into account is simultaneously to confer upon courts a liberty, not subject to any constraint in the terms of the Act, to depart from those principles. In other words the very fact that domestic courts are required to take into account Strasbourg principles makes clear that the enterprise of deciding damages claims under the HRA is distinct from the remedial enterprise in which the ECtHR is engaged. If the intent behind the damages provisions was that domestic courts should act as a surrogate

[22] *Greenfield* (n 1) [19].

[23] A point made in *Greenfield* (n 1) [6], but which was of little consequence in deciding the final approach to damages.

[24] J Laws, *The Common Law Constitution* (CUP, 2014) 80. Comments made in the context of discussion of s 2 HRA, but they are equally applicable to the terms of s 8. For judicial decisions endorsing this interpretation see, eg, *Re P* [2009] 1 AC 173, [34], *Doherty v Birmingham CC* [2009] AC 367, [126], and see further those cases cited in nn 77–83 below.

[25] *Faulkner* (n 1) [29].

for the ECtHR, effectively exercising the ECtHR's remedial jurisdiction on the domestic plane, Parliament would have imposed a more prescriptive obligation than to require merely that domestic courts have regard to the general principles applied by the ECtHR; for example, Parliament could have provided that domestic courts are mandated to follow the ECtHR's practice or jurisprudence more generally. With respect, to extrapolate from a provision directing courts to take into account principles applied under Article 41 that Article 41 has been imported into domestic law entails a feat of interpretation.

Neither Lord Bingham nor Lord Reed considered arguments against their construction. For example, if Parliament had intended that the monetary remedy under the HRA should be equivalent to that in international law one would have expected the legislature not to have described the remedy as 'damages', given that term has a specialised meaning in English law; 'compensation', 'monetary award' or simply 'just satisfaction' could have been used to conclusively distinguish the remedy. Other key aspects of the legislative scheme, discussed elsewhere in this book,[26] which support a tort-based approach were not discussed in either decision, including sub-sections (2) and (5). Article 13, which requires Member States to grant effective remedies to victims, and which section 8 was intended to give domestic effect to,[27] was not mentioned in either *Faulkner* or *Greenfield*. This is striking given the long-standing maxim that where a domestic provision is intended to give effect to an international obligation, it ought to be construed so as to ensure compliance with that obligation.

The terms of the statute are clear. The principles adopted by the ECtHR are merely a relevant consideration for a court determining HRA damages claims, and it is not the case that the mirror approach *follows from* or is *mandated* by section 8(4) as *Greenfield* and *Faulkner* suggest.

However, if one thought the Act ambiguous, parliamentary debates on the Human Rights Bill confirm that it was not Parliament's intention that Strasbourg practice be followed doggedly: the then Lord Chancellor posited that 'our courts must be free to try to give a lead to Europe as well as to be led';[28] 'British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights across Europe'.[29] Indeed, key arguments for incorporation were that 'British judges are denied the opportunity of building a body of case law on the Convention

[26] See chs 3.IV, 6.1.I.

[27] See further s 2 below.

[28] HL Deb vol 583 cols 513–515 (18 November 1997); P Boateng and J Straw 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] *European Human Rights Law Review* 71, 72.

[29] HC Deb vol 307 col 770 (16 February 1998) Mr Jack Straw; HL vol 582 col 1227 (3 November 1997) Lord Irvine of Lairg.

which is properly sensitive to *British legal and constitutional traditions*'[30] and the HRA would 'give power back to British courts'.[31] In deciding not to incorporate Article 13 the Government emphasised that English courts are 'rich in remedies'[32] and that English remedies law 'is one of the most sophisticated and developed systems in the world'.[33] This suggests that there was an expectation that courts would have at least some recourse to the long-established law of remedies in English law. More recently the two legislators who led the Bill through Parliament reiterated that the Act was never intended to bind domestic courts to Strasbourg practice.[34] Overall, as Burrows argues: '"To bring home" rights might be thought to require that rights are compensated in the way that home regards as appropriate'.[35]

I. PRINCIPLES OR PRACTICE?

It would be one thing for domestic courts to follow faithfully the Strasbourg 'principles'—the term used in section 8(4)—but they have gone much further, effectively treating the ECtHR's Article 41 *jurisprudence* as binding. As the Law Commissions observed, there is a clear conceptual distinction between 'principles' developed by a court and its 'practice' or 'jurisprudence': '"Principles" are normally understood to refer to the basic objectives of the system, as opposed to the application of those principles to assessing damages in individual cases'.[36] One may look to practice to discern an overarching principle which may then be taken into account in domestic decision-making, but this is a different enterprise to seeking to *replicate* a practice. It is the latter approach that characterises the HRA damages jurisprudence; as Lord Reed said in *Faulkner*, the focus is upon the 'ordinary practice'[37] of the ECtHR, his Lordship proceeding to trawl through one ECtHR case after another to discern that practice, so that it could be replicated.

The Supreme Court found a convenient remedy for the incongruity between such approach and the plain terms of section 8: the Court defined 'principles' 'in a broad sense' as 'ordinary practice'.[38] The main explanation

[30] Boateng and Straw (n 28) 72 (emphasis added).
[31] ibid 71. But see the ambivalent statements regarding damages: at 77.
[32] HL Deb vol 583 col 479 (18 November 1997); HL Deb vol 584 col 1266 (19 January 1998) Lord Irvine of Lairg.
[33] HL Deb vol 583 col 477 (18 November 1997) Lord Irvine of Lairg.
[34] Lord Irvine, 'A British Interpretation of Convention Rights' [2012] *PL* 237; J Straw, *Aspects of Law Reform* (CUP, 2013) ch 2.
[35] A Burrows, 'Damages and Rights' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 303.
[36] *Damages Under the Human Rights Act 1998*, Law Com 266/Scot Law Com 180 (2000) [4.6]–[4.11] [Law Commissions Report].
[37] (n 1) [36].
[38] ibid [31]–[36].

given was that the ECtHR does not often articulate principles and it may be unsafe to rely on any statements of principle without examining practice, as practice may be inconsistent with such statements; the focus ought therefore to be on 'how the [ECtHR] applies article 41'.[39]

First, in construing section 8(4) in this way Lord Reed gave no consideration to the differences between sections 8(4) and 2(1). While section 8(4) only refers to 'principles', section 2(1) requires domestic courts, in interpreting substantive rights, to 'take into account' any Strasbourg 'judgment, decision, declaration or advisory opinion' on point. If Parliament wished courts to take into account ECtHR *practice* under Article 41 it could have modelled section 8(4) on section 2(1), yet different terms were chosen.[40]

Second, the nature of the jurisprudence under Article 41, rather than supporting imposition of an unnatural meaning on the term 'principles', sheds light on why the legislature might have referred courts to principles rather than practice. A leading work on the European Convention on Human Rights (ECHR) summarises the Article 41 jurisprudence thus:

> The case law under Article 41 … is characterized by the lack of a consistently applied law of damages at the level of detail which one would find in national systems and which permit specific calculations to be made on the basis of precedent … The Court applies a series of general principles … to the facts of each case.[41]

From this one can understand the drafting of section 8(4). Domestic courts are not directed to ECtHR practice because that practice is unsatisfactory, not being characterised by a consistently applied and worked-out law of damages. However, while the jurisprudence lacks the detail that characterises English damages law, a small set of general principles permeate the jurisprudence, such as *restitutio in integrum* and factual causation. It makes perfect sense that the legislature would not refer domestic courts to a troubled practice but rather to readily discernible and basic overarching principles. In *Faulkner*, Lord Carnwath, writing separately, linked these features of the Strasbourg jurisprudence to the difference in wording between sections 8(4) and 2(1), saying: '[t]he more specific wording of section 8(4) in my view reflects the reality that not all decisions of the Strasbourg court in relation to damages will be determinative, or even illustrative, of any principle of general application'.[42] This is because—as we shall see below—each such decision entails a discretionary, equitable response to the facts of the

[39] ibid [31].

[40] See *KB* (n 5) [22] (the difference in drafting may indicate that 'Parliament … wanted the UK court to have somewhat greater freedom in relation to decisions of the European Court on the amount of damages awarded in particular cases, quantum normally being a matter for the forum').

[41] D Harris et al, *Law of the European Convention on Human Rights* 3rd edn (OUP, 2014) 155; see also *Anufrijeva* (n 5) [59]–[60].

[42] (n 1) [113].

case rather than application of a worked-out set of detailed rules.[43] Lord Carnwath's recognition of the nature of Strasbourg practice led him to a view—contrary to the majority—more faithful to the plain terms of section 8: domestic courts should be guided by general principles clearly enunciated by the ECtHR rather than seeking to mirror practice not based in a worked-out law of damages.[44]

More generally, if Strasbourg jurisprudence is characterised by certain oft-repeated, basic principles, such as causation, but particular cases deviate from such principle, it is not clear why a court should prioritise practice, when the statute directs them specifically to principles. Further, it is in the nature of a principle that it is not always followed; a principle is a guide not a prescriptive rule. Thus, deviation from a principle does not necessarily cast doubt on its existence.

Third, Lord Reed's analysis is based upon an erroneous premise. A key reason given for imposing an unnatural meaning upon 'principles' is that the ECtHR does not often articulate statements of principle. The concern appears to be that an approach that entailed solely looking to Strasbourg would be unworkable if courts were restricted to considering only *genuine* principles, because these are few. But lack of genuine principles is only concerning if one accepts the premise—erroneous for reasons given above—that courts may only look to Strasbourg.

Fourth, the great irony of treating 'practice' as 'principle' is that *genuine* Strasbourg principles are side-lined. For example in *Greenfield* Lord Bingham observed that the ECtHR seldom made awards for non-pecuniary loss for particular breaches of Article 6, as the Court is not often satisfied of a causative link between claimed loss and the rights-violation.[45] Going by the plain terms of section 8(4) one would expect domestic courts to take into account the basic principle of causation in deciding whether to make an award in similar cases. This was not Lord Bingham's approach. Rather, he signalled that domestic courts should follow the ECtHR's *ordinary practice*,[46] which his Lordship saw as being that awards should rarely be made, except where a case has some 'special feature … which warrants an award'.[47] Not only does this ignore the principle applied by the ECtHR, it enunciates a principle distinct and at variance from that applied by the ECtHR: while the ECtHR applies a principle of causation, domestic courts determine such claims according to the principle that awards should be rare. This illustrates the extent to which higher courts have distorted the plain meaning of the HRA damages provisions.

[43] ibid [105].
[44] ibid [113]–[114].
[45] (n 1) [11], [16].
[46] ibid [16], [26]. See also *Faulkner* (n 1) [36].
[47] ibid [29].

A. Quantum

Lord Bingham's dicta, in *Greenfield*, on quantum are worth considering in a little more detail. His Lordship rejected the appellant's argument that 'the levels of Strasbourg awards are not "principles" applied by the court' on the basis that it involved a 'legalistic distinction', and that it was 'contradicted by the White Paper and the language of section 8'.[48] As a result domestic courts, in setting quantum, must look to the ECtHR's 'practice in relation to the level of awards in different circumstances';[49] 'section 8(4) … merely means that courts should aim to pitch their awards at the general levels indicated by Strasbourg awards in comparable cases, so far as that can be estimated'.[50]

With respect, the distinction between 'scales' or 'levels', which represent the ECtHR's *practice* as to quantum, and 'principles' which frame how the court approaches determination of quantum, is conceptually sound and not pedantic. It is not apparent how statutory language undermines the appellant's argument. Section 8(4) expressly refers to 'principles' as opposed to 'practice', 'scales', 'quanta' or 'levels of awards'. And even if the Act did include one such formulation, Strasbourg levels would not be binding; they would only need to be taken into account. On the other hand the White Paper does provide some support for Lord Bingham's view. It says:

> The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the [ECtHR] in awarding compensation, *so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg*.[51]

However, the Law Commissions felt that this statement should not be taken 'too literally'.[52] Furthermore, when it comes to statutory interpretation, '[t]he text is the law, and it is the text that must be observed'.[53] The text of section 8(4) is unambiguous. If Parliament wished domestic courts to hitch domestic scales to those applied at Strasbourg it would have expressly prescribed this. It did not.

Another reason given by Lord Bingham for rejecting the applicant's argument that scales do not constitute principles, was that 'principle' has 'little application' 'in a decision on … quantum';[54] in other words, it would be

[48] ibid [19].
[49] *Faulkner* (n 1) [31].
[50] ibid [35].
[51] White Paper (n 2) [2.6] (emphasis added).
[52] Law Commissions Report (n 36) [4.4].
[53] A Scalia, *A Matter of Interpretation* (Princeton, 1997) 22. In the parliamentary debates on the remedial provisions of the Human Rights Bill Jack Straw, the then Home Secretary, expressed a similar view: 'I have always taken the view that what Parliament passes is not what Ministers say, but what is on the face of the Bill' (HC Deb vol 312 col 987 (20 May 1998)).
[54] *Greenfield* (n 1) [19].

difficult to see how section 8(4) regulates quantum if 'principles' is not interpreted to include scales. However, a cursory glance at the detailed rules and principles governing quantum in English damages law rebuts the idea that principle is irrelevant to quantum.[55] Indeed, statements in *Greenfield* itself reveal that principle is relevant. For example, Lord Bingham referred to the Strasbourg Court's acceptance of the 'principle' of *restitutio in integrum*,[56] and cited the ECtHR's dictum that it is 'well established' that *restitutio in integrum* is 'the *principle* underlying the provision of just satisfaction for a breach of article 6'.[57] This is a principle which plainly governs quantum: each award is a product of application of this principle, being the amount necessary to restore the victim to a position as if the wrong had not occurred.

As in the context of deciding whether to make awards, the courts' treatment of practice as principle has led to *genuine* Strasbourg principles, such as *restitutio in integrum*, being side-lined and abrogated. Thus in *Faulkner*, Lord Reed, having surveyed multiple Strasbourg cases, discerned that awards for distress in Article 5(4) cases have often been 'modest'. According to the interpretation of section 8(4) adopted by the Court this summary statement of practice is a principle.[58] But, of course, the relatively modest levels of awards are not principles in any ordinary sense of that word but rather the product of application of a general principle, namely *restitutio in integrum*, to those cases that happen to have come to the ECtHR; if the circumstances of the majority of those cases had been more traumatic, awards may very well have been higher in general, to reflect greater losses (even if still low relative to domestic levels). However, *restitutio in integrum* is never mentioned in *Faulkner* despite being the ECtHR's central principle. The result is likely to be under-compensation in more serious cases as lower courts concentrate on ensuring awards are small, and lose sight of the principle that quantum must be sufficient to make the victim whole, given the degree of loss suffered. As other judges have observed, prescriptions that awards should be low do not really assist, given the court's task is to calibrate quantum to the degree of injury in fact suffered so that the award is sufficient compensation.[59]

II. A SECTION 2(1) ANALOGY?

We have already observed the material difference in legislative drafting between sections 8(4) and 2(1). Despite this, Lord Reed, giving the lead

[55] See chs 2.III, 3.II, III.

[56] *Greenfield* (n 1) [10]; see also, eg, *Bernard* (n 5) [42]; *Breyer Group Plc v Department of Energy and Climate Change* [2014] JPL 1346, [152].

[57] *Kingsley v UK* (2002) 35 EHRR 10, [40] (emphasis added), cited in *Greenfield* (n 1) [10].

[58] *Faulkner* (n 1) [13](14), [68].

[59] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [109].

judgment in *Faulkner*, aligned the general approach to Strasbourg jurisprudence under the two provisions. The starting point of this approach is that the domestic 'court should follow any clear and constant jurisprudence of the European court'.[60] Lord Reed did not address the differences in drafting between sections 2 and 8.

On top of the material drafting differences, there are further good reasons why it is inappropriate to read across to section 8 the approach applied under section 2.

The 'clear and consistent' test is not viable in the damages context. Where the ECtHR finds violation of a *substantive right* it typically recalls articulated rules and principles governing that right, as established in previous case law, and reasons according to those norms to a conclusion as to compliance.[61] It gives substantial reasons, in the knowledge that such determinations afford important guidance to Member States which are bound to comply with rights-guarantees, while determination of these substantive rights-issues is the Court's central function (see further section 2.I.B below). A search for clear and consistent jurisprudence is therefore likely to bear some fruit. The ECtHR's approach to *Article 41* is markedly different. It adopts a discretionary, case-by-case approach, determining whether to make awards and quantum according to what would be 'equitable' on the facts: 'most of the decisions are not intended to have precedential effect, and it is a mistake … to treat them as if they were',[62] such decisions being 'little more than equitable assessments of the facts of the individual case'.[63] Few if any reasons are typically given by the Court for why awards are made or refused while there is seldom any reasoned justification of quantum.[64] Therefore, the search for clear and consistent jurisprudence is misplaced; indeed it is difficult to view a set of discretionary, case-by-case determinations as constituting a 'jurisprudence' as such.

Importantly, core justifications for adopting the 'clear and constant' test in adjudication of *substantive rights* have little or no relevance in the *damages* context.[65]

The main justification[66] for taking the ECtHR's interpretation of Convention rights as the default interpretation of rights under the HRA is the

[60] *Faulkner* (n 1) [36] following *R (Alconbury Developments Ltd) v SOS for the Environment, Transport and the Regions* [2003] 2 AC 295, [26].

[61] Even this description of the ECtHR's method in respect of substantive rights adjudication may be somewhat rose-tinted.

[62] *Faulkner* (n 1) [105].

[63] A Lester and D Pannick, *Human Rights Law and Practice* (LexisNexis, 1999) [2.8.4] fn 3, quoted in ibid [108].

[64] See s 2.II below.

[65] The discussion herein may also help to explain the different statutory language as between ss 2 and 8.

[66] The rationales discussed herein derive from the case law. See, eg, *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20]; *Re P* (n 24) [35]–[36]; *SOSHD v AF (No 3)* [2010] 2 AC 269, [70]; *R (Al-Skeini) v SOSD* [2008] 1 AC 153, [105]–[106].

practical concern that if domestic courts fail to give effect to the ECtHR's rights-jurisprudence, the consequence will likely be a finding of violation at Strasbourg. This concern is reinforced by the principle that legislation based on an international treaty ought to be construed consistently with that treaty. Linked to the primary practical concern is a concern not to put litigants to the expense of travelling to Strasbourg unnecessarily. Amongst other reasons for faithfully following consistent Strasbourg jurisprudence are the importance of uniform interpretation of the Convention across Member States, and the principle that domestic courts ought to respect decisions of foreign courts decided on the same point.

Whether these concerns justify adoption of a mirror approach under section 2 has been a matter of protracted debate.[67] However, notwithstanding whether such approach is justifiable under section 2, none of these concerns justify domestic courts mirroring the ECtHR's Article 41 jurisprudence under section 8. Principally this is because Article 41 is not a provision addressed to Member States, with which they are required to adhere; the Article solely governs the ECtHR's *own* remedial practice. Article 41 does not appear in Section I of the Convention, entitled 'Rights and Freedoms', which sets out those rights which Member States must secure to everyone in their jurisdiction. Rather, it appears in Section II, entitled 'European Court of Human Rights', which establishes the ECtHR, its institutional structure and procedural machinery. Thus, while a domestic court's decision not to follow ECtHR jurisprudence under Articles 5 or 8 carries the risk that the UK may be found in violation of the Convention, a decision not to follow Article 41 jurisprudence does not carry such risk. The erroneous premise underpinning a mirror approach to damages is reflected in Lord Reed's observation in *Faulkner* that in respect of domestic damages practice it is necessary 'to ensure that our law does not fall short of Convention standards'; neither Article 41 nor the jurisprudence under it entail 'standards' intended to govern the conduct of Member States or which bind Member States.[68]

The argument for uniform treaty interpretation has little relevance given a domestic court's task under section 8 is not to *interpret* Article 41, but rather, in making its own determination as to damages, to *take into account* the principles the ECtHR has developed under Article 41; domestic courts take the Strasbourg principles as they find them. The task of domestic courts means there is no risk of divergent interpretation. For this reason also there may be no argument that by adopting a different approach to monetary relief than the ECtHR domestic courts are challenging the position of the Strasbourg Court as the 'authoritative expounder' of the meaning of the Convention text.[69] Further, uniform interpretation is presumably based

[67] There are too many articles and extra-judicial speeches on the topic to cite here.
[68] *Faulkner* (n 1) [29].
[69] *Ullah* (n 66) [20].

on the concern that human rights standards should not vary across Member States. Article 41 does not set human rights standards. It is far more parochial, addressed 'inwards' rather than 'outwards', to the ECtHR's own remedial practice.

In terms of the principle of respect for foreign judgments decided on the same points, one might argue that the ECtHR under Article 41, and domestic courts under section 8 are determining the same points: what monetary compensation ought to be awarded to a victim? However, they are doing so under distinct provisions framed in different terms; the ECtHR is acting directly pursuant to Article 41, whereas domestic courts are charged with taking into account the principles applied under Article 41 in exercising their own, *distinct* remedial jurisdiction under domestic statute. This contrasts with the position in respect of those Articles, enumerating substantive rights, scheduled to the HRA, which are in identical terms to those in the Convention. Further, as discussed in section 2 below, the ECtHR approaches its remedial task as a subsidiary, supervisory institution whereas domestic courts are charged with primary responsibility for relief, such that there is a convincing argument that the 'points' are not the 'same'.

If there is any jurisprudence which should guide interpretation of section 8 according to the interpretive principle of consistent construction it is that under Article 13.[70] Article 13 is the Article which governs the remedial obligations of Member States, requiring States to provide an effective remedy for rights-violations. Further, section 8 was specifically intended to give effect to *this* Article *not* Article 41. This was made clear in the parliamentary debates on the Human Rights Bill;[71] indeed, it was because section 8 gave full effect to Article 13 that it was not considered necessary to incorporate Article 13.[72] As Lord Nicholls said in *Re S*, '[t]he object of [sections 7 and 8 of the HRA] is to provide in English law the very remedy Art 13 declares is the entitlement of everyone whose rights are violated',[73] this view being oft-repeated by members of the House of Lords.[74] Specifically in respect of damages Lord Rodger in *Somerville* said, '[b]y giving the court power to grant the necessary damages, the law provides the effective remedy for the violation of the victim's Convention rights which article 13 … requires'.[75] Surprisingly Article 13 was not mentioned in either *Greenfield* or *Faulkner*.

[70] See *Al-Skeini* (n 66) [56]–[57], [147]–[149] (Act should be read so as to give effect to Article 13).

[71] See the following statements by Lord Irvine: HL Deb vol 583 cols 475–81 (18 November 1997); HL Deb vol 584 cols 1265–68 (19 January 1998); HL Deb vol 585 cols 384–85 (29 January 1998).

[72] ibid. See also HL Deb vol 582 col 1308 (3 November 1997) Lord Williams of Mostyn.

[73] *Re S* [2002] 2 AC 291, [61].

[74] eg *R v Kansal (No 2)* [2002] 2 AC 69, [70]; *Brown v Stott* [2003] 1 AC 681, 715; *Re Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, [175].

[75] *Somerville v Scottish Ministers* [2007] 1 WLR 2734, [131]

Whereas the main rationale for adoption of the mirror approach is to avoid running afoul of Convention requirements, as Feldman observes, '[t]oo great a concentration on Article 41 may make [it] impossible in some cases' for domestic courts to comply with Article 13.[76] As discussed further below, this is because the ECtHR's approach under Article 41 is that of a supranational, subsidiary, supervisory body, and does not represent a model for domestic courts to follow in fulfilling the UK's obligations under Article 13.

It is important to observe that even under section 2 HRA the courts have signalled a move away from strict adherence to Strasbourg jurisprudence, such that a stronger variant of the mirror approach is applied under section 8 than section 2, despite the case for a mirror approach being far weaker under section 8. For example, in *Re P* Lord Hoffmann, while noting that there are good reasons for following the ECtHR's interpretation of rights, said that the direction in section 2(1) that domestic courts 'take into account' Strasbourg decisions

> makes it clear that the United Kingdom courts are not bound by such decisions; their first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg.[77]

In the same case Lord Hope observed that the 'Strasbourg jurisprudence is not to be treated as a straightjacket from which there is no escape'.[78] In *Rabone* Lord Mance said '[w]e are required to "take account of" the case-law of the European Court of Human Rights—no less but no more'.[79] Lord Brown, in the same case, indicated that domestic courts should not feel 'driven' by Strasbourg jurisprudence to 'unwillingly' decide a question a particular way unless the jurisprudence *compelled* such result, this high threshold indicating a wide margin for domestic courts to chart their own course.[80] In *Pinnock* Lord Neuberger said that the Supreme Court 'is not bound to follow every decision of the EurCtHR'.[81] His judgment also evinced a concern not to undermine basic features of English law, indicating that even clear and constant ECtHR jurisprudence could be departed from where it cut across substantive or procedural domestic law 'in some fundamental way'.[82] Given this specific concern, and the increased willingness of domestic courts to forge their own path under the Act, it is odd then that

[76] D Feldman, 'Remedies for Violations of Convention Rights' in D Feldman (ed), *English Public Law* 2nd edn (OUP, 2009) [19.42].
[77] (n 24) [34].
[78] ibid [50].
[79] *Rabone* (n 1) [123].
[80] ibid [112].
[81] *Manchester City Council v Pinnock* [2011] 2 AC 104, [48]–[49]. See also, eg, *R v Horncastle* [2010] 2 WLR 47; *R (Chester) v SOSJ* [2014] 1 AC 271; *R (Nicklinson) v MOJ* [2015] AC 657.
[82] *Pinnock* ibid [49]; see also *Horncastle* ibid [11]; *Chester* ibid [25]–[27], [120]–[124].

under section 8 the courts have departed radically from the long-standing English approach to award and quantification of money relief for wrongful interference with basic interests, and dogmatically sought to replicate Strasbourg remedial practice.

Lastly, given sections 8(4) and 2(1) both require courts to take Strasbourg material 'into account', and that the arguments for a mirror approach are far stronger in respect of section 2, it is rather difficult to reconcile (i) the propositions in *Faulkner* that section 8(4) effectively imports the international remedy and that domestic courts must mechanistically replicate Strasbourg remedial practice; with (ii) the prevailing judicial view that substantive rights under the Act are 'domestic and not international rights', and that pursuant to section 2 'UK judges' must 'ultimately … form their own view as to whether or not there is an infringement of Convention right for domestic purposes'.[83] This variation of approach is perplexing.

III. THE 'ORDINARY' APPROACH

Section 8(4) does not mandate a mirror approach, while the provision has been given a tenuous interpretation which cannot sustain the mirror approach; the provision cannot bear the weight placed on it by the higher judiciary. Importantly that provision, given its natural meaning, does not bar adoption of a principally common-law-based approach to damages, as long as domestic courts have regard—as they are required to—to what broad principles can be divined from the Strasbourg jurisprudence.[84] The central principle at common law and at Strasbourg[85] is the same, at least in regard to compensatory damages: *restitutio in integrum*. Given the general lack of detailed rules in the Strasbourg material, the elaborate rules and principles developed at common law could be drawn on to fill the gap within the rubric of such overarching principles. The foregoing analysis also suggests that a domestic court has freedom to set awards at domestic tort levels given section 8(4) does not, on its plain meaning, address levels of awards, let alone bind domestic courts to Strasbourg levels. Indeed, not only does the Act not bar an approach to damages which takes common law principle and scales as its starting point, as we saw in chapter 3,[86] the terms of the Act provide some positive support for such approach. Further,

[83] *Nicklinson* (n 81) [71]ff.

[84] The Law Commissions came to a similar conclusion in their report on HRA damages: (n 36) [4.11].

[85] *Kingsley* (n 57) [40]; *Hobbs v UK* (2007) 44 EHRR 54, [67]; Law Commissions Report [3.19]–[3.21], [4.14]; LG Loucaides, 'Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum' [2008] *European Human Rights Law Review* 182.

[86] See ch 3.IV.

there is a strong normative argument for a tort-based approach, whereas the normative justification for the mirror approach is plunged into doubt once we recognise that such approach does not follow necessarily from the terms of the Act.

In *Faulkner* Lord Reed observed that the approach to damages under section 8

> differs from the ordinary approach to the relationship between domestic law and the Convention, according to which the courts endeavour to apply (and, if need be, develop) the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international obligations; the starting point being our own legal principles rather than the judgments of an international court.[87]

This 'ordinary' approach is consonant with that just outlined: the English law of damages would provide the starting point in determining damages claims, while courts would take account of those broad principles that could be divined from Article 41 jurisprudence (applying section 8(4)), and also Article 13. The ordinary approach is consonant with views expressed in early damages decisions: in *Cullen* Lord Millett, having noted the problematic nature of the Strasbourg jurisprudence, said: 'we may have to develop our own jurisprudence, while keeping an eye open on the case law of the Strasbourg court to ensure that we do not stray too far from the principles which that court may lay down'.[88] It is also analogous to the approach Irish courts have adopted under the European Convention on Human Rights Act 2003, which sets out a statutory framework governing damages not dissimilar to that under the HRA.[89]

If this is the 'ordinary' approach then one would expect good reasons for deviating from it. Justification cannot lie in section 8, given the ordinary approach is perfectly consonant with that provision. And, for reasons discussed, it cannot lie in an argument that the approach to Strasbourg jurisprudence ought to be consistent across sections 2 and 8. In any case, in the post-*Faulkner* decision in *Osborn* Lord Reed, consistent with the more general trend away from the mirror approach under section 2, signalled that the 'ordinary approach' was the correct approach to questions concerning *substantive rights*:

> [The HRA does not] supersede the protection of human rights under the common law or statute, *or create a discrete body of law based upon the judgments of the*

[87] *Faulkner* (n 1) [29]. See also, eg, *Osborn* (n 1) [54]ff; *Kennedy v Charity Commission* [2015] AC 455, [46] ('the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene').

[88] *Cullen v Chief Constable Royal Ulster Constabulary* [2003] 1 WLR 1763, [80].

[89] See particularly ss 3 and 4 of the Act and *Pullen v Dublin CC* [2009] IEHC 452; see further ch 3.IV.B.

> *European court*. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act *when appropriate*.[90]

He continued, '*the starting point [is] our own legal principles*'.[91] If the ordinary approach is that taken to adjudication of substantive rights, then it is not clear what the normative basis is for taking the inverse approach to damages.

SECTION 2. THE SUPRANATIONAL DIMENSION

I. SUPRANATIONAL VERSUS DOMESTIC CONTEXT

There is no requirement in international law that domestic courts follow the Article 41 jurisprudence. On a normative level, the Strasbourg Court's approach to relief under Article 41 does not provide an appropriate model for human rights damages in domestic law. In the absence of statutory terms mandating the mirror approach, such approach ought to be rejected as without normative basis.

A. No Strasbourg Imperative

There is no obligation on Member States to follow the ECtHR's Article 41 jurisprudence. This is because Article 41 governs *the ECtHR's* remedial jurisdiction, not the remedial responsibilities of Member States.

However, Member States are under remedial obligations pursuant to Article 13, and the ECtHR has developed a substantial jurisprudence under that provision, which is distinct from that under Article 41. The Article 13 jurisprudence does not entail prescriptions as to the precise scales states ought to apply or detailed rules which domestic courts must employ when assessing compensation. Rather, the jurisprudence articulates a framework of minimum standards, including that awards ought not to be so low as to undermine effective protection, that remedies must be effective in practice as well as in principle, and that both pecuniary and preventive remedies ought to be available.[92] Within that basic framework domestic courts have 'discretion'[93] to organise remedies consistently with their own traditions. This approach is not dissimilar to that taken within EU law: Member States may organise remedies for breaches of EU law according to their own

[90] *Osborn* (n 1) [57] (emphasis added).
[91] ibid [67] (emphasis added).
[92] See ch 6.1.II; Council of Europe Directorate-General (Human Rights and Rule of Law), *Guide to Good Practice in Respect of Domestic Remedies* (2013).
[93] *Cocchiarella v Italy* (26 March 2006) App no 64886/01, [79]–[80] (GC).

traditions, subject to basic requirements that the remedial approach ought not to render exercise of EU rights impossible or excessively difficult, and/or afford EU rights less protection than equivalent rights in domestic law.[94] The approach is also consonant with the position in private international law, that remedies are quintessentially for the forum.[95]

Under Article 13 the Grand Chamber has emphasised, specifically in regard to compensation, that it is open to a Member State 'to organise the remedy in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned' and stated that domestic approaches may legitimately deviate from the ECtHR's own remedial practice.[96] Indeed, the Court envisions that rather than following Article 41 practice it is open to and would be 'easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage', including 'personal injury, damage relating to a relative's death or damage in defamation cases'.[97] Similarly, where the Court has held, pursuant to Article 46, that it is incumbent on domestic institutions to take general and/or individual measures to effect *restitutio in integrum*, it has emphasised that as long as this general principle is adhered to and remedies are effective, domestic institutions are free to choose the manner in which they afford redress.[98] This has included situations where those measures are likely to include monetary relief; in such cases the Court has not sought to pre-empt how such awards are calculated or quantum.[99] Reflecting the degree to which organisation of remedies, and particularly assessment of monetary awards, is viewed as properly for domestic institutions, there have been high-level proposals (not so far implemented) that where the ECtHR finds a violation and determines compensation should be awarded, assessment ought as a 'general rule' to be remitted to domestic institutions.[100]

Given the absence of any prescription that Article 41 jurisprudence must be followed, it is rather odd that the Strasbourg Court has been the target of domestic judges' ire at feeling compelled to follow Strasbourg's remedial approach. For example, in *Rabone* Lord Mance was seemingly frustrated

[94] See generally A Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 *EL Rev* 51; M Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before the National Courts' in P Craig and G de de Búrca (eds), *The Evolution of EU Law* 2nd edn (OUP, 2011).

[95] eg *Iraqi Civilians v MOD* [2014] EWHC 3686; *KB* (n 5) [22].

[96] *Scordino v Italy (No 1)* (2007) 45 EHRR 7, [188]–[189]; *Cocchiarella* (n 93) [79]–[80]; *Burdov v Russia (No 2)* (15 January 2009) App no 33509/04, [99] (ECtHR First Section).

[97] *Scordino* ibid.

[98] eg *Assanidze v Georgia* (2004) 39 EHRR 32, [198], [202].

[99] eg *Kuric v Slovenia* (2013) 56 EHRR 20, [406]–[415]; *Bittó v Slovenia* (28 January 2014) App no 30255/09, [135] (ECtHR Third Section).

[100] *Report of the Wise Persons to the Committee of Ministers*, CM(2006)203 (15 November 2006) [94]–[99]. See also Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us, Vol 1* (2012) [11.6], [11.13].

at what he perceived to be the Strasbourg Court's overzealous interference with the domestic order, saying:

> [The ECtHR] could have left it to national systems, in the event of any failure by state authorities to address such a risk [to life under Article 2], to recognise a range of victims *and to provide compensation consistent with their ordinary law of tort* … But that is not how the Convention has been interpreted.[101]

This criticism, as it applies to compensation, is misdirected. It is the House of Lords, through *Greenfield*, sustained by Supreme Court decisions in *Faulkner* and *Rabone* itself, which have tied the domestic approach to Article 41 practice. The Strasbourg Court has *explicitly* left it open to domestic courts to adopt an approach to monetary relief consistent with domestic traditions; indeed, it has suggested that domestic scales applied in torts such as defamation would be an appropriate comparator.

B. The Subsidiary Role of the European Court of Human Rights

The mirror approach is not required by the Convention. In addition, the ECtHR's approach under Article 41 does not offer an appropriate remedial model for domestic law.

The ECtHR grants monetary compensation under Article 41 to afford 'just satisfaction', whereas states parties are charged with affording victims an 'effective remedy' under Article 13. When the ECtHR makes an award under Article 41 it does not purport to be granting the effective remedy which it is the obligation of the Member State to afford the applicant, but is rather exercising its own distinct remedial jurisdiction.

Importantly, the Strasbourg Court exercises that remedial jurisdiction according to the principle of subsidiarity, which holds that the protection of rights and provision of remedies is first and foremost the responsibility of domestic institutions and that the Court acts only in a secondary, supervisory role:[102] 'It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role *subject to* the principle of subsidiarity';[103] the Court emphasises that it 'cannot, and must not, usurp' the primary role of domestic institutions.[104]

[101] *Rabone* (n 1) [121] (emphasis added).

[102] ECHR, Protocol 15, art 1 (not yet in force); *McFarlane v Ireland* (2011) 52 EHRR 20, [112]; *Gross v Switzerland* (2014) 58 EHRR 7, [68]; *Papamichalopoulos v Greece* (1996) 21 EHRR 439, [34] ('If the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself'); *Salah v Netherlands* (2007) 44 EHRR 55, [70]; *Scordino* (n 96) [179], [247]; *Handyside v UK* (1979–80) 1 EHRR 737, [48]–[50]; *Z v UK* (2002) 34 EHRR 3, [103].

[103] *A* (n 13) [174] (emphasis added).

[104] *Gough v UK* (2015) 61 EHRR 8, [137].

What constitutes just satisfaction at the supranational level, afforded by a supervisory and subsidiary institution, will naturally and legitimately differ from what constitutes effective redress provided by domestic institutions with principal responsibility for redress.[105] The Court has said that its role in provision of relief is not analogous to that of domestic courts: 'Article 41 … does not provide a mechanism for compensation in a manner comparable to domestic court systems';[106] 'it is not [the Court's] role under art 41 to function akin to a domestic tort mechanism court [sic] in apportioning fault and compensatory damages between civil parties'.[107] The Grand Chamber says: '[i]t is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights' and the Court

> *cannot emphasise enough* that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation—both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.[108]

As such, '[t]he [ECtHR] is not the usual forum for ordering compensation in respect of human rights violations; that is a question for national courts'.[109]

That the ECtHR's remedial function is subsidiary to and not comparable to that of domestic courts is made clear by Article 41 itself. It provides that the ECtHR may only make an award if domestic law 'allows only partial reparation to be made'. In this respect commentators observe that the reference to Article 41 in section 8(4) HRA is 'curious' given 'Article 41 is, in terms, directed to a situation in which domestic law fails to make adequate provision' for monetary relief.[110] It is also illustrative of the ECtHR's subsidiary position that it may only grant two remedies: a finding that rights have been violated and monetary compensation.[111] It has not traditionally possessed power to grant coercive relief[112]—a judgment of the Court 'cannot

[105] See Feldman (n 76) [19.42].

[106] *Varnava v Turkey* (2010) 50 EHRR 21, [156] [*Varnava* Third Section].

[107] *Al-Jedda v UK* (2011) 53 EHRR 23, [114]; *Varnava v Turkey* (18 September 2009) App no 16064/90, [224] (GC) [*Varnava* GC].

[108] *Demopoulos v Turkey* (1 March 2010) App no 46113/99, [69] (GC) (emphasis added).

[109] C Harlow, *State Liability* (OUP, 2004) 68.

[110] Clayton and Tomlinson (n 15) [21.58].

[111] See Law Commissions Report (n 36) [3.31], where a wealth of authorities are cited. This explains the absence of guidance in the Article 41 jurisprudence as to how monetary and specific remedies ought to interact: *Anufrijeva* (n 5) [60].

[112] But note that this is gradually changing: P Leach, 'No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies' in A Føllesdal et al (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013). For example the Court may, pursuant to Article 46, indicate specific and individual measures that it considers the Member State ought to implement at domestic level to, for example, remove the source of ongoing or systemic violations and/or redress the consequences of violations: eg *Stanev v Bulgaria* (2012) 55 EHRR 22, [254]–[258]; *Savriddin Dzhurayev v Russia* (25 April 2013) App no 71386/10, [242]–[264] (ECtHR First Section).

of itself annul or repeal' impugned domestic measures[113]—while it did not even make monetary awards before 1987. As commentators observe,[114] that the Court's role is supervisory partly explains why relief is not available as of right at the supranational level and subject to a wide discretion; satisfaction may not be required if remedial steps have been taken or may be taken by domestic institutions.[115] Contrast the position under Article 13, where it is the *entitlement* of every victim to be afforded an effective remedy by the Member State. This reinforces that the remedial roles of domestic courts and the supranational Court ought not to be conflated.

The Court does not see its task under Article 41 as being to stand in the shoes of a domestic court and grant the remedy that a domestic court would grant. For example, domestic courts may take a tort-based approach to damages for breaches of human rights. However, they may not have extended the damages remedy to a certain type of rights-violation. In turn, the unavailability of damages may constitute violation of Article 13. The ECtHR's response is not to provide the tort-based remedy that domestic courts would have awarded had they recognised that a compensatory award was required. Instead the ECtHR follows its own *sui generis* approach under Article 41.[116] In general the Court does *not* assess compensation 'by reference to the principles or scales of assessment used by domestic courts'.[117] This is not because it disapproves of domestic approaches. Rather, it sees its own role as distinct. This is further illustrated by those exceptional instances where the Court has by necessity been required to function as a court of first instance for repeat claims for compensation arising from some systemic defect in the domestic legal system and for which no effective remedy is available domestically. In such circumstances the ECtHR has expressly stated that it *uplifts* scales under Article 41 so as not to disadvantage applicants relative to awards they could be expected to have received domestically had damages been available.[118] Such practice makes it plain that the Court envisions that its *usual* remedial practice, including ordinary levels of its awards, will be at variance with that appropriate for domestic institutions.

That the Court does not perform a remedial function analogous to domestic courts, is explained by its central concerns, which reflect its position as a supranational court. Those concerns, as the Court increasingly stresses, are setting minimum human rights standards across Europe and monitoring implementation: 'The emphasis is not on providing a mechanism for

[113] *Marckx v Belgium* (1979–80) 2 EHRR 330, [58]; *Selcuk v Turkey* (1998) 26 EHRR 477, [125].
[114] Harris et al (n 41) 157.
[115] *Broniowski v Poland* (2004) 40 EHRR 495, [198].
[116] This example is based on *McFarlane* (n 102).
[117] *Osman v UK* (2000) 29 EHRR 245, [164]; *Beet v UK* (2005) 41 EHRR 441, [46]. The ECtHR may well take domestic scales into account—but they are not decisive: *Z* (n 102) [131].
[118] *Scordino* (n 96) [176].

enriching successful applicants but on [the Court's] role in making public and binding findings of applicable human rights standards'.[119] Whereas the 'trigger' for the Court's consideration of a case is an individual petition, 'the Court serves a purpose beyond the individual interest in the setting and applying of minimum human rights standards for the legal space of the Contracting States. The individual interest is subordinate to the latter';[120] 'The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention'.[121] That the Court has a very different role to domestic courts, focused on international standard-setting, helps to explain why the Court considers that 'the awarding of sums of money to applicants by way of just satisfaction is not one of [its] main duties'.[122]

The ECtHR's ordering of priorities is evident in various features of its practices. It may refuse to make compensatory awards or indeed consider individual cases where there is an ongoing violation and the state has indicated it is taking measures to resolve the violation;[123] the Court's principal concern is not to resolve individual grievances but ensuring implementation of treaty obligations and observance of minimum standards. Whereas an applicant would not normally be required to exhaust a remedy that was not in place at the time of lodging their application, the Court—'[g]iving weight … to the subsidiary character of its role'—has been increasingly willing to declare applications inadmissible for non-exhaustion of domestic remedies on the basis that the state had introduced a domestic remedy since the application was lodged.[124] Again, this reflects a primary concern for state compliance, and a view that individual redress is first and foremost for domestic institutions. The ordering of priorities—specifically, subordination of individual interests to the wider aim of standard-setting—is also evident in (i) the Court's power to 'continue the examination of an application, even if the applicant no longer wishes to pursue his case' 'where respect for human rights so requires',[125] and (ii) its power to examine an application even though the applicant has not suffered 'significant disadvantage'—as is typically required for an application to be admissible—where 'respect for human rights as defined in the Convention … requires an examination of

[119] K Reid, *A Practitioner's Guide to the ECHR* (Sweet and Maxwell, 1998) 398, cited by the Law Commissions (n 36) [3.9].

[120] *Varnava* Third Section (n 106) [156].

[121] *Demopoulos* (n 108) [69].

[122] *Salah* (n 102) [70]. Of course, dissenting views have been aired, reflecting different conceptions of the ECtHR's primary role: eg *Kingsley* (n 57) 196–97 (partly dissenting opinion of Judges Casadevall and Kovler) ('Applicants are entitled to something more than a mere moral victory or the satisfaction of having contributed to enriching the Court's case law').

[123] eg *Greens v UK* (2011) 53 EHRR 21, [98], [116]–[122].

[124] *Demopoulos* (n 108) [87]–[88].

[125] ECHR, art 37(1); *Varnava* Third Section (n 106) [156].

the application'.[126] Even where what is 'at stake' for the *individual* applicant is 'considerable', if they have not suffered significant disadvantage the application will be inadmissible if consideration of the application would not 'amplify or contribute to [the Court's relevant] case-law'.[127] Giving further expression to the prioritisation of standard-setting is the Court's long-standing view that its judgments 'are essentially declaratory' in nature, 'leav[ing] to the State the choice of the means to be utilised in its domestic legal system for performance of its [remedial] obligation[s]'.[128] Also, one may observe that the contexts in which the Court has more consistently been willing to make awards include those where there is a systemic failing in the domestic system which the respondent state has omitted to adequately address, the best examples being breaches of Article 6 caused by systemic delays in the court systems of Member States, or where the respondent state is persistently recalcitrant, as in the case of Russia. One reading of such remedial practices is that they are guided by the central priority of securing state compliance: money awards are made so as to incentivise the respondent state to take steps towards compliance or desist from persistent rights-violating behaviour.

Albeit that normative debates continue as to the Court's role,[129] it seems inevitable that the focus on standard-setting and compliance-control will only intensify at the expense of individual redress, as the Court and Member States seek to combat the overwhelming backlog of applications faced by Court;[130] in this respect recent measures, specifically Protocols 14–16, point in only one direction.[131]

C. The Conceptual Nature of Convention Rights: International Law versus Domestic Law

Linked to the different roles of the ECtHR and domestic courts, and just as important in understanding why remedial approaches legitimately vary, is that the basis of liability is arguably different between domestic and international contexts.

The basis of liability in domestic law is breach of individual personal rights.[132] In contrast it is far from clear that this is the basis of liability at

[126] ECHR, art 35(3)(b).

[127] *Heather Moor and Edgecomb Ltd (No 2) v UK* (26 June 2012) App no 30802/11, [25]–[26] (ECtHR Fourth Section).

[128] *Marckx* (n 113) [58].

[129] eg S Greer and L Wildhaber, 'Revisiting the Debate about "Constitutionalizing" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655.

[130] See Harris et al (n 41) 38–40.

[131] For discussion of those measures see ibid 165–71.

[132] See ch 4.2.II.A.

the supranational level. That the bases of liability may be distinct further helps to explain the distinctiveness of the ECtHR's remedial approach, and the inaptness of transposing it to the domestic order.

Henkin observes that while human rights treaties 'deal' with and refer to individual rights, there are different perspectives as to whether these treaties *create* individual rights, that is legal rights *in international law* possessed by individuals and correlative to duties owed by states.[133] He outlines three possibilities: (1) the orthodox view that treaties only create rights and duties between states; (2) while creating obligations between states, these treaties may *also* bestow individuals with rights; and (3) states parties as legislators, have legislated human rights into international law as 'affirmative individual values';[134] Henkin says that while this third perspective is independent of the previous two, it might be compatible with either.

In terms of the present discussion, which is concerned with understanding ECtHR remedial practice, the relevant inquiry is not whether there is an intellectual argument that the Convention creates individual rights, but how *the ECtHR* conceptualises the basis of liability under the Convention.

In a canonical statement the ECtHR said: 'the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"'.[135] The description of treaty obligations as 'objective' does not in itself suggest that they are obligations owed to individuals. Indeed, there is an obvious contrast with the idea of 'subjective rights', which are personal and individualistic. The idea of objective obligations would rather suggest a position consonant with Henkin's third perspective, that is, the Convention creates obligations between states parties while also 'enacting' free-standing objective obligations with which Member States must comply. This is similar to Simma's view that human rights treaties legislate into international law free-standing standards of international public policy, which serve the general interest.[136] This explains why, for example, a contracting party may 'require the observance of [Convention] obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals'.[137] The ECtHR and European Commission have similarly described the Convention as a 'law-making treaty'[138] which establishes a 'common public order of the free

[133] L Henkin, *The Age of Rights* (Columbia, 1990) 34.
[134] ibid 34–37.
[135] *Ireland v UK* (1979–80) 2 EHRR 25, [239].
[136] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, ch V.
[137] ibid 366–67.
[138] *Wemhoff v Germany* (1979–80) 1 EHRR 55, [8].

democracies of Europe'.[139] Such view is further reinforced by the excerpts cited above in which the Court characterises individual applications not as claims of individual right, but as 'triggers' for the Court's jurisdiction. That jurisdiction is not described as entailing adjudication of individuals' *rights*, but rather setting of minimum *standards*; this task transcending individual interests, albeit individuals naturally have an interest in seeing those standards observed.[140] This may be contrasted with the approach of other international human rights bodies, such as the Inter-American Court of Human Rights, which has explicitly spoken in terms of international law obligations owed directly to individuals.[141]

The central obligation on Member States under Article 1 is to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. This obligation renders enumerated rights legally relevant.[142] It is clear that this obligation is owed by state parties to one another. It is less clear that the Convention imposes obligations on states owed directly to individuals in international law, correlative to individual rights. The ECtHR's statements on Article 1 suggest it conceptualises that Article as imposing a duty on states parties to implement in domestic law the protections envisioned by the Convention, rather than directly creating rights in international law. For example the Court repeatedly says the 'object and purpose of the Convention, as set out in art 1' is 'that rights and freedoms should be secured by the Contracting State within its jurisdiction',[143] rather than to create individual rights in international law. In similar vein it says that domestic incorporation is a particularly faithful reflection of the intention behind Article 1.[144] Also oft-repeated by the Court is that its role is to supervise 'implementation' of treaty obligations, rather than, say, direct enforcement of individual rights.

The trajectory of these statements is consonant with the plain wording of Article 1: a legal obligation on states to 'secure' rights to those in their jurisdiction suggests a duty of implementation. Such obligation is conceptually distinct from owing a legal obligation to each such person by virtue of their actual holding of rights.

[139] *Austria v Italy* (1961) 4 YBECHR 112 (EComHR); see similarly, *Loizidou v Turkey* (1995) 20 EHRR 99, [75], [93] ('constitutional instrument of European public order ("ordre public")').

[140] Above at nn 120ff.

[141] *The Effect of Reservations on the Entry into Force of the American Convention (Arts 74 and 75)* (24 September 1982) Advisory Opinion OC-2/82, IACHR Series A No 2, [29]; M Carven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 *European Journal of International Law* 489, 513.

[142] Albeit, *in practice* the Article is not that prominent nor considered to be of great importance: *Ireland v UK* (n 135) [238].

[143] eg *Chagos Islanders v UK* (2013) 56 EHRR SE15, [81].

[144] *Ireland v UK* (n 135) [239].

From the foregoing it is at best unclear that the ECtHR considers the basis for exercise of its remedial jurisdiction to be breach of a duty owed to an individual rights-bearer. In turn this bears on remedies. If the obligation breached is not owed to an individual, then the normative basis and imperative for provision of individual redress is obviously weaker than where the obligation is owed directly to the individual; in these circumstances, where the Court awards monetary compensation to an individual it is *not* on the basis of a personal legal wrong. In turn this may help to explain the Court's cautious approach to money awards, and the Court's greater focus on compliance. These insights also help to explain the absence of an idea within the Article 41 jurisprudence of compensation for damage to the right itself (normative damage), given the obligation breached is not a personal right. Importantly this discussion casts further doubt on the mirror approach: it is difficult to see how the approach of a subsidiary, supervisory international court to provision of satisfaction to an individual harmed in consequence of a breach of a duty not owed to that individual is an apt model for a domestic court with primary responsibility for provision of redress to an individual who has suffered a personal wrong in domestic law.

To the foregoing we may add that Article 41 has its origin in clauses in classic-style arbitration treaties which provided for settlement of disputes *between states*.[145] Such clauses empowered an arbitral tribunal to award 'equitable satisfaction' where it found that a domestic measure enjoining one of the parties to the arbitration was wholly or partly contrary to international law but domestic law did not allow annulment of the consequences of the measure. It is difficult to envision how awards made under a clause with such lineage could provide a sound model for provision of awards by domestic courts for breaches of fundamental personal rights in municipal law.

D. The Supranational Context

There are wider contextual considerations, specific to the supranational plane, which further indicate that the ECtHR's remedial approach is inappropriate for transplantation into domestic law.

These wider considerations further help to explain the Strasbourg Court's cautious approach to awards and the modesty of awards. If the Court routinely ordered Member States to pay substantial compensation and/or awarded aggravated and/or punitive damages, it could compromise its political legitimacy and the goodwill of Member States on which the entire

[145] See, eg, *De Wilde v Belgium (No 2)* (1979–80) 1 EHRR 438; German Swiss Treaty on Arbitration and Conciliation 1921, art 10; Geneva General Act for the Pacific Settlement of International Disputes 1928, art 32.

supranational system depends, and which have been fostered carefully by the Court over the last half-century.[146] Even putting aside liabilities to pay money awards Member States have exposed themselves to significant 'burdens' within and ceded a fair degree of sovereign control to the European human rights system, especially compared to the lighter burdens typically associated with Treaty regimes;[147] states have accepted the jurisdiction of a supranational court which issues legally binding judgments, backed by strong enforcement machinery led by the Committee of Ministers, as well as accepting rights of individual and state petition. It is therefore unsurprising that the Court is reluctant to impose further burdens in the form of regular and substantial money awards and that the Court refused to make any monetary awards during its first few decades.

Against this backdrop, it is unsurprising that Shelton has observed 'a clear concern for the reaction of governments' in the Court's decisions on just satisfaction.[148] She quotes a former judge of the Court as saying, a 'parsimonious' approach is warranted because 'one mistake and the whole system collapses'.[149] Fear of Member States ignoring judgments or even withdrawing from the Convention looms large. Consider an issue such as prisoner voting.[150] The ECtHR's finding[151] that the UK ban on prisoner voting violated the Convention has caused a great deal of consternation among UK politicians, the Prime Minister sharing that he felt 'physically ill' at the idea of giving prisoners the vote, while there have been increasing calls for withdrawal from the Convention in the wake of this litigation (amongst other ECtHR rulings). If the ECtHR's ruling was coupled with substantial monetary awards to prisoners, the ire of domestic politicians would only have been raised even further. It is not surprising therefore that the ECtHR, in follow-up applications by UK prisoners, has consistently refused to make awards, despite the UK still not having implemented the original 2005 ruling.[152]

[146] LR Helfer and AM Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 316–17, discussing how the ECtHR's awareness of political boundaries and incremental approach has been a key determinant of its success. In respect of the ECtHR's gradual expansion of its power to award compensation see, eg, Harlow (n 109) 68ff.

[147] For example, in *Golder v UK* (1979–80) 1 EHRR 524 Judge Fitzmaurice observed (at [38] of his separate opinion) that the Convention had 'broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction'.

[148] D Shelton, *Remedies in International Human Rights Law* 2nd edn (OUP, 2005) 259; Leach (n 112) 145.

[149] Shelton, ibid.

[150] For analysis of this saga see: E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 504.

[151] *Hirst v UK* (2006) 42 EHRR 41.

[152] *Greens* (n 123) [94]–[98]; *Firth v UK* (12 August 2014) App no 47784/09, [17]–[18] (ECtHR Fourth Section); *McHugh v UK* (10 February 2015) App no 51987/08, [12]–[17] (ECtHR Fourth Section).

In addition, there are significant wealth disparities between Member States. This makes it difficult for the Court to, for example, raise levels of awards across the board, or for it to impose liability for monetary awards with the regularity of a domestic court. In deciding upon quantum the Court has regard to the standard of living in the defendant state, such that awards against the UK may be higher than those against Turkey.[153] In *Faulkner* the Supreme Court held that in assessing quantum English courts should only have regard to awards made against the UK or states with similar costs of living.[154] However, if English courts wanted to calibrate awards to English conditions it is unclear why awards have not been calibrated to domestic scales.[155] Also, the Court in *Faulkner* neglected the wider contextual and other reasons which have been traversed above, which serve to explain why Strasbourg levels of awards are low *in general* compared to domestic law.

E. The English Courts' (Lack of) Consideration of the Distinctiveness of Supranational Context

In light of the foregoing Lord Bingham's observation in *Greenfield* that 'the focus of the Convention is on the protection of human rights and not the award of compensation' does not take one far in the domestic context.[156] Similarly, in *Faulkner* Lord Reed observed that the ECtHR 'has not regarded the award of just satisfaction as its principal concern'.[157] In both decisions their Lordships made these statements in the course of elaborating the nature of the approach that was being read across to domestic law. In neither case did their Lordships pause to consider that the ECtHR's ordering of priorities follows from the distinctive context within which it operates and its role as a supranational court, such that its remedial practice is neither apt for nor intended for importation. Nor did their Lordships refer to any statements made by the ECtHR explaining the differing remedial responsibilities of that Court and domestic institutions.

Other distinctive features of the ECtHR's approach have similarly been noted by English courts but not led to more general reflection upon the mirror approach. For example, Lord Reed in *Faulkner* observed that the ECtHR does not undertake detailed fact-finding. His response was that domestic

[153] *ECtHR Practice Direction: Justice Satisfaction Claims* (28 March 2007) [2]–[3] (http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf); Harris et al (n 41) 156.

[154] (n 1) [38]–[40].

[155] Rather unsurprisingly scales in English tort law are calibrated to domestic conditions: eg *Heil v Rankin* [2001] QB 272, [38].

[156] (n 1) [9]. In any case, is award of compensation not one means of protecting rights?

[157] (n 1) [34].

courts ought to resolve disputed questions of fact in the ordinary way even if the ECtHR would, in similar circumstances, not do so.[158] This is a welcome tweak to a flawed approach. However, Lord Reed did not pause to consider that this feature of the ECtHR's approach, like many others, reflects that the ECtHR does not function as a domestic court, which in turn casts doubt on the appropriateness of following its remedial practices in general.

For example, fundamental features of the ECtHR's practice are shaped by its lack of fact-finding capacity, yet these features have been mechanically read into domestic law. In *Greenfield* Lord Bingham observed that in Article 41 decisions on pecuniary loss suffered in consequence of breach of Article 6, '[i]t is enough to say that the court has looked for a causal connection, and has on the whole been slow to award such compensation';[159] under the mirror approach this is 'practice' that will guide domestic courts, such that domestic courts will be slow to make awards. However, there was no consideration of whether the rarity of awards might be due to causation being heavily fact-dependent such that it would be difficult for the ECtHR to find a 'clear causal link'[160] absent hearing and testing evidence, which that Court generally does not do. As the ECtHR has said itself, it 'is acutely aware of its own shortcomings as a first instance tribunal of fact';[161] it does not have the capacity to and nor would it be appropriate for it to routinely undertake detailed fact-finding in connection with claims of compensation as if it were a first-instance court;[162] and 'domestic authorities or courts are clearly in a better position than the Court to determine the existence and quantum of pecuniary damage'.[163]

Similarly, where the ECtHR awards compensation for non-pecuniary loss such as mental distress it does not typically have evidence of actual suffering, nor evidence as to the precise factual circumstances of the violation. That it cannot be sure whether loss has in fact been suffered and does not have a firm basis for making reliable factual inferences, may further help[164] to explain its cautious approach to compensation for mental distress, confining awards to cases of 'evident trauma',[165] and those entailing more serious violations, presumably on the basis that it is safer to assume loss for such violations. Again, domestic courts have not considered this in reading across the ECtHR's generally cautious approach.

[158] ibid [37], [39].
[159] (n 1) [11].
[160] Practice Direction (n 153) [7].
[161] *Denizci v Cyprus* (23 May 2001) App no 25316/94, [315] (ECtHR Fourth Section).
[162] *Demopoulos* (n 108) [69].
[163] *Dimitrov v Bulgaria* (10 May 2011) App no 48059/06, [125] (ECtHR Fourth Section).
[164] In addition to other factors mentioned above and below, including the Court's concern not to undermine its political legitimacy, its lack of an express power to award non-pecuniary loss, and its conception of itself as a standard-setting court rather than small-claims tribunal.
[165] *Varnava* GC (n 107) [224].

A major feature of domestic courts' practice under the mirror approach has been adoption of the ECtHR's practice of denying awards for non-pecuniary loss that is not 'sufficiently serious'.[166] The ECtHR has held that

> [i]n *many* cases where a law, procedure or practice has been found to fall short of Convention standards [a finding of violation] is enough to put matters right … In some situations, however, the impact of the violation may be … of a nature and degree as to have impinged *so significantly* on the moral well-being of the applicant as to require something further.[167]

In addition to the ECtHR's lack of fact-finding capacity, this approach is explicable by reference to the ECtHR's primary role being maintenance of basic standards; it is not constituted to be a small-claims tribunal. Its position as a subsidiary institution is also relevant: if the Court were to operate routinely as a redress mechanism wherever some consequential loss were suffered it would usurp domestic institutions' primary responsibility for provision of redress. Further, the ECtHR has specifically linked the 'sufficiently serious' criterion to the terms of Article 41 which make 'no express provision for non-pecuniary or moral damage'.[168] Against this backdrop the Court limits itself to awarding compensation where there is a particularly strong imperative for it to deviate from its default setting, ie where the impact of the violation is 'so significant' that it would be remiss even for a subsidiary institution not to afford some measure of redress.

Perhaps the most striking instance of English courts reading across ECtHR practice where that practice is significantly shaped by concerns irrelevant to the domestic context is in Article 5(4) cases. As is discussed below, the effect of the Supreme Court decisions in *Faulkner* and *Osborn* is that awards for distress will be made regularly for breaches of Article 5(4) caused by delay (i.e. a failure to conduct proceedings speedily)—as the ECtHR has often made awards for such breaches—but will generally not be made for breaches of Article 5(4) caused by a procedural fault other than delay, as Strasbourg practice as to awards has not been clear and consistent in this context. However, it seems that the main reason why awards have regularly been made in delay cases is because the ECtHR has had to deal with a deluge of repeat claims caused by systemic delays in domestic systems.[169] In this context the Court has effectively had to function as a first instance

[166] *Faulkner* (n 1) [62]–[66]; see further ch 7.I. Note this practice is not equivalent to a principle recognised at common law, that de minimus loss can be disregarded. More than de minimus loss, but which is not 'so significant', is routinely compensated within torts actionable per se, and where loss is de minimus nominal damages are awarded.

[167] *Varnava* GC (n 107) [224] (emphasis added).

[168] ibid.

[169] See, eg, *Scordino* (n 96); *Cocchiarella* (n 93). Those cases concerned violations caused by delay in the context of Article 6(1), however it was the remedial approach developed in these Article 6(1) delay cases that was then read across to Article 5(4) delay cases on the basis that a consistent approach should be taken to delay cases: *HL v UK* (2005) 40 EHRR 32, [149].

court given the lack of domestic remedies for such delays, and further, has arguably been more willing to exercise its remedial discretion in favour of awards so as to incentivise respondent states to address systemic defects and introduce effective domestic remedies. The ECtHR has not faced such issues in respect of other types of procedural breach under Article 5(4), such that it has not had reason to depart from its default, parsimonious approach. It makes no sense for legal propositions in English damages law to depend on the fact that several European states, at one time or another, suffered systemic delays in their respective court systems.

F. Compliance with Convention Requirements

While one of the core justifications for adoption of a mirror approach is to ensure compliance with Convention requirements, a focus on Article 41 could in fact cause the UK to fall foul of Article 13.[170]

The risk of non-compliance is not high in respect of quantum, given awards have needed to be meagre before the ECtHR will find violation of Article 13. However, this is not to say that the ECtHR has not found violations on this basis. One source of risk of breach of Article 13 is the oft-repeated direction from higher courts, that awards for non-pecuniary loss should be modest, higher courts going so far as to advise that damages will be "modest" even for deliberate wrongdoing.[171] If this direction were followed in a case of serious violation there would be a real risk of breach of Article 13. There are such examples under the HRA. For example an award of £1,200 was made to a prisoner for distress caused by a delay before the Parole Board, where the distress stretched over a very long period of two years, there being significant aggravating features in the case, in particular that the prisoner suffered mental health issues, which made the delay more difficult to cope with.[172]

There are greater risks associated with other features of a mirror approach, such as following the ECtHR's practice of holding a finding of breach to be sufficient relief in the presence of loss. If such practice became dominant in general or characterised the remedial approach for particular types of violation, there is a good chance it would lead to violation of Article 13. This is the case for breaches of Article 6: *Greenfield* holds that awards will generally not be made, despite the ECtHR itself having made awards for such breaches in a not insignificant number of cases.[173] In *Osborn* the Supreme Court held that awards would ordinarily not be recovered for breaches of

[170] On the requirements of Article 13 see ch 6.1.II.
[171] *Watkins* (n 1) [73].
[172] *R (Guntrip) v SOSJ* [2010] EWHC 3188; see further s 2.II.C.iii below.
[173] See n 396 below.

Article 5(4) (not involving delay) if such violations had not resulted in deprivation of liberty.[174] Yet, as the Supreme Court in *Osborn* and *Faulkner* observed, there are 'numerous cases' in which awards have been made for such violations by the ECtHR for distress alone.[175] Putting to the side that it is striking that the practice of domestic courts is even more restrictive than that of a subsidiary, supranational Court, such approach is likely to fall foul of Article 13. The ECtHR maintains that compensation ought to be available for rights-violations. An available remedy is one available not only *in theory*, but also *in practice*. The ECtHR has found breaches of Article 13 where, despite compensation being available in principle for a particular type of violation, there was no clear domestic practice of awards actually being made.[176] If there is no pattern of awards *plus* express statements from the highest courts maintaining that awards will generally not be made, as in *Greenfield* and *Osborn*, violations of Article 13 seem inevitable. Indeed, the unavailability in English law of awards for distress alone, consequential upon breaches of Article 5(4) (not involving delay), has previously been held to violate Article 5(5);[177] that provision provides that compensation ought to be available for Article 5 breaches, with similar principles being applied as those under Article 13. Neither Article 5(5) nor 13 was considered in *Osborn*.

In contrast, it is highly unlikely that a tort-based approach would run afoul of Article 13. As Lord Woolf has said: 'The domestic approach to the quantum of compensation would certainly meet the requirements of the [Convention]'.[178] The ECtHR has itself observed of claims in English tort law, 'the possibility of obtaining compensation in civil proceedings for the claims of the breach of the rights … will generally, and in normal circumstances, constitute adequate and sufficient remedy'.[179] In other cases it has specifically found awards in tort, including for vindicatory torts such as battery, to constitute effective redress.[180]

In any case, if there is any risk that quantum under a tort-based approach might contravene Article 13, it must be a far lower risk than that in respect of the mirror approach, given scales applied by the ECtHR are in general modest compared with domestic scales. Further, the ECtHR has shown greater tolerance for awards lower than what it would ordinarily consider adequate where scales are explicable according to domestic legal traditions

[174] *Osborn* (n 1) [2](xiii).
[175] ibid [114]; *Faulkner* (n 1) [61].
[176] See ch 6.1.II.
[177] *Waite v UK* (2003) 36 EHRR 54; *Kolanis v UK* (2006) 42 EHRR 12.
[178] H Woolf, 'The Human Rights Act 1998 and Remedies' in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective* (Kluwer, 2000) 431.
[179] eg *Chagos* (n 143) [81]; see the tort claims for damages made in domestic proceedings: *Chagos Islanders v Attorney General* [2003] EWHC 2222, [102].
[180] eg *Wainwright v UK* (2007) 44 EHRR 40, [55]; see also *Hay v UK* (2000) 30 EHRR CD188; *Caraher v UK* (2000) 29 EHRR CD119.

or living standards;[181] whereas such considerations might 'save' an unusually low award made according to a tort-based approach they could not save an equivalent award made pursuant to the mirror approach.

According to a tort-based approach damages would be awarded more frequently than under the mirror approach, generally wherever damage or loss is suffered. It would therefore be most unlikely that a domestic court would fail to make an award in a case in which Article 13 demanded an award, while there could be no argument that the damages remedy was not effective in practice, as a clear practice of making awards would naturally follow from a tort-based approach.

Indeed, in cases where the ECtHR has been more prescriptive as to the requirements of Article 13, especially where very important rights are at stake, it has enunciated an approach for domestic courts akin to the vindicatory, tort-based approach argued for in Part 1 of this book:

> [T]he Court is of the opinion that the domestic courts, as the custodians of individual rights and freedoms, should have felt it their duty to mark their disapproval of the State's wrongful conduct to the extent of awarding an adequate and sufficient quantum of damages to the applicant, taking into account the fundamental importance of the right of which they had found a breach in the present case, even if they considered that breach to have been an inadvertent rather than an intended consequence of the State's conduct. As a corollary this would have conveyed the message that the State may not set individual rights and freedoms at nought or circumvent them with impunity.[182]

As at least one English judge has observed, in evaluating the justifiability of a remedial approach to breach of basic rights focused solely upon consequential factual harm and which excludes damages for the wrong in itself: 'a regime in which damages were confined to damages for distress would render the rights (to a degree) "illusory" (to use the word used by the ECHR) and would, to a degree, fail to provide an effective remedy [as required by Article 13]'.[183]

II. PROBLEMATIC JURISPRUDENCES: SUPRANATIONAL AND MUNICIPAL

The mirror approach requires English courts to follow a deeply problematic jurisprudence: the Strasbourg jurisprudence lacks consistency, coherence and principle, offers little guidance as to when awards should be made and assessment of quantum, and is characterised by opaque, flawed and minimal reasoning. This section demonstrates that the result of tying domestic

[181] ibid [77]; *Cocchiarella* (n 93) [80]; *Scordino* (n 96) [206].
[182] *Shilbergs v Russia* (17 December 2009) App no 20075/03, [78] (ECtHR First Section).
[183] *Gulati v MGN Ltd* [2015] EWHC 1482, [113] (in the context of the action of misuse of private information).

practice to Strasbourg practice is emergence of a domestic damages jurisprudence which mirrors the most problematic features of the supranational jurisprudence. The section also argues that where domestic courts have elaborated more meaningful guidance, this guidance has not been sourced from Strasbourg. Rather, it resembles aspects of the common law of damages. In turn this calls into question the credibility and sustainability of the mirror approach, and illustrates the artificiality of seeking to maintain strict separation between HRA damages and ordinary law.

A. The Supranational Jurisprudence

The Strasbourg jurisprudence is riddled with problems. Commentators,[184] the Law Commissions[185] and judges[186] are united in the view that apart from some broad general principles, such as *restitutio in integrum*, the Strasbourg Court's approach to just satisfaction lacks consistency, coherence, predictability and principle.[187] The Law Commissions considered the 'lack of clear principles as to when damages should be awarded and how they should be measured' to be perhaps 'the most striking feature of the Strasbourg case-law'.[188] Members of the Court are quoted as saying that, when it comes to just satisfaction, they either have no principles or do, but do not apply them.[189] Commentators advise practitioners to avoid searching the case law for principles which do not exist,[190] and that 'there are cases where different results have occurred even though they appear to be indistinguishable on their facts'.[191] A book-length study of the ECtHR's Article 41 jurisprudence reaches the following conclusions: 'it is difficult to discern any

[184] eg Feldman (n 76) [19.42]; R Clayton, 'Damage Limitation: the Courts and the Human Rights Act Damages' [2005] *PL* 429, 431–33; Clayton and Tomlinson (n 15) [21.30]; M Amos, 'Damages for Breach of the Human Rights Act 1998' [1999] *European Human Rights Law Review* 178, 189; AR Mowbray, 'The European Court of Human Rights' Approach to Just Satisfaction' [1997] *PL* 647, 658–59; Beatson et al (n 19) [7-141]; K Starmer, *European Human Rights Law* (LAG, 1999) [2.44], [2.51]; Woolf (n 178) 432.

[185] Law Commissions Report (n 36) [3.4]–[3.15].

[186] See those quotes below from judges at lower court and Supreme Court level (at nn 216–33); *cf Greenfield* (n 1) [15], and see the discussion of *Faulkner* below at n 234.

[187] Note that the ECtHR has taken some steps to try and ameliorate the problem of inconsistency (Harris et al (n 41) 155–56) including establishment of an Article 41 Unit in the Court's Registrary (O Ichim, *Just Satisfaction under the European Convention on Human Rights* (CUP, 2015) 256–57, noting the Unit's exact role remains undisclosed). But given inconsistency remains a core feature of the jurisprudence these efforts do not seem to have proven particularly successful.

[188] Law Commissions Report (n 36) [3.4].

[189] Shelton (n 148) 2. Although, given the emergence of some general principles, Shelton is, relatively speaking, more optimistic about the development of the jurisprudence compared to the first edition of her book: *Remedies in International Human Rights Law* (OUP, 1999) 1.

[190] A Lester et al, *Human Rights Law and Practice* 3rd edn (LexisNexis, 2009) [2.8.4] n 3.

[191] H McGregor, *McGregor on Damages* 19th edn (Sweet and Maxwell, 2014) [48-025].

logic in the current practice of the Court';[192] 'the Strasbourg system of reparation lacks consistency and predictability'; 'broad discretion and lack of reasoning reverberate negatively on the coherence of the system. The result is a practice that may sometimes be characterised as being arbitrary';[193] and Article 41 determinations 'lack … transparency' with the judges 'unwilling[] to give legal reasoning for their awards of reparation'.[194] The study also reveals shocking examples of inconsistency and incoherence, such as private companies being awarded more for non-pecuniary loss associated with violation of property rights than human victims of inhuman and degrading treatment.[195] The author rightly describes such practice as the 'perversion of human rights'.[196]

The state of the jurisprudence is unsurprising[197] when one considers that the Court adopts a broad discretionary approach, which emphasises a flexible case-by-case methodology,[198] and generally does not rationalise its decisions by reference to past awards,[199] nor in general explain the basis on which it decides whether to make an award or how it comes to quantum, only typically saying it has done so on an 'equitable basis'. Of one of the Court's significant remedial practices it has been observed that:

> [W]hether a finding of breach … is sufficient to accord the applicant just satisfaction is a peculiarly subjective matter, and it is not therefore surprising to find the case law does not provide any coherent principles to apply in deciding whether or not this is the case.[200]

The discretionary approach even extends to pecuniary loss—losses that can be objectively quantified—with both the decision[201] whether to award damages for pecuniary loss and assessment[202] ultimately turning on what the ECtHR considers equitable and just on the facts, while even in respect of such objective loss the Court often does not offer reasoned justification

[192] Ichim (n 187) 258.
[193] ibid 271.
[194] ibid 235–38.
[195] ibid 157.
[196] ibid.
[197] Certain other factors have arguably contributed to the state of the jurisprudence including that the Court is divided into chambers, which hinders consistency; that the Court does not see compensation as its primary concern; and it is perhaps unsurprising that a Court comprised of members from different legal traditions should express conclusions on damages in general terms (although this does not prevent the Court giving more detailed reasons for its decisions as to rights-compliance).
[198] See *Varnava* GC (n 107) [224]; *Al-Jedda* (n 107) [114].
[199] There are notable exceptions: eg *MAK v UK* (2010) 51 EHRR 14, [91]–[99].
[200] McGregor (n 191) [48-025].
[201] *Varnava* Third Section (n 106) [155] (summary dismissal of claim for pecuniary loss).
[202] eg *Smith and Grady v UK* (2001) 31 EHRR 24, [19]; *Assanidze* (n 98) [200]–[201]; *Surek v Turkey (No 4)* (8 July 1999) App no 24762/94, [78] (GC); *O'Keeffe v Ireland* (28 January 2014) App no 35810/09, [201] (GC); Mowbray (n 184) 650–51; Clayton and Tomlinson (n 15) [21.68].

for sums awarded.[203] The Court has given its discretionary approach as a reason for not adopting defined scales in particular areas.[204] It has only explicitly adopted scales in few contexts where it has dealt with many repeat cases caused by systemic defects in domestic systems,[205] though it refuses to publish those scales, does not explicitly reason by reference to them, and awards still ultimately rest on the Court's absolute discretion.[206]

To give a flavour of the ECtHR's general approach, consider the extent of the reasoning given in support of awards in the following examples:

— 'The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 7,500 in respect of non-pecuniary damage'.[207]
— 'Having regard to previous cases and making an assessment on an equitable basis, the Court considers it reasonable to award each applicant EUR 1,000 in respect of non-pecuniary damage'.[208]
— 'The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, taking into account the nature of the violations found and ruling on an equitable basis, it awards the applicant EUR 20,000 in respect of non-pecuniary damage'.[209]
— 'It considers that the applicant must have experienced certain distress which cannot be compensated for by the Court's findings of violations alone. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 1,000 in respect of non-pecuniary damage'.[210]

[203] But note that the Court's remedial practice in respect of pecuniary loss is more predictable relative to its wildly unpredictable approach to non-pecuniary loss: Ichim (n 187) 98–117, 155–56.

[204] *Varanava* GC (n 107) [225].

[205] *Scordino* (n 96) [176].

[206] Ichim (n 187) 121ff, 156ff; Harris et al (n 41) 155–56. Rumour has it that the Court Registrary has produced tables to guide assessment more generally. But those tables remain unpublished, the Court does not explicitly refer to them, it is unclear what their legal status is or what legal principles they are based in—the Court has not generally articulated principles to guide quantification so it is unclear what principles the tables encapsulate—and in any case they do not seem to have greatly aided consistency. Until the Court disciplines its open-ended, unreasoned discretionary approach by articulating, adhering to and reasoning by reference to a set of worked-out rules and principles consistency will remain elusive. Yet commentators observe the Court has 'no intention of renouncing such wide power' (Ichim (n 187) 17).

[207] *Venskutė v Lithuania* (11 December 2012) App no 10645/08, [92] (ECtHR Second Section).

[208] *Goussev and Marenk v Finland* (17 January 2006) App no 35083/97, [64] (ECtHR Fourth Section).

[209] *Mosendz v Ukraine* (17 January 2013) App no 52013/08, [129] (ECtHR Fifth Section).

[210] *MSS v Belgium and Greece* (2011) 53 EHRR 2, [406].

— '43. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.
44. The Government considered this claim unsubstantiated.
45. The Court considers that the finding of a violation, constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant'.[211]
— 'The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 2,500 under this head'.[212]
— 'The Court agrees with the Government that the finding of a violation constitutes sufficient just satisfaction'.[213]

Of course there are some cases in which greater reasoning is proffered, particularly in claims for pecuniary loss, and the odd case where the Court articulates a few more detailed considerations or considers past cases, but these are rare and the foregoing represent the Court's standard approach: 'There is virtually never any real articulation as to why the Court has awarded a particular sum'.[214] The Court's practice of conjuring figures out of thin air has led to it being described as a 'calculating machine', with commentators—quite genuinely—speculating that the Court uses a computer programme to fix quantum.[215]

Not surprisingly domestic courts have struggled with the direction that they ought to look to Strasbourg. The following statements by lower court judges give some insight into the difficulties faced:

— 'it is far from simple to see the principles which the ECtHR applies'.[216]
— 'it is not at all clear from the reports how the ECtHR arrived at particular figures'.[217]
— 'there is little in the cases that I have been referred to that assist in the assessment process … other than that they illustrate [that awards are modest]'.[218]
— 'Stanley Burton J [in a pre-*Greenfield* case] reviewed the European cases and demonstrated that there were no consistent principles applied by the European Court as to when to award damages … That situation remains substantially the same now'.[219]
— 'I cannot reconcile … those two European authorities'.[220]

[211] *Garnaga v Ukraine* (16 May 2013) App no 20390/07, [43]–[45] (ECtHR Fifth Section).
[212] *Jaanti v Finland* (24 February 2009) App no 39105/05, [35] (ECtHR Fourth Section).
[213] *Gillan v UK* (2010) 50 EHRR 45, [94].
[214] *DSD* (n 17) [68](iii).
[215] Ichim (n 187) 127.
[216] *Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865, [97].
[217] *Pennington* (n 17) [20].
[218] ibid [22].
[219] *R (Degainis) v SOSJ* [2010] EWHC 137, [18].
[220] *KB* (n 5) [57].

— 'Beyond [a few] basic principles, however, with some exceptions it is impossible to identify a relevant set of principles consistently applied by the European Court when considering awards … The Court tends to award global sums on an 'equitable' basis, and its judgments do not analyse the basis of calculation … or give a breakdown between different items of damages. They may even not distinguish between damages and the costs and the expenses of the proceedings … These characteristics render it difficult to identify more than very general principles'.[221]
— 'This broad discretionary approach to the award of compensation is no doubt the reason for what has been identified by [the Law Commissions], as the "lack of clear principles [in the Strasbourg case law] as to when damages should be awarded and how they should be measured"'.[222]
— 'In general the "principles" applied by the European Court, which we are thus enjoined to "take into account", are not clear or coherent'.[223]
— 'This selection of authorities is typical of the proposition agreed between counsel that there are authorities from the European Court which go in either direction and … it is hard to discern any hard and fast principles from those judgments'.[224]
— 'If the parties are agreed upon one thing in this case it is the difficulty of identifying any principles upon which the European Court of Human Rights decides whether it is necessary to afford just satisfaction under Article 41'.[225]
— 'whilst in this jurisdiction the principles governing awards of "general damages" are well established … the same is not true of the Strasbourg jurisprudence'.[226]
— 'the assistance to be derived from [the Strasbourg] jurisprudence is limited'; 'The difficulty lies in identifying … clear and coherent principles governing the award of damages'.[227]
— 'Although there is now a good deal of jurisprudence both here and in Strasbourg on the issue of compensation for breach of article 5.4, the ascertainment of clear principles governing the issue is with respect an elusive exercise'.[228]
— 'It is notoriously difficult to deduce clear principles in relation to "just satisfaction" from the Strasbourg jurisprudence'.[229]

[221] ibid [24]–[25].
[222] *Dobson* (n 17) [43].
[223] *Re C* [2007] HRLR 14, [64].
[224] *Downing v Parole Board* [2008] EWHC 3198, [20], see also [14].
[225] *Bernard* (n 5) [35].
[226] *Van Colle v Chief Constable Hertfordshire Police* [2006] EWHC 360, [111].
[227] *Anufrijeva* (n 5) [52], [57].
[228] *R (Sturnham) v SOSJ* [2012] 3 WLR 476, [13].
[229] *R (Hooper) v SOS for Work and* Pensions [2003] WLR 2623, [147].

— 'the Strasbourg jurisprudence fails to give a consistent answer as to when the primary relief sought is by itself "just satisfaction"'.[230]
— 'it is well known, and is common ground before us, that there are no articulated principles, and no discernible tariff, by which [the ECtHR's] awards [under Article 41] are set … the use in the statute of the definite article—"*the* principles"—may have been something of a legislative act of faith … nothing approaching a tariff has yet emerged from the awards made under art 5(4) in Strasbourg'.[231]

It has not only been lower court judges who have found life tough. In *Rabone* Lord Mance observed that there are 'numerous [ECtHR] cases giving only limited guidance on the factors governing and the range of compensation appropriate under the Convention', while Lord Dyson observed that

> [n]o decision has been cited to us which purports to be a guideline case in which the range of compensation is specified and the relevant considerations are articulated. It is, therefore, necessary for our courts to do their best in the light of such guidance as can be gleaned from the Strasbourg decisions on the facts of individual cases.[232]

Lord Millett, in the pre-*Greenfield* case of *Cullen*, having observed the lack of principles in ECtHR jurisprudence, suggested: '[i]n this situation, we may have to develop our own jurisprudence' while keeping an eye on Strasbourg.[233]

In *Faulkner* Lord Reed noted academic commentary criticising the Strasbourg jurisprudence and advising of the futility of seeking to identify principle, as well as Crown counsel's submission that there was an 'air of unreality' in seeking to analyse an accumulation of ad hoc decisions of a Court that does not have the same regard for precedent as English courts.[234] Lord Reed considered such scepticism 'over-stated'.[235] This was not because he thought detailed rules and consistently applied scales do in fact characterise the Strasbourg material but because the term 'principles' in section 8(4) HRA is to be construed broadly as *practice*.[236] Lord Reed's view appears to be that English courts ought not to be concerned by the lack of a detailed law of damages within the Strasbourg jurisprudence because a domestic court's task, according to the mirror approach, is not to discern legal principle but to replicate ECtHR *practice*. This is a striking view. Most striking is that it evinces no alarm that the practice followed is the product of an approach

[230] *R (AM) v Chief Constable West Midlands Police* [2010] EWHC 1228, [25].
[231] *Faulkner v SOSJ* [2011] EWCA Civ 349, [6], [15] [*Faulkner* CA].
[232] *Rabone* (n 1) [84], [122].
[233] *Cullen* (n 88) [80].
[234] *Faulkner* (n 1) [35].
[235] ibid.
[236] ibid.

devoid of specific rules and principles, which does not accord weight to values of consistency or coherence, and which is not characterised by reasoned judgment; the normative driver for following such jurisprudence is obscure. Making this state of affairs even more troubling has been the higher courts' seeming reluctance to evaluate critically any practices which they discern from Strasbourg, such that practices based in a troubled jurisprudence are imported without evaluation of their substantive merits. One would expect the higher courts to be a little more discerning.

Also striking is that in rejecting concerns over the Strasbourg jurisprudence Lord Reed did not consider that the lack of detailed rules and principles in that jurisprudence suggests it is unlikely that the ECtHR's practice will be 'clear and consistent', such that concrete guidance may be discerned from it according to the mirror method. These concerns are borne out by some of Lord Reed's own observations in *Faulkner*: the ECtHR 'has offered little explanation of its reasons for awarding particular amounts or for declining to make an award';[237] 'The cases are therefore of limited assistance in relation to the point now under consideration';[238] 'none of the awards which I have mentioned offers any clear guidance';[239] 'It is however impossible to derive any precise guidance from these awards'.[240]

B. Limited Guidance

Let us assume, contrary to all evidence to the contrary, that there are convincing reasons for deriving domestic norms from the ECtHR's remedial practice. Even making this generous assumption, the stark reality is that the mirror approach has borne limited guidance. In general it is difficult to identify clear and consistent practice, while where such practice is identifiable only limited assistance may be derived from it. This is unsurprising given the general features of the Strasbourg jurisprudence already discussed.

Let us consider the two major HRA damages decisions from the House of Lords and Supreme Court, given that if concrete guidance were to emerge one would expect it to come from the highest courts.

In *Greenfield* the only guidance elaborated by the Law Lords as to *quantum* for non-pecuniary loss consequent upon breach of Article 6 was that awards should be 'modest', with no indicative scale proffered.[241] The guidance as to *whether* awards for *distress* ought to be made specifically in cases of structural bias was that the ECtHR's ordinary practice is not to make an award. From this it is clear that awards should seldom be made but when

[237] ibid [34].
[238] ibid [63].
[239] ibid [74].
[240] ibid [75].
[241] (n 1) [17].

should they be made? There is little if any guidance on this. Lord Bingham observed that the ECtHR has, in some cases, made awards for distress on the basis that distress 'must have' been suffered.[242] However, no guidance is given in *Greenfield* nor by the ECtHR as to why loss was inferred and an award merited in those cases but not others with apparently similar facts and for similar violations.[243] The ECtHR has applied a causation principle, but it is not clear how this relates to Lord Bingham's prescription that awards should be made sparingly. The guidance derived in respect of awards for *loss of real opportunities* caused by defective procedure was that the ECtHR does not generally make such awards on the assumption of a lack of causal connection but 'has softened this response where it was persuaded that justice required it to do so'.[244] Appeals to amorphous notions of 'justice' do not provide a great deal of guidance. Lord Bingham rejected counsel's criticism of variations in the language used by the ECtHR to explain how probable it must be that an outcome would have been more favourable to the claimant if Article 6 had been complied with before an award for lost opportunities may be contemplated.[245] He said that the linguistic variations reflect different assessments by the ECtHR of the probability of a different outcome in each case. Even if we are charitable to the ECtHR and assume this is correct (it seems more likely to be the result of undisciplined use of language and/or lack of any clear principle), this still leaves open and unresolved what level of probability of a more favourable outcome is required before an award can be contemplated. The ECtHR follows no clear and consistent threshold or standard; as counsel in *Greenfield* pointed out, the ECtHR's jurisprudence is marked by varied linguistic formulations, while Lord Bingham himself observed that there are cases where one might have expected an award but none was made. No guidance is given in *Greenfield* other than the generic appeal to 'justice', while Lord Bingham even praised the ECtHR for not laying down any firm rules(!). One does not envy a lower court judge faced with such 'guidance'.

Faulkner was intended as a guideline judgment for damages in Article 5(4) delay cases. The Supreme Court's guidance as to quantum for distress caused by delay was that awards should be modest barring special circumstances; no guidance as to defined scales, or factors which might increase or decrease awards was given,[246] other than mental illness.[247] That such limited guidance was discernible is particularly striking given the ECtHR has had to consider just satisfaction in a plethora of delay cases caused by systemic delays in the court systems of Member States.

[242] ibid [16].
[243] ibid.
[244] ibid [14]–[15].
[245] ibid.
[246] *Faulkner* (n 1) [13](14), [67]–[68].
[247] ibid [66].

In terms of guidance for assessment of quantum for 'loss of liberty', Lord Reed concluded that it was impossible to derive any precise guidance from Strasbourg such that

> a judgment has to be made by domestic courts as to what is just and appropriate in the individual case, taking into account such guidance as is available from awards made by the European court, or by domestic courts under … the [HRA] in comparable cases.[248]

The only general guidance given was that awards for loss of liberty would be more than awards for frustration alone, and that where the victim would have been on conditional release from prison but for the delay, the award would be lower compared to where their freedom would have been unconditional (as discussed in the next section, it is not clear that this guidance comes from Strasbourg). No guidance as to scales was elaborated. The only Strasbourg material which Lord Reed postulated might offer guidance as to quantum was a single case.[249] But it is questionable whether even this case was on point: the award was not for loss of liberty but a combined award for loss of an *opportunity* of release *and* distress.[250] Given the ECtHR does not disaggregate awards according to heads of loss it is impossible to know what proportion of the award related to liberty, while a *definite* loss of liberty and *loss of an opportunity* of liberty are conceptually distinct, such that it is difficult to see how levels of awards for each could be equated. So, lower courts are effectively left with no specific guidance as to quantum for actual loss of liberty.

This is very limited guidance indeed, *especially* in respect of scales. It stands in contrast to typical damages guideline judgments, in which higher courts see it as 'an important function'—indeed, a 'positive duty'[251]—to lay down guidelines 'as to the quantum of damages appropriate to compensate for various types of commonly occurring injuries' and keep them up to date.[252] For example such judgments may state a tariff and then enumerate considerations which justify an uplift or decrease.[253] Alternatively courts may set out bands, each associated with a scale of damages, say £500–£6,600, £6,600–£19,800, £19,800–£33,000,[254] offering general guidance as to the type of case that would fall into each. Once a case is

[248] ibid [75].
[249] ibid [74]; *Kolanis* (n 177).
[250] *Kolanis* ibid [92].
[251] *Simmons v Castle* [2013] 1 WLR 1239, [12].
[252] *Wright v British Railways Board* [1983] 2 AC 773, 784; *Simmons* ibid [8]–[12].
[253] eg *Gulati* (n 183) [229]–[231]; *Thompson v Commissioner for the Metropolis* [1998] QB 498.
[254] *Vento v Chief Constable West Yorkshire* [2003] ICR 318. These bands are for assessment of damages for injured feelings in the discrimination context. The bands stated in the text take into account two uplifts subsequent to *Vento*: *Da'Bell v NSPCC* [2009] UKEAT 0227_09_2809; *The Cadogan Hotel Partners Ltd v Ozog* [2014] UKEAT 0001_14_1505.

allocated to a band, further factors are relied on to place the case within the band. Such judgments provide a structured method for setting quantum based in a clear framework of principle, yet allow scope for judges to adjust awards according to the facts before them. In turn such guidance facilitates a rational, coherent and consistent body of jurisprudence, and a basis for settlement.[255] In formulating guidance courts have not been hamstrung by past awards; while past practice is relevant, the court setting the guidance will ultimately determine appropriate scales for itself. Thus, where a higher court finds that 'variations [in past awards] disclose no logical pattern'[256] the response has not been that no guidance can or ought to be given. Rather, the unsatisfactory nature of existing jurisprudence is what prompts the court to set its own guidance. It is difficult to see how consistent jurisprudence will emerge if higher courts do not grasp the nettle. That they have not in the human rights context is seemingly the product of reluctance to step outside Strasbourg materials, where that material offers a paucity of guidance and no discernible scales.

If the highest courts have struggled to divine concrete guidance, so too have lower courts.[257] Take the example of *Pennington*, which entails a serious attempt by a lower court judge to apply the mirror approach.[258] The case was an Article 5(4) delay case, where the rights-violating delay caused the claimant to remain in detention several months longer than he would have otherwise. The Judge identified several general principles from the Strasbourg jurisprudence, which broadly framed his approach, including *restitutio in integrum*, causation, and that in assessing quantum regard should be had to any conduct of the claimant which exacerbated loss. Needless to say, we need not have travelled to Strasbourg for such edification.

The Judge was unable to extract any more detailed guidance. No guidance was extracted as to when damages should be awarded other than it was clear damages had been awarded for delay in some cases; the Judge was therefore required to exercise his own judgement.[259] As to assessment, the Judge, having examined the Strasbourg decisions, concluded: 'there is little in the cases that I have been referred to that assist in the assessment process for this case other than that they illustrate [that the awards are modest]'.[260] The defendants submitted that a figure could be extrapolated from individual Strasbourg decisions. The Judge rejected this: (i) the Strasbourg Court emphasises that awards are case-specific; (ii) the cases suggested no conventional approach; and (iii) it was not clear how the ECtHR arrived at

[255] *Heil* (n 155) [25]; *Wright* (n 252) 784.
[256] *Thompson* (n 253) 514.
[257] In addition to the discussion here see the quotes from lower court judges above expressing the difficulties they have faced in interpreting the Strasbourg material: nn 216–31.
[258] *Pennington* (n 17).
[259] See ibid [23]–[25].
[260] ibid [22].

particular figures; of one case the Judge noted that apart from stating an amount and that it had been reached on an equitable basis, '[t]here was no other reasoning'.[261]

If domestic courts cling to the mirror approach there is a real risk that, with little guidance upon which to peg awards and a ban on looking to domestic principles, domestic courts will end up mirroring the ECtHR's own subjective case-by-case approach. Indeed in *Greenfield* Lord Bingham positively directed courts to follow this approach:

> The [ECtHR] routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them.[262]

In *Faulkner* we saw that Lord Reed similarly indicated that courts should simply decide what is just and appropriate on the facts, given little guidance from Strasbourg. In the later case of *Shahid* the Supreme Court, having derived very little assistance from Strasbourg cases, itself resorted to a broad discretionary approach in deciding whether to award damages to a prisoner kept in solitary confinement in breach of Article 8; given this was an exercise of discretion limited to the facts of the case, supported by very brief reasons, it offers no meaningful guidance for lower courts, and nor did the Supreme Court attempt to articulate any more general guidance, the damages determination taking up roughly one page of the judgment.[263] It is thus not surprising that 15 years on from the HRA coming into force lower court judges continue to observe that '[t]here is little guidance in the authorities on the approach to be taken when quantifying an award of damages … If one looks at the authorities for appropriate comparators, again there is relatively little assistance'; as such judges have no choice but to adopt a justice-on-the-case approach similar to that taken by the ECtHR.[264] In turn, the risk that domestic jurisprudence will come to be characterised by those problems that dog the Strasbourg jurisprudence is now materialising.

C. Emergence of a Problematic Domestic Jurisprudence

A number of problems have emerged in the domestic jurisprudence, mirroring those that mark the Strasbourg case law. These include a lack of reasoning to justify outcomes and guide future decisions, opaque reasoning, flawed reasoning, inconsistency, and decision-making based in highly

[261] ibid [16]–[22].
[262] (n 1) [19].
[263] *Shahid* (n 1) [87]–[90].
[264] *Re H* [2014] EWFC 38, [84]–[91].

subjective concerns. The following are a series of examples illustrative of the emergent problems. These developments are deeply concerning in themselves. But there is also a wider concern that as judges grow accustomed to such bad habits in judicial decision-making, these habits may spread beyond human rights law and affect judicial decision-making more generally.

i. Problems of Reasoning

In *Faulkner* Lord Reed upheld damages of £300 for non-pecuniary losses, such as distress, caused by delay in breach of Article 5(4) for Sturnham.[265] His legal analysis of whether to make an award and quantum in Sturnham's case occupied one paragraph.[266] He considered that the frustration caused by a six month delay was sufficiently serious that an award was warranted, this determination resting on the following reasoning: 'in my view'.[267] The extent of reasoning as to quantum was: 'In the light of the awards made in the Strasbourg cases, of which [*Betteridge*] is the most nearly in point, the award of £300 which was made by the judge was reasonable in the circumstances of this case'.[268] In contrast to reasoning one might find at common law, there was no attempt to reason how Sturnham's case compared to *Betteridge*. It was also, with respect, odd that Lord Reed relied on one case to gauge quantum given he had previously said that not much could be made of individual awards given they are equitable responses to particular facts.[269] There was no attempt to place the award within a specific scale, to set scales, to articulate factors which led the Court to £300, nor to articulate factors more generally to guide lower courts. In other cases reasoning as to quantum has been even more cursory; in *Haney* the reasoning offered by the Supreme Court in support of quantum for distress suffered through breach of Article 5(4) was: 'An appropriate award is £500'.[270]

The Court in *Faulkner* also determined Faulkner's claim who, unlike Sturnham, suffered loss of liberty which he would not have suffered if the Parole Board had processed his parole application speedily. When it came to quantum Lord Reed reduced the £10,000 award made by the Court of Appeal, conjuring the alternative figure of £6,500 out of thin air.[271] The only factor referred to explicitly was that the liberty lost would have been conditional as Faulkner, if released earlier, would have been on licence. There was no attempt, for example, to articulate timescale-based guidance or justify

[265] *Faulkner* (n 1) [97].
[266] ibid.
[267] Strangely the Court did not have express recourse to the very guidance it had given earlier in the judgment, although the result seems consistent with that guidance.
[268] *Faulkner* (n 1) [97].
[269] ibid [68].
[270] *Haney* (n 1) [50], [60].
[271] *Faulkner* (n 1) [75], [87].

the award according to general principles. The crux of the reasoning was similar to that in Sturnham's appeal: 'it appears to me that an award in the region of £6,500 would adequately compensate Mr Faulkner'.[272] Lord Reed did say he was applying the approach articulated earlier in his judgment. But given that the paragraph he refers back to states that it is impossible to derive precise guidance from Strasbourg such that domestic courts must decide what is just and appropriate on the facts, the reference back to this 'approach' sheds no light on the *reasons* for lowering the award.[273] Further, there was no recognition that the lower Court's award was for 'loss of an opportunity of conditional liberty',[274] which is distinct from the Supreme Court's conceptualisation of the relevant head:[275] *actual* loss of conditional liberty. Given compensation for loss of an opportunity of freedom would logically be on a lower scale than compensation for actual loss of liberty, the disparity between the lower Court's award and the Supreme Court's reduced award is even more marked. This brings into even greater focus the need for *reasoned elaboration*—which was not forthcoming.

Importantly, it is not clear what the award in Faulkner's case was for. The Court did not address whether the award was for mental suffering in fact suffered by Faulkner as a result of remaining in jail longer than he would have otherwise, or for the loss of liberty in itself, or both.[276] On the one hand the ECtHR's approach, which the Supreme Court was purporting to follow, is to award compensation only for actual loss, such as distress. On the other hand Lord Reed referred to the award being for 'loss of liberty', which is the term associated with the head of normative damage for interference with liberty interests in false imprisonment. Classification matters: if the award is for distress then an individual wrongly deprived of liberty who suffers no distress should receive no award, whereas if the award is for the deprivation in itself a substantial award should nonetheless be made. Classification is also made relevant by Lord Reed's view that if the liberty lost was conditional, because the prisoner would have been on licence rather than completely free, the award should be substantially reduced. If the award is for *distress* suffered through wrongful imprisonment—the basis for ECtHR awards—it is unclear why it matters whether one would otherwise have been completely or conditionally free; what matters is the degree of distress actually suffered, which is a factual question. Alternatively if damages address loss of liberty in itself it is not clear that there is a great deal of difference

[272] ibid.
[273] ibid [87].
[274] *Faulkner* CA (n 231) [18].
[275] The Supreme Court did note ((n 1) [84]) that the Court of Appeal had not reduced the award according to the chance of release, but this does not address the fact that the Court of Appeal appeared to be compensating a different head from that being compensated by the Supreme Court.
[276] See ibid [69]–[75].

between complete freedom and conditional freedom, such that awards for loss of conditional liberty ought to be 'well below'[277] those for loss of unconditional liberty. Even where one is subject to licence one may be free to do almost anything that a completely free citizen could do. Lord Reed seemed to justify the reduction on the basis that conditional liberty is 'more precarious'[278] as there is a chance that one might be recalled to custody if a condition of licence is breached. But elsewhere in his judgment he rejected explicitly the idea of reducing awards 'on the basis of speculation'—and *specifically* speculation as to whether a prisoner, if they had been released when they ought to have been, would have nonetheless been recalled to prison.[279] The key point is that lack of reasoned explanation of the award and the more general lack of analytical rigour, symptomatic of broad discretionary approaches, leaves lower courts to assess damages without it being clear what damages are for; inconsistency, incoherence and confusion seem inevitable.

Osborn offers a paradigm example of minimal reasoning.[280] In that case Lord Reed, for the Supreme Court, considered a damages claim for distress consequent upon breach of a procedural requirement of Article 5(4) other than speediness, in this case failure to hold an oral hearing when one ought to have been held. The damages issue was addressed in under one page.[281] Lord Reed observed that there were conflicting Strasbourg decisions as to whether awards ought to be made for such breaches, and that no award had been made in circumstances comparable to the present case. Lord Reed disposed of the claim as follows:

> 115. It is not argued that the appellant Reilly has suffered any deprivation of liberty as a result of the breach of article 5(4): damages are sought in respect of feelings of frustration and distress which the court is invited to assume he experienced. In the circumstances, taking into account the principles applied by the European court as required by section 8(4) of the Human Rights Act, the finding of a violation constitutes sufficient just satisfaction.[282]

The cursory reasoning bears striking similarity to the ECtHR's own approach. Compare the ECtHR's explanation in *Nikolova* for denying an award for a similar breach: 'As to the alleged frustration suffered by her on account of the absence of adequate procedural guarantees during her

[277] ibid [75].
[278] ibid [74], [87].
[279] ibid [83]. Further, if such approach were to be applied rigorously one would need to assess the probability that the particular claimant would breach his licence conditions rather than adopting a blanket approach; why should a claimant with a previous unblemished record on licence suffer a greatly reduced award on the basis that he might do something which could lead to his recall to prison?
[280] *Osborn* (n 1).
[281] ibid [114]–[115].
[282] ibid [115].

detention, the Court finds that in the particular circumstances of the case the finding of a violation is sufficient'.[283]

Several matters pertinent to disposal of the claim were either not adequately reasoned or not reasoned at all. The question of whether distress could be inferred was not expressly resolved. One must therefore speculate that either (i) the Court considered the claimant had suffered distress but that damages should nonetheless not be awarded for unstated reasons; or (ii) the Court considered that distress could not be inferred for unstated reasons. One might have expected this matter to be clearly addressed given it goes to the existence of loss. All the more so in *Osborn* given Lord Reed had, in determining the substantive rights-claim, quoted research documenting distress experienced by those in the claimant's position; that research

> reveals the frustration, anger and despair felt by prisoners who perceive the [Parole Board's] procedures as unfair, and the impact of those feelings upon their motivation and respect for authority … The potential implications for the prospects of rehabilitation … are evident.[284]

His Lordship recalled Lord Philips' observations in a previous decision that negative feelings will naturally be suffered by parties subject to unfair proceedings.[285] Indeed, Lord Reed gave as one of the rationales for procedural rights that their observance avoids infliction of negative feelings upon those subject to procedures.[286] Given all of this, one might have expected an explanation of what it was in *Osborn* which meant distress could not be inferred, or alternatively if the Court considered distress had been suffered, an explanation for why no award was warranted.

The theme of cursory reasoning is evident in other aspects of the decision. One of the reasons, if not the key reason no award was made was that Lord Reed did not consider any case in which the ECtHR made an award was comparable with *Osborn*. Let us put to the side that this is a flawed decision-criterion.[287] Lord Reed mentions two cases which one might have considered broadly analogous to *Osborn*. In *Osborn* the claim was brought

[283] *Nikolova v Bulgaria* (2001) 31 EHRR 3, [76].

[284] *Osborn* (n 1) [70]. Similarly, in *Shahid* (n 1) the Supreme Court, in determining whether a prisoner kept in solitary confinement had suffered violation of Article 8, cited multiple sources documenting that it is common for prisoners in solitary confinement to suffer serious negative effects on their mental wellbeing even where the period of confinement is brief (at [77]–[79]). But when it came to damages no mention was made of this material and the Court evidently considered that no loss warranting compensation could be inferred given it concluded that a declaration constituted sufficient remedy—despite the claimant having being detained in solitary confinement for the extraordinary period of *five* years (at [89]–[90]). With respect, it is very difficult to rationalise this conclusion.

[285] ibid citing *AF* (n 66) [63].

[286] ibid [68]–[70].

[287] What Lord Reed is *not* saying is that the ECtHR has considered a comparable case and denied an award, but that there simply has not been a case comparable to *Osborn* in which an award has been made. But this may simply be because no case on all fours with *Osborn* happens to have come before the ECtHR.

by a prisoner on an indeterminate sentence for distress suffered in consequence of wrongfully being denied an oral hearing when the Parole Board considered whether he ought to be released. The facts of the cases cited by Lord Reed in which the ECtHR made awards were different in only one way.[288] The single difference was that procedural unfairness—the breach of Article 5(4)—arose not from lack of a hearing but because the review was not conducted by a judicial body. Based on this difference Lord Reed did not consider these cases were comparable. But there was no elaboration of why this difference was material: why, as a matter of principle, is it justifiable to make an award for distress suffered in consequence of not having one's case determined by a judicial body, but not where distress was due to lack of an oral hearing? Further, there are ECtHR cases in which prisoners have been awarded compensation for assumed distress where the violation was due to failure to hold oral hearings, but which were not mentioned in relation to damages in *Osborn*—despite being referenced elsewhere in the judgment, and in Lord Reed's judgment in *Faulkner*.[289] For example, in *Waite*[290] an individual was not afforded an oral hearing in a Parole Board review of whether he should be recalled to prison. The ECtHR inferred distress, awarding 2,500 Euros. The similarities between the judicial method in *Osborn* and the ECtHR's standard practice of not engaging seriously with past decisions and cursory reasoning is disconcerting, as are inconsistencies in result across cases which are materially similar.

The last point to observe about *Osborn*, which is the most striking, is that in Lord Reed's bullet-point-style summary of his conclusions at the very beginning of his judgment his Lordship states that breach of Article 5(4) procedural requirements (other than speediness) will not normally result in damages unless the breach leads to deprivation of liberty.[291] However, this general guidance is not articulated outside of this summary. The section of the judgment dedicated to damages only considers whether damages should be awarded on the facts and there is no attempt at articulating general guidance nor justifying the general proposition found in the summary. Such decision-making bears an uncanny resemblance to the ECtHR's own unreasoned, opaque and 'declaratory' approach.

Such unsatisfactory practice is evident in lower court decisions. For example, in *Savage*, in which damages were claimed for breach of Article 2, the Judge considered the damages issue within one paragraph, noting difficulties he experienced in discerning Strasbourg principles. The only reasoning

[288] *Curley v UK* (2000) 31 EHRR 401; *Von Bülow v UK* (2004) 39 EHRR 16.

[289] *Waite* is mentioned at [104] and [110] of *Osborn*, while cases of violation of Article 5(4) not involving delay in which the ECtHR awarded compensation—including *Waite*—were discussed in *Faulkner* (n 1) [61].

[290] (n 177).

[291] *Osborn* (n 1) [2](xiii).

offered for making an award was that 'it was right to grant damages'.[292] Turning to quantum the Judge observed that the range of awards made by the ECtHR for this type of breach varied widely between 5,000 to 60,000 Euros, noted awards made by the Court of Appeal in *Van Colle* (but did not analyse those awards),[293] and that the claimant had not brought the claim for financial reward. The Judge then proclaimed: 'I assess the figure for just satisfaction purposes at £10,000'.[294] This is unsatisfactory reasoning. But it is unsurprising given the Strasbourg material that judges must follow provides limited assistance.

In *OOO* damages were awarded for breach of investigative duties under Articles 3 and 4. In assessing quantum the Judge considered one ECtHR decision, but found it did not provide 'suitable guidance'.[295] There was therefore no range within which the Judge could place the case before him. The Judge noted that the distress occurred over a period of 12 to 15 months. He then said: 'In all the circumstances, I have reached the conclusion that the appropriate award of damages for each Claimant is £5,000'.[296] No further reasoning was proffered. Again, while this is plainly unsatisfactory the Judge faced serious difficulties: *Greenfield* required him to look to Strasbourg, where he found no guidance, and he was barred from looking to domestic law.

In the recent High Court decision of *DSD* we find greater reasoning as to assessment, but that reasoning is, with respect, flawed in significant respects.[297] For example the Judge repeatedly described the nature of awards under the HRA as 'compensatory', observed that the ECtHR has not shown an interest in 'awarding exemplary or punitive damages which might go beyond compensation' and that the Court in *Anufrijeva* ruled out exemplary awards under the HRA, while he would not have made exemplary awards on the facts in any case.[298] However, in assessing damages for breach of the investigative duty under Article 3 the Judge adjusted quantum of damages—damages which were apparently for consequential non-pecuniary losses such as distress and psychological injury and pecuniary losses such as treatment costs—by reference to factors such as whether the sum needed to be 'enhanced' 'to encourage compliance', or to reflect that the defendant's failings were not 'merely operational' but 'systematic and of a deep and abiding nature'.[299] With respect, this reasoning is confused.

[292] *Savage* (n 216) [97].
[293] *Van Colle* CA (n 6).
[294] *Savage* (n 216) [97]. This sort of 'reasoning' is not uncommon: eg *R (Mohammed) v Chief Constable West Midlands* [2010] EWHC 1228, [45] ('The sum I award is £500').
[295] *OOO v Commissioner for the Metropolis* [2011] HRLR 29, [189].
[296] ibid [190].
[297] *DSD* (n 17).
[298] ibid [28].
[299] ibid [118]ff.

Goals of encouraging compliance and admonishing systemic failings have nothing to do with assessing factual loss. It is thus difficult to square the Court uplifting awards on this basis with the idea that awards are compensatory for loss. Furthermore, goals such as deterrence are traditionally associated with punitive damages, so that it is difficult to reconcile the Judge uplifting awards according to such factors with the proposition that exemplary damages are unavailable in HRA law and were not relevant on the facts of *DSD*. The Court justified consideration of these wider normative concerns on the basis that the ECtHR has said that it takes into account the overall circumstances of a case. However, by this the ECtHR only generally means that it will consider the relevant facts of the case and does not mean to implicate the wider normative concerns that guided the Court in *DSD*; the ECtHR has no consistent practice of express reliance on the types of factors that influenced the Judge in *DSD*. Further, augmenting awards for the purpose of deterrence is inconsistent with the ECtHR's own practice of refusing to make aggravated or exemplary awards. However, given the ECtHR rarely reasons its decisions as to just satisfaction, and indeed has not provided an authoritative explanation of the nature of just satisfaction or its guiding norm of equity[300] it is perhaps not surprising that such misunderstandings can occur in interpreting its case law. More generally, it is somewhat unsurprising that a domestic approach to damages led by appeals to woolly, unelaborated and ambiguous notions such as 'equity' or 'just satisfaction', and reliant upon interpretation of an unreasoned Strasbourg jurisprudence, would lead to incoherence and confusion.

ii. Problems of Broad Discretion: Subjective Concerns and Inconsistency[301]

Typical problems associated with an unstructured discretionary approach are evident within the fledging domestic jurisprudence, notably decision-making based in highly subjective concerns and inconsistency. Some such concerns (such as the victim's moral character) reflect Strasbourg practice, but others (such as most public policy concerns invoked by lower courts) do not; either way, domestic courts' practice of subjective decision-making is a natural consequence of following the ECtHR's justice-on-the-case approach, coupled with a lack of guidance to discipline decision-making.

Consider damages claims decided by lower courts in Article 5(4) delay cases prior to the Supreme Court decision in *Faulkner*. There were a number of such claims, brought by prisoners due to systemic failings in the parole system, such that there is a critical mass of decisions to consider.

[300] Ichim (n 187) 43ff, 264ff.
[301] See further ch 6.2.V.B, VI.

In determining such claims some judges took into account the claimant's moral worthiness, specifically that the claimant was a prisoner serving a sentence for a serious crime.[302] One judge considered whether the claimant would use any award to compensate the victim of their previous criminal wrongdoing.[303] Another concluded that an award to a prisoner, who was now on the run, would not be 'fair', given consideration of 'public confidence in the administration of justice'.[304] In contrast other judges stated explicitly that such considerations were irrelevant, in particular that the prisoner had previously committed an offence.[305] In each case where the prisoner's character was considered, no award was made. Where it was not, awards were made in some cases.

There are other significant variations. Partly based on an interpretation of the Strasbourg material some judges held that awards should rarely be made for Article 5(4) violations, except where the claimant could demonstrate they would have been released from prison earlier in the absence of the Parole Board's delay.[306] In contrast others considered that even in cases which were not serious, and where the claimant would not have been released earlier, an award should be made for distress suffered in consequence of the delay, so as to ensure the right to liberty is 'upheld'.[307] Different judges took into account different policy factors such as the potential deterrence effects of awards,[308] the possibility of precipitating a flood of claims,[309] and the costs associated with damages claims,[310] whereas other judges made no mention of such factors despite determining similar claims. Some looked to Strasbourg for guidance,[311] others cited no or very little Strasbourg material,[312] others identified their own considerations which they considered to be relevant,[313] while yet others referred to common law material, including the common law's traditional approach to protection of liberty.[314]

In this way which judge was allocated to one's case could determine the success or failure of one's claim. The rule-of-law concerns with such a state of affairs are manifest.

[302] Partly on the basis that the ECtHR has had regard to such concerns. See *Downing* (n 224) [29], [31]; *R (Biggin) v SOSJ* [2009] EWHC 1704, [35]; see further ch 6.2.V.B.

[303] *R (Parratt) v SOSJ* [2013] EWHC 17, [57]. This is contrary to the common law position: courts take no account of what a claimant will spend their award on.

[304] *R (Faulkner) v SOSJ* [2009] EWHC 1507, [39].

[305] *Guntrip* (n 172) [35]; *Degainis* (n 219) [19]–[20]; *R (Faulkner) v SOSJ* [2011] HRLR 7, [80].

[306] *Sturnham* (n 228); *Mason v MOJ* [2008] EWHC 1787, [40].

[307] *R (Sturnham) v Parole Board* [2011] EWHC 938, [51] [*Sturnham* HC]; *Faulkner* CA (n 231) [12], [18].

[308] *Faulkner* CA (n 231) [12].

[309] *Sturnham* HC (n 307) [51]; *Guntrip* (n 172) [54].

[310] *R (Betteridge) v Parole Board* [2009] EWHC 1638, [31].

[311] *Sturnham* (n 228).

[312] *Guntrip* (n 172); *Biggin* (n 302).

[313] *Guntrip* (n 172) [53]–[57]; *Pennington* (n 17) [23]–[25].

[314] *Faulkner* CA (n 231) [12], [18].

Of course, this case law precedes *Faulkner*. While the guidance proffered by the Supreme Court is minimal the decision does settle some of these differences; for example the view that damages ought not ordinarily to be awarded for distress caused by delay has received its coup de grâce. However, other questions such as the relevance of policy factors or the victim's character were not squarely addressed, such that lower courts may continue to rely upon these factors on an ad hoc (and inconsistent) basis as part of a broad discretionary approach.[315]

Also significant is that *Faulkner* only provides guidance—however limited that guidance may be—for damages for one type of violation of one sub-section of one Article, ie breaches of sub-section (4) of Article 5 caused by delay. That guidance cannot simply be read across to damages claims in respect of other Articles because the higher courts have emphasised that under the mirror approach courts are required to look to Strasbourg practice in respect of the specific class of violation before them.[316] As a result, awards made for one type of violation are not generally referred to in adjudicating damages claims for other types.[317] In respect of the vast majority of classes of violation of the vast majority of Articles there is no guidance whatsoever from higher courts. In each of these contexts there is therefore an obvious and serious risk that domestic damages jurisprudence will resemble the pre-*Faulkner* Article 5(4) jurisprudence, especially given the difficulties in distilling concrete guidance from the Strasbourg material.

iii. Quantum

There is evidence of inconsistency between awards under the HRA. Consider two decisions made within months of each other, both concerning damages for the same heads of loss—distress and frustration—caused by procedural violations. In *Guntrip*, decided in December 2010, the Judge awarded £1,200 to the claimant who had suffered a two year delay before the Parole Board, in breach of Article 5(4).[318] In May 2011 in *OOO* the Judge awarded £5,000 to each claimant for frustration and distress suffered over a 12 to 15 month period due to the authorities' failure to investigate claims of mistreatment in breach of Articles 3 and 4.[319]

Broadly speaking, in both cases damages were awarded for frustration caused by an authority's failure to comply with procedural obligations, during a period of delay which the claimants ought not to have endured.

[315] For example the victim's character has been invoked as a relevant consideration in post-*Faulkner* case law: *DSD* (n 17) [37]–[39].

[316] *Greenfield* (n 1) [7]; *Faulkner* (n 1) [109].

[317] eg *Pennington* (n 17) [12]. In contrast awards made for breaches of different rights were referred to in pre-*Greenfield* decisions: eg *KB* (n 5) [54].

[318] *Guntrip* (n 172).

[319] *OOO* (n 295).

Despite these similarities it is difficult to reconcile the awards. One rough means of comparison, given awards relate to frustration during a period of delay, is to break the awards down into per month rates. In *Guntrip* that rate was £50, whereas in *OOO* it was £370.[320] Thus the rate in *OOO* was 7.4 times higher than that in *Guntrip*. To provide some perspective, if the length of the delay in *OOO* had been the same as in *Guntrip* then the award to the claimants in *OOO*, applying the per month rate, would have been £8,880, whereas in *Guntrip* the award was only £1,200. The difference is marked, especially assuming HRA awards are on a modest and therefore compressed scale. Such disparity calls for explanation.

One justification might lie in the fact that damages in *OOO* were for breach of a procedural norm constituted to protect among the most important interests protected by the HRA. But liberty too is close to the apex of the normative hierarchy of interests protected by the HRA, such that this factor could not in itself explain such marked disparity. Furthermore, it is difficult to see the significance of normative hierarchy given courts are not assessing damages for normative injury but for actual distress.

A significant aggravating feature was present in *Guntrip*: the claimant suffered mental health issues which heightened his frustration and distress, whereas no special factor was present in *OOO*. Also, in *OOO* the Judge considered that frustration would naturally increase over time during a period of delay, which suggests that the award should increase at an exponential rate for every extra month of frustration suffered; the delay in *Guntrip* was nearly a year longer than that in *OOO*. Given these factors, it is even more difficult to explain the marked disparity between awards in *Guntrip* and *OOO*.

Such incoherence is likely to continue to characterise human rights damages while a case-by-case approach is adopted and while awards for one type of violation are considered in isolation from awards for other types. Further, such approach prevents formulation of general rules and principles which would facilitate consistency and coherence.

It is worth adding that in the first instance decision in *Sturnham*[321] the Judge broke the award in *Guntrip* down into a per month rate—£50 per month—and applied that rate to Sturnham's case, awarding £300 for distress and frustration suffered during a six month delay. In doing so the Judge recorded the aggravating features in *Guntrip*, such as Guntrip's mental health issues, which were *not* present in *Sturnham*. He nonetheless asserted: 'I see no reason to depart from an award of approximately that amount'.[322] It is difficult to see the logic of this reasoning, given it was clear

[320] Assuming a delay of 13.5 months in *OOO*: the mid-point of the 12–15 month range indicated by the Judge.
[321] Above (n 307).
[322] ibid [52].

that the special features in *Guntrip* led to an uplift. The Supreme Court upheld the £300 award in *Sturnham*.[323]

iv. Incoherence

Faulkner establishes that damages will ordinarily be awarded for sufficiently serious distress suffered in consequence of a delay in breach of Article 5(4), and that in certain circumstances such losses are presumed. In stark contrast, in *Osborn* Lord Reed effectively ruled out damages for distress suffered in consequence of a procedural violation of Article 5(4) *other than delay*. *Greenfield* had earlier more or less ruled out damages under Article 6(1), outside of special cases.

It is difficult to rationalise this patchwork of public authority liabilities on the one hand and near-immunities on the other, and there is no attempt by courts at rational justification of these variations. If X suffers feelings of helplessness and anxiety in consequence of unfair treatment in breach of Article 6(1), it is not apparent why X ought not to recover whereas if they had suffered the same type and intensity of feelings at a delay in breach of Article 5(4) they could recover. Equally it is not clear why courts should readily infer distress in Article 5(4) delay cases, whereas short shrift is given to claims that distress should be inferred for breaches of Article 5(4) not involving delay, such as the frustration one may legitimately feel at wrongful denial of the opportunity to put one's case in proceedings concerning one's liberty; indeed, more generally it is difficult to reconcile routine assumption of loss in procedural delay cases with judicial reluctance to infer even some compensable non-pecuniary loss in the context of relatively serious breaches of other rights, such as where prisoners are subject to extensive periods in solitary confinement in breach of Article 8.[324] Similarly it is difficult to reconcile the proposition in *Greenfield* that pecuniary losses will only rarely be recoverable for breaches of Article 6,[325] with warmer attitudes expressed in *Faulkner*.[326] *Greenfield* recognises the possibility of recovering for loss of real opportunities caused by denial of fair process under Article 6,[327] whereas *Faulkner* rules out such awards for denial of fair process under Article 5(4).[328]

The ECtHR has made several statements, though its pronouncements and practice are far from consistent,[329] that it does not consider a causal link

[323] *Faulkner* (n 1) [88]ff.

[324] See text to nn 280ff (on Article 5(4) cases not involving delay); *Shahid* (n 1) and n 284 above (on Article 8 prisoner claims).

[325] (n 1) [11].

[326] *Faulkner* (n 1) [13](8), [53].

[327] *Greenfield* (n 1) [12]–[15].

[328] *Faulkner* (n 1) [13](10), [82].

[329] See, eg, examples of awards for breach of Article 6 caused by structural bias (below in n 396). Contrast these cases with statements in *Kingsley* (n 57) [43] that awards are not made for such violations.

between procedural violations and non-pecuniary loss can be shown, *except* where the violation is caused by delay. For example in *HL* the Court said: 'despite the procedural nature of … a violation [of Article 5(4)], it is accepted that there can be a causal link between the violation (delay) and the non-pecuniary damage claimed'.[330] It is hard to identify a principled basis for this distinction.[331] Whether there is a causal link between any violation and claimed non-pecuniary loss is a question for case-by-case determination. It is not possible to definitively rule out the possibility of a causal link between a particular type of violation and distress. It might well be that in general it is easier to prove such link between distress and delay than between distress and other types of procedural unfairness. But this does not logically lead to the proposition that causation can *never* be proven in the latter type of case. Indeed, empirical research cited in *Osborn* shows that unfair procedures can cause significant feelings of distress and despair outside delay cases.[332]

Such anomalies would be unlikely to emerge under a 'joined-up' approach characterised by a framework of general rules and principles, which would serve to ensure consistency in analysis of analogous matters as they arise across human rights law. The approach under the HRA is the exact opposite. The domestic courts' focus on replicating Strasbourg practice on a right-by-right basis (and emphasis on a broad discretionary approach) has prevented the fashioning of a general, coherent and normatively justifiable framework of rules and principles, while there is marked judicial reluctance to subject propositions derived from Strasbourg to normative evaluation. Given the ECtHR does not approach cases within a consistently applied framework of detailed rules and principles, it is unsurprising that following Strasbourg practice has resulted in a domestic jurisprudence characterised by incoherence.

Of course we should acknowledge that questions over damages can be difficult. For example there is no perfect, scientific approach to placing a monetary figure on intangible loss. These difficulties are no doubt why judges observe: 'Personally I have a dislike, which I have reason to believe is shared by other judges, to the task of assessing damage'.[333] But whatever these difficulties there is no excuse for returning damages to the nineteenth century, when the advice offered by a leading treatise on damages for torts

[330] *HL* (n 169) [149].

[331] This is because the basis for it likely lies outside of purely legal concerns. As was discussed above (text to n 169), the ECtHR has faced many repeat cases in respect of delays caused by systemic defects in domestic legal systems. As a result the ECtHR has, in delay claims, had to function more or less as a court of first instance, so that it has been more willing to make awards in this context than it would otherwise have been, while it also seems likely that the Court has been more willing to routinely make awards for delay so as to incentivise respondent states to address systemic delays and introduce domestic remedies for delay.

[332] See n 284 above.

[333] *The Greta Holme* [1897] AC 596, 604.

such as false imprisonment—which were largely assessed by juries—was: 'damages are always a mere matter of speculation. The talents of the counsel, the temper of the jury, and the view taken by the judge, have a greater influence upon their amount than any principles of law which can be laid down'.[334] Since 1877, when that observation was made, English damages law has made incredible progress, with articulation of elaborate rules and principles and scales of awards, which have served to facilitate consistency, coherence and rigour.[335] The current approach to human rights damages threatens to reverse that progress.

D. Supplementing Strasbourg

Thus limited guidance has been derived from Strasbourg. What guidance has been derived is in general not edifying, so general that it cannot provide meaningful guidance, and/or the substance of the guidance is difficult to justify in principle. One result of this state of affairs is that problems associated with Strasbourg practice are emerging domestically. Another result is that domestic courts have, on an ad hoc basis, supplemented the Strasbourg material, formulating rules, principles or methods not sourced from Strasbourg, aspects of which resemble features of the common law of damages. In turn, this calls into question the viability and credibility of the mirror approach and the 'ban' on recourse to common law material.

As discussed in chapter 3,[336] domestic courts have at times taken an approach akin to a pure common law approach—the 'usual approach'[337]—to award and assessment of damages for consequential pecuniary losses, specifically in claims by companies for interference with proprietary interests. In these claims courts have not sought to gauge Strasbourg practice by trawling the cases, and then replicate that practice. Rather they have applied the broad Strasbourg principles (ie genuine principles) such as *restitutio in integrum* and causation, awarding damages as of course where causation is proven and assessing pecuniary losses as a domestic court would in tort or contract.[338] This approach contrasts with the ECtHR's approach which is to take a broad equitable approach to the question of award and assessment, although the Court's practice in respect of pecuniary loss, and particularly

[334] JD Mayne and L Smith, *Mayne's Treatise on Damages* 3rd edn (Stevens and Haynes, 1877) 402.

[335] See ch 3.I.F.

[336] See ch 3.I.C.

[337] *R (Infinis Plc) v Gas and Electricity Markets Authority* [2013] JPL 1037, [27].

[338] *R (Infinis Plc) v Gas and Electricity Markets Authority* [2011] EWHC 1873 (upheld: ibid); *Breyer Group Plc v Department of Energy and Climate Change* [2014] JPL 1346 (upheld: [2015] EWCA Civ 408).

losses connected to property, is more predictable than the wildly unpredictable approach to non-pecuniary loss.[339] This divergent practice—domestic courts have explicitly distinguished the approach to pecuniary damages from that taken to non-pecuniary loss[340]—poses a serious challenge to the credibility of the mirror approach: how can the courts maintain a mirror approach to non-pecuniary loss, but take an approach to pecuniary loss indistinguishable from domestic tort law? Why do courts apply broad Strasbourg *principles*—which are consonant with the common law—in respect of pecuniary loss, but generally look to replicate *practice* in respect of non-pecuniary loss?

Even in respect of non-pecuniary losses lower courts have, on occasion, formulated decision-criteria not sourced from Strasbourg. For example, in Article 5(4) claims by prisoners in respect of Parole Board delays courts have taken into account the claimant's belief as to the strength of their case for release, the stronger the belief (as long as reasonably held) the greater the distress likely to have been suffered.[341] Courts have also considered whether the claimant suffered mental illness, which might have made it more difficult to cope with delay.[342] One of the best examples of a judge taking it upon himself to formulate factors is *Pennington*. In that case the Judge, having found no detailed guidance in the Strasbourg material, articulated factors *he* considered indicated a higher or lower award.[343] In respect of each of these examples the relevant factors were not sourced in clear and constant Strasbourg practice; rather the judges had to come up with their own factors because of a lack of guidance from Strasbourg or higher courts. Indeed, of the mental health factor one Judge noted that '[t]he [ECtHR] jurisprudence … does not suggest that any special legal principles apply to mental health cases as distinguished from other cases in which the lawfulness of detention falls to be determined under Article 5'.[344] Nonetheless the Judge considered this factor bore on quantum.

Similarly, where higher courts have propounded more detailed guidance, this guidance has not been sourced from Strasbourg. However, there have been tenuous efforts to link such guidance to Strasbourg. One might

[339] Ichim (n 187) ch 4. It is true that the ECtHR does not always have the same firm factual foundation to adjudicate such claims that domestic courts do but this cannot completely explain the ECtHR's approach, as the Court may be guided by 'equitable' concerns even where it is has evidence before it. This reflects that the Court's general approach to money awards—in respect of *both* non-pecuniary and pecuniary loss—is discretionary and subject to the Court's open-ended idea of 'equity'.

[340] *Infinis* (n 337) [26]–[27].

[341] *Pennington* (n 17) [24].

[342] *Guntrip* (n 172); *KB* (n 5).

[343] *Pennington* (n 17) [23]–[25]. For another good example see *R (AM) v Chief Constable West Midlands Police* [2010] EWHC 1228, [44] (the Judge having noted that Strasbourg provided little guidance on whether non-monetary relief affords just satisfaction: [25]).

[344] *KB* (n 5) [70].

speculate that this effort at 'keeping up appearances' is the product of higher courts feeling duty-bound to provide some more detailed guidance to lower courts, while not wishing to undermine the integrity of the mirror approach, which they have bound lower courts to apply.

In *Rabone* the Supreme Court assessed damages for non-pecuniary loss suffered by relatives of an individual who had died in circumstances where authorities breached their Article 2 obligations to the deceased. Lord Dyson enumerated several factors bearing on quantum, including the closeness of the family link between the deceased and the claimants, the nature of the breach and the seriousness of the non-pecuniary damage suffered by the relatives.[345] He introduced these factors as those which '[o]ne would expect the [ECtHR] to have regard to'.[346] The only evidence provided that the ECtHR *does* have regard to these factors is that there had been 'passing reference to some of these considerations' in a single case;[347] this is hardly clear and consistent practice. Despite the attempt to link the factors to Strasbourg, the factors were in truth those that Lord Dyson *himself* considered ought to guide assessment. To introduce the factors as those the ECtHR would be expected to consider is a construct; indeed, why should we assume the ECtHR approaches assessment according to a consistent set of factors at all, given most decisions are unreasoned and inconsistency characterises the Court's practice? Lord Dyson himself had observed that the Court had not been directed to any ECtHR judgment which serves as a guideline judgment and enumerates those considerations relevant to assessment.[348] Interestingly, the approach of setting out factors, as well as the content of those factors, focused as they are on factual features of the case that may indicate greater or lesser loss, are close to what one would find in a guideline judgment at common law. Also of note is that the award made for bereavement in *Rabone* was identical to what would have been awarded under domestic legislation governing damages for bereavement.[349]

As we saw above[350] Lord Reed in *Faulkner* indicated that damages for loss of conditional liberty will be less than for loss of unconditional liberty. Putting to the side that it is not clear what these damages compensate for, Lord Reed cited no ECtHR case in which this factor had been explicitly relied on to reduce awards.[351] He considered Strasbourg cases in which

[345] *Rabone* (n 1) [85]. This list is a little confusing in that what is being assessed is non-pecuniary damage, such that making non-pecuniary damage a factor does not make a great deal of sense, while it is unclear how the nature of the breach relates to quantifying factual losses.

[346] ibid.

[347] ibid [86]; *Kallis v Turkey* (27 October 2009) App no 45388/99 (ECtHR Fourth Section).

[348] *Rabone*, ibid [84].

[349] *Rabone* CA (n 9) [112], upheld in the Supreme Court although note that the Supreme Court felt the award was a little low: (n 1) [88].

[350] Text to nn 271ff.

[351] *Faulkner* (n 1) [69]–[76].

awards were made for lost *unconditional* liberty. He also considered ECtHR cases in which awards were made for *loss of an opportunity* of release, in circumstances where release would have been on licence. But there was no case in which awards had been made for *actual* loss of *conditional* liberty. Referring to one loss of opportunity case, in which the liberty that was potentially lost was conditional, Lord Reed said:

> A higher award would no doubt have been appropriate if there had been a definite loss of liberty for 12 months; but a lower award would have been appropriate if, instead of a patient losing her liberty, the case had concerned a convicted prisoner who had lost an opportunity of earlier release on licence.[352]

This is not the reasoning of the ECtHR, nor a statement as to the practice of the ECtHR—it is Lord Reed's proposition. The only other Article 5(4) ECtHR case which Lord Reed specifically relied on to support his proposition was *Weeks*.[353] He said that the level of award made in that case relative to awards in Article 5(1) cases, where liberty lost was unconditional, supported the proposition that awards for loss of conditional liberty should be reduced. But, with respect, this is thoroughly unconvincing given that in *Weeks* the ECtHR explicitly held that the award was *not* for lost liberty at all, but only for *distress* associated with the state's failure to comply with procedural guarantees.[354]

So, as in *Rabone*, we have an example of a more detailed proposition formulated by a domestic court, not sourced from Strasbourg, coupled with an *attempt* to find support for that proposition in Strasbourg material. Also in common with *Rabone*, this sort of guidance bears a passing resemblance to reasoning one might find at common law;[355] at common law the degree of interference with liberty bares on quantum.[356]

Also in *Faulkner* the Supreme Court asserted a rebuttable presumption that damages ought to be awarded for distress in Article 5(4) delay cases where the delay was at least three months.[357] This was coupled with guidance that awards should not ordinarily be made where the delay was less than three months. To support this guidance Lord Reed cited five ECtHR cases in which delay was three months or less. In two of these cases awards

[352] ibid [74].

[353] ibid; *Weeks v UK* (1991) 13 EHRR 435.

[354] *Weeks* ibid [12], [14] ('no compensation is payable in respect of the harmful consequences attributable to the contested deprivation of liberty as such; for the purposes of an award of just satisfaction … the only prejudice that may be taken into account is that caused by the lack of a remedy satisfying the requirements of Article 5 para 4 … the absence of a remedy satisfying the requirements of Article 5 para 4 … must have caused Mr Weeks a feeling of frustration and helplessness').

[355] Although, as discussed above (text to nn 271ff) there are problems with the way this reasoning has been applied in the HRA context.

[356] See ch 2.III.C.iv.

[357] *Faulkner* (n 1) [13](15), [66].

were made for delays *under* three months; however, Lord Reed distinguished these on the basis that they concerned delay incurred during remand, which placed the claimants in a particularly sensitive position, whereas *Faulkner* concerned delay in processing applications for release from imprisonment following conviction.[358] But there is no evidence that this factor influenced the ECtHR, the ECtHR in both cases adopting its usual sparing approach to reasoning.[359] In two other cases the ECtHR refused to make an award;[360] prima facie this supports Lord Reed's guidance. However, these cases were decided in the early 1990s whereas Lord Reed had indicated earlier in his judgment that cases decided by the ECtHR during this earlier period may not offer reliable guidance as to the ECtHR's contemporary practice.[361] Indeed, Lord Reed himself observed that the decisions were 'somewhat dated'.[362] In the final case of the five relied upon—a more recent decision—the ECtHR refused to make an award for claimed distress suffered over a very short 17 day period.[363]

Thus, there is no *express* basis in Strasbourg decisions for ordinarily declining to make awards where delay is less than three months—such as a guideline judgment—nor can it be said, based on the cases invoked by Lord Reed, that there is clear and consistent ECtHR practice of declining awards for such delays. Only a single case from the Court's contemporary case law was cited by Lord Reed where the ECtHR had refused to make an award for delay of less than three months, and in that case the delay was *significantly* less than three months: 17 days. The presumption is *in truth* the Supreme Court's own creation. Lord Carnwath was a little more candid in his separate judgment in *Faulkner*, opining that the threshold is the result of the 'national court['s] … view' in the light of its consideration of 'interests of certainty and proportionality', as well as any 'Strasbourg principles'.[364]

Two points are pertinent. First, that what meaningful guidance can be derived from domestic case law is not the product of the mirror approach casts further doubt upon the viability of that approach, while that some of this guidance closely resembles common law rules, principles or modes of reasoning is illustrative of the artificiality of attempting strict separation of human rights damages and common law. If one is concerned to develop a rational and coherent law of human rights damages, it makes little sense to take a flawed jurisprudence as one's starting point, and then seek to imperfectly ameliorate the shortcomings of an approach based on such

[358] ibid [64].
[359] *Mooren v Germany* (2010) 50 EHRR 23, [130]; *GB v Switzerland* (2002) 34 EHRR 10, [42].
[360] *Koendjbiharie v Netherlands* (1991) 13 EHRR 820; *E v Norway* (1994) 17 EHRR 30.
[361] *Faulkner* (n 1) [50].
[362] ibid [65].
[363] *Rutten v Netherlands* (24 July 2001) App No 32605/96 (ECtHR First Section).
[364] *Faulkner* (n 1) [127].

jurisprudence by supplementing it on an ad hoc basis with common law-like rules, principles or reasoning. It makes far more sense to take the common law as one's starting point, in accordance with the 'ordinary approach'.[365]

Second, while it is positive that judges have at times sought to articulate greater guidance, they have been relieved of justifying the substance of that guidance by attributing it to Strasbourg, often where there is no basis for such attribution. The reasoning in the domestic cases is in general cursory and highly formalistic; typically judges assert propositions by reference to Strasbourg decisions, without serious engagement with Strasbourg material or any elaboration upon the normative justifications for such propositions; the Strasbourg material itself does not offer such normative justifications given Article 41 decisions are typically unreasoned. At times the treatment of Strasbourg material gives the impression that that material is marshalled and presented in such a way as to support normative positions arrived at independently of that material, with the reasons underlying those normative positions left unarticulated.

SECTION 3. THE METHODOLOGY OF THE MIRROR APPROACH

I. A PROBLEMATIC METHOD

Even where guidance has been derived from Strasbourg the robustness of the *method* of derivation is questionable.

In *Faulkner* the Supreme Court's method was to extract the ECtHR's 'general practice' by sifting through a plethora of Strasbourg decisions, and to read that practice across to domestic law. Lord Reed found that in the majority of cases where the ECtHR found a violation of Article 5(4) by reason of delay, the Court had awarded compensation for distress. This was taken to be the Court's 'general practice'.[366] That practice was then effectively transformed into a norm in domestic law, the Court holding that damages should ordinarily be awarded for sufficiently serious distress in delay cases. In *Greenfield* Lord Bingham, adopting a similar method, concluded that the ECtHR's 'routine'[367] practice had been to make no award for breach of Article 6, as the ECtHR had denied awards in the 'great majority'[368] of cases, so that under the HRA awards should only be made exceptionally. In *Greenfield* the House of Lords did not come close to considering every successful Article 6 claim in which just satisfaction had been claimed. In *Faulkner* a significant number of Article 5(4) cases were cited; it is unclear what proportion of all relevant ECtHR cases were considered.

[365] See s 1.III above.
[366] *Faulkner* (n 1) [53].
[367] *Greenfield* (n 1) [9].
[368] ibid [8].

It is difficult to see the basis for transmuting raw data (the regularity of the making of awards for a particular violation) into a legal norm—'general principles'[369]—where that data derives from the case-by-case exercise of broad remedial discretion, the ECtHR determining whether to make awards and quantum according to 'what is just, fair and reasonable in all the circumstances of the case'.[370] That awards have been made in a majority of cases for a particular type of violation tells us only that the ECtHR considered awards equitable in the circumstances of those cases.[371] Where awards have been denied this tells us only that the Court considered awards inappropriate in those cases. That awards were made in a majority of cases may simply reflect the types of cases which happened to reach the Court: it may have just so happened that there were a higher proportion of cases presented to the ECtHR which had features which the Court, in its subjective judgement, considered warranted an award than cases in which the Court subjectively considered that awards were not warranted. Are we to take statistics which may well depend on the vicissitudes of the ECtHR's docket as a basis for creating domestic norms?

Further, it is difficult to see how it follows from, say, awards being denied in the majority of Article 6 cases that it is the ECtHR's 'routine' practice to refuse awards. If we assume Lord Bingham in *Greenfield* was correct that the ECtHR declined awards in the majority of successful Article 6 cases but also, for the sake of argument, assume that those cases in which awards *were* made constituted a third of all successful Article 6 cases then it would be misleading to say that the ECtHR's routine practice was to decline awards. Assuming a proportion of one third, awards would have been made in a significant proportion of cases, and such cases could not be said to be rare.

Given the stated goal of the mirror approach—to replicate what the ECtHR would do in a particular case domestically—knowing that the ECtHR has made awards in 64 per cent of cases of violation X or 37 per cent of cases of violation Y is not particularly illuminating. In order to replicate what the ECtHR would decide in a given case we would need to know the considerations which lead the Court to make or decline awards. But in general the Court offers no substantive reasoning. For example, Lord Justice Waller observed in *Dobson* of ECtHR practice in Article 8 pollution cases that '[a]ll one can say with any certainty is that damages have been awarded for non-pecuniary loss, ie for inconvenience and distress, in pollution cases'.[372] What is *un*certain is *when* such losses ought to be compensated. Similarly in *Shahid* the Supreme Court recorded that there were cases where the Strasbourg Court 'declined to make an award' to prisoners

[369] *Faulkner* (n 1) [76].
[370] ibid [34], quoting *Al-Jedda* (n 107) [114].
[371] *Faulkner*, ibid [105].
[372] *Dobson* (n 17) [43].

subjected to segregation in breach of Article 8, and cases where 'modest awards have been made', but was unable to distill any guidance as to *when* awards ought or ought not to be made.[373] In consequence the Court resorted to a broad discretionary approach, considering factors not sourced from Strasbourg. Another example is the Strasbourg practice in respect of awards for distress consequent upon breach of Article 5(4) outside of delay cases. In both *Faulkner* and *Osborn* Lord Reed observed that despite express statements from the ECtHR that awards should not be made in such cases, awards had in fact been made in 'numerous cases'.[374] Thus it could not be concluded that the overall 'bulk' of decisions went one way or the other. Of course because such decisions are largely unreasoned and discretionary it would be difficult, if not impossible, to explain why awards had been made in some cases but not others. Such a situation, which will not be uncommon given the state of Strasbourg jurisprudence, poses a distinct challenge to the viability of the mirror method. The outcome was for Lord Reed, in *Osborn*, to avoid the issue of how to discern ECtHR practice and simply assert that awards would generally not be made, except where there is a loss of liberty (see section 2.II.C.i above). Ironically, the result is that domestic practice will now depart from ECtHR practice, given the Strasbourg Court does make awards for such violations in 'numerous cases'.

These issues do not arise in application of the mirror approach to questions of substantive rights pursuant to section 2 HRA. This is because domestic courts do not, in determining questions of right, seek to divine aggregate trends in outcomes of particular sets of claims. Rather courts are concerned to identify consistently applied *rules* and *principles*, and then apply those rules and principles in domestic law. This is feasible because unlike determinations under Article 41, ECtHR determinations as to rights-violations are reasoned. Further, while the Strasbourg Court does not follow a doctrine of precedent equivalent to that in English law, there is some system of precedent in operation.[375] Also, the Court's decisions in respect of violations are not made pursuant to discretion, so that one is able to identify consistently-applied rules and principles through a stream of jurisprudence, which offer relatively safe guidance as to how the ECtHR would approach a given case. In contrast, as Lord Carnwath observed in *Faulkner*, '[t]he great majority of … awards [under Article 41] are made on an "equitable" basis reflecting particular facts … most of the decisions are not intended to have any precedential effect, and it is a mistake in my view to treat them as if they were'; he saw force in the view that 'the [ECtHR's] decisions on just

[373] *Shahid* (n 1) [88]–[89].
[374] *Osborn* (n 1) [114]; *Faulkner* (n 1) [61].
[375] See, eg, AR Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9 *Human Rights Law Review* 179.

satisfaction [are] "little more than equitable assessments of the facts of the individual case"'.[376]

Where, as is typically the case, there is little reasoning from the ECtHR in a particular stream of Article 41 determinations by reference to which one could discern whether patterns of outcomes reflect some rational design, it may be tempting to impute such design; equally there may be a temptation to explain away decisions which are inconsistent with a desired narrative. But this involves a real risk of revisionism, and of enunciation of rules which have no true basis in the Strasbourg jurisprudence. For example in *Faulkner* Lord Reed sought to explain one ECtHR Article 5(4) delay case in which an award had been *refused* on the basis that the delay in that case occurred not in proceedings addressed to whether detention continued to be justified, in which context awards had been made, but in the context of proceedings concerning whether the applicant's confinement ought to be extended.[377] But there was no reference to this factor in the ECtHR's reasoning, the Court adopting its usual style of reasoning, noting that some distress may well have been suffered but that '[t]he finding of a violation of Article 5 § 4 of the Convention constitutes in itself sufficient just satisfaction'.[378] How are we to know which factors bore on the Court's determination and what weight they were given? Further, if one is looking for a rational basis for refusal of an award Lord Reed's explanation does not offer one. Why should it make a difference, in terms of recovery, if the individual suffers serious anxiety as a result of delay in the context of proceedings concerning continued justification of their detention or in the context of proceedings concerning whether their confinement should be extended? In each case serious distress is suffered in consequence of a rights-violation, and in proceedings brought to determine whether the victim will regain their freedom. If anything, the variations in the ECtHR decisions demonstrate a *lack* of rational order.

A further issue with the mirror method, not addressed by courts, is the specificity or generality at which a court's inquiry into Strasbourg practice should be pitched. For example in *Faulkner* the Court considered practice in respect of particular types of violation: Lord Reed considered practice in respect of (1) Article 5(4) violations caused by delay, and (2) practice in respect of Article 5(4) violations caused by procedural breach other than delay, such as bias or failure to conduct an oral hearing.[379] In respect of (2), framing the inquiry according to procedural violations *as a general class* left open the possibility that awards would be available for such violations in domestic law; pitched at that level of generality one could possibly conclude that the ECtHR had a practice of making awards.[380] In contrast in *Osborn*,

[376] *Faulkner* (n 1) [105], [108], quoting Lester and Pannick (n 63) [2.8.4] fn 3.
[377] ibid [51].
[378] *Rutten* (n 363) [59].
[379] *Faulkner* (n 1) [41]–[61].
[380] ibid [61].

Lord Reed, in determining the damages claim, considered ECtHR practice at a far greater level of specificity, examining ECtHR practice for *specific* types of procedural violation *and* within the specific factual matrix at issue in *Osborn*.[381] So narrowly confined, the inquiry led to the conclusion that there were no Strasbourg cases comparable to *Osborn* in which awards had been made, the damages claim being summarily dismissed.

II. QUANTUM

As it relates to quantum the mirror approach requires English courts to aim not to be more or less generous than the ECtHR would be in a similar case.[382] In turn this implicates an inquiry into what award the Strasbourg Court would make. One cannot work this out by reference to ECtHR guidance as to scales and factors which increase or decrease quantum given the Court has not articulated such general, consistently-applied guidance.

One might search for an ECtHR case with facts similar to that under consideration and follow the award in that case. But this is problematic because, as Lord Bingham observed in *Greenfield*, each award is wholly dependent on what the ECtHR, in its discretion, considered 'fair' in the circumstances of that particular case, such that it would be wrong to treat the decision as setting a precedent.[383] In *Faulkner* too Lord Reed considered individual awards could not provide a reliable basis for decision-making, while Lord Carnwath observed, 'most [Article 41] decisions are not intended to have any precedential effect'.[384] This is consistent with the view of discretion in English law: no one exercise of discretion is

> binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise the discretion differently.[385]

A core difference, of course, is that in English law judges generally reason why they exercise discretion one way or another, so that later judges may at least follow the considerations which guided previous exercises.

In any case, one would need to know *which* facts the ECtHR considered material to setting quantum in order to work out whether a domestic case is analogous. But the ECtHR does not typically analyse the facts in deciding compensation, usually offering no analysis whatsoever. Further, facts are not the only relevant consideration: the Court has been known to take

[381] *Osborn* (n 1) [114].
[382] *Greenfield* (n 1) [19]; *Faulkner* (n 1) [35].
[383] *Greenfield* (n 1) [19].
[384] *Faulkner* (n 1) [68], [105].
[385] *Jaggard v Sawyer* [1995] 1 WLR 269, 288.

into account *normative* considerations on an ad hoc basis, such as the victim's moral status, some public interest concerns (albeit rarely), and other 'equitable' considerations.[386] Obviously where no reasoning is proffered it is impossible to know whether such concerns influenced the Court. Commentators observe that the ECtHR may well take into account certain concerns, such as moral status, even if they are not expressly mentioned.[387]

Another way one might implement the mirror approach is to determine awards in individual cases by reference to 'general' levels of awards at Strasbourg for particular classes of violation. However, there are problems with implementing this approach too. Take awards for indirect victims, such as relatives, for non-pecuniary losses suffered in consequence of Article 2 violations. In both *Savage* and *Rabone* each Court noted that the range of awards made by the ECtHR is 5,000 to 60,000 Euros.[388] There is no 'general' level of awards here—for example a clustering around a particular level—such that a domestic court could set an award within the 'ballpark' of that cluster. Rather, there is 'a considerable range'.[389] This leads on to an obvious problem; to determine quantum judges not only require a guideline range but a set of factors to guide them in placing the case before them *within* that range. As already discussed these factors cannot be derived from Strasbourg. And even if we had factors we would need to know whether the scale is weighted a particular way, if we are to take seriously the goal of ensuring broad consistency with Strasbourg. For example is 30,000 Euros a 'par' award or is the 30,000–60,000 Euros range reserved for exceptional cases?

Treating the highest and lowest awards made by the ECtHR as the polarities of a range within which awards should be set suggests that these are start- and end- points of a defined, clear and consistent scale of awards, with domestic courts' task being to determine where the ECtHR would place the case on that scale. Yet we do not know if the ECtHR applies such a scale, or if it does, what that scale is. The awards of 5,000 and 60,000 Euros are merely the lowest and highest awards the Court has made among those cases that have come before it; if the Court had dealt with a different set of cases the range might be 15,000 to 150,000 Euros. The 'range' is thus rather artificial.

One recent case entails a heroic attempt by a lower court judge to forge the Strasbourg case law on just satisfaction for procedural breaches of Article 3 into something akin to a guideline judgment.[390] He articulates

[386] As the Law Commissions observed ((n 36) [4.96]), the ECHR has been known to take into account 'a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law'.

[387] Shelton (n 148) 260–65; see ch 6.2.V.B.

[388] *Rabone* (n 1) [85]; *Savage* (n 216) [97].

[389] *Rabone* ibid; *Savage* ibid (range is 'wide').

[390] *DSD* (n 17).

bands and factors to guide assessment. This is, with respect, a commendable effort and the judgment offers far more guidance as to quantum than any higher court judgment. However, it is highly doubtful whether the guidance reflects the Strasbourg Court's own approach. Rather the guidance entails a 'reconstruction' of the Strasbourg material. For example bands are articulated by the Judge imposing his own order on the range of awards made by the Strasbourg Court. But there is no way of knowing whether these bands correlate with the Strasbourg Court's own method, if it has one, while as with *Rabone* and *Savage*, there are problems with treating the Strasbourg awards as setting a range. The factors which the Judge articulates to guide assessment are derived by going through one Strasbourg case after another and speculating as to the reasons why the Strasbourg Court awarded higher or lower figures in particular cases, unrealistically assuming these equitable case-by-case determinations must form a rational ordering, despite the general absence of any substantive reasoning from the ECtHR as to why it reached particular figures on particular facts.

It is a very odd thing that our law of human rights damages is the product of English judges reading Strasbourg tea leaves.

III. INCONSISTENT METHOD AND THE RISK OF SKEWED INTERPRETATION

There have been inconsistencies in the way different courts have 'interpreted' the Strasbourg material, which have affected conclusions as to the availability of damages. On one view this is a likely outcome where differently constituted courts interpret a troubled jurisprudence. On another view such inconsistencies raise the spectre of decision-making guided by unstated concerns.

Let us compare Lord Reed's analysis in *Faulkner* of ECtHR practice as to awards for distress in Article 5(4) cases concerning procedural unfairness other than delay, and Lord Bingham's analysis in *Greenfield* of ECtHR practice as to awards for distress in Article 6 structural bias cases (structural bias being a form of procedural unfairness).

Lord Bingham recorded that awards for distress had been made in some cases of breach of Article 6 but that the ECtHR had been 'very sparing' in making such awards, citing four ECtHR cases in which awards were declined.[391] Turning to cases of structural bias in particular, he concluded that the ECtHR's ordinary practice was not to make awards. This conclusion was based on a single statement from the ECtHR that it was 'normal practice' to refuse to make awards in such cases; he had also previously

[391] *Greenfield* (n 1) [16].

cited two structural bias cases in which awards were declined.[392] No serious attempt was made to check the ECtHR's statement as to its practice against actual practice by, for example, conducting a survey of relevant decisions.

In *Faulkner* Lord Reed recorded that the Strasbourg Court, including the Grand Chamber, had, in *Nikolova* and *HL*, made general statements that awards would not ordinarily be made for breaches of Article 5(4) (or 5(3)) caused by procedural failures other than delay and which did not result in loss of liberty.[393] However, Lord Reed thought these statements could not be said to lay down a strict rule because the ECtHR adopts a discretionary approach. Further, he observed that awards had been made in 'numerous cases' subsequent to the first of these statements. He did not reach a concluded view as to whether such awards ought to be available in principle in domestic law. However, his analysis tended to support availability of damages. In addition to his interpretation of *Nikolova* and *HL* as not setting down a rule against recovery, he placed emphasis on a statement of the ECtHR in *Abdi* in which the Court cited *HL* and *Nikolova* as supporting the proposition that awards would be made where causation was established.[394] Lord Reed's invocation of and reliance upon this single statement is rather difficult to marry up with his treatment of those statements in *HL* and *Nikolova* that awards ought not to be made, which he considered confined to their facts and not capable of offering general guidance. Lord Reed's willingness to leave open the making of awards for distress caused by procedural breaches of Article 5(4) contrasted with Lord Carnwath's view: his Lordship favoured following the ECtHR's express statements, and would have ruled out recovery of awards based on *Nikolova* and *HL*.[395]

Thus in *Faulkner* Lord Reed was willing to look past repeated, express statements from the ECtHR against awards to the ECtHR's practice. On this basis he did not rule out awards, and seemingly favoured availability of awards where causation was proven. In contrast Lord Bingham in *Greenfield* relied almost exclusively on a single statement from the ECtHR to conclude that awards ought not to be made in cases of structural bias. Unlike Lord Reed, Lord Bingham did not seriously consider Strasbourg practice. In fact a review of the ECtHR jurisprudence reveals that the ECtHR has made awards in a significant number of Article 6 structural bias cases.[396]

[392] ibid; *Kingsley* (n 57) [43].

[393] *Faulkner* (n 1) [55]–[61]; *Nikolova* (n 283) [76]; *HL* (n 169) [148]–[149].

[394] *Faulkner* ibid [61]; *Abdi v UK* (2013) 57 EHRR 16, [91]. Although, it is not clear that the statement from *Abdi* was made in respect of compensation for *distress*, which was the head of loss Lord Reed was concerned with; it seems rather to have been concerned with *loss of liberty*, which would be consistent with the views of the ECtHR in *HL* and *Nikolova*.

[395] *Faulkner* (n 1) [115]ff. This had also been the approach of the lower courts: [116].

[396] eg *De Cubber v Belgium* (1991) 13 EHRR 422, [24]; *Kadubec v Slovakia* (2001) 33 EHRR 41, [68]; *Lauko v Slovakia* (2001) 33 EHRR 40, [72]; *Sadak v Turkey (No 1)* (2003) 36 EHRR 26, [77]; *Tsfayo v UK* (2009) 48 EHRR 18, [56]; *Golubović v Croatia* (27 November 2012) App no 43947/10, [66] (ECtHR First Section); *Harabin v Slovakia*

Against this background Lord Reed's approach, in the post-*Faulkner* decision in *Osborn*, when he revisited the issue of whether damages could be recovered for distress consequent upon procedural breaches of Article 5(4), is striking. While in *Faulkner* his analysis suggested damages would be available if causation were established, in *Osborn* he asserted that procedural breach of Article 5(4) would not normally sound in damages (unless the breach resulted in loss of liberty). This general proposition was not the subject of reasoned justification.[397] What is pertinent for present purposes is that the rule in *Osborn* is identical to that articulated in *Nikolova* and *HL*. It is difficult to see this as mere coincidence. It seems Lord Reed has adopted, or at least been heavily influenced by an express statement of the ECtHR despite that statement not reflecting practice—as observed in *Faulkner* there is a practice of making awards for procedural breaches—and despite his own view, previously expressed in *Faulkner*, that such statements were unreliable. Indeed it was the very fact that express statements were unreliable *because* they conflicted with practice which led Lord Reed to interpret 'principles' in section 8 HRA as 'practice'.[398] Other unexplained variations between *Faulkner* and *Osborn* have already been canvassed such as variation in the generality or specificity of the inquiry into practice.[399] While there are other curious features of *Osborn* such as the glaring absence of any analysis of cases, such as *Waite*,[400] which were invoked in *Faulkner* in support of damages for procedural breaches outside delay cases.[401]

On the one hand these variations may be explicable on the basis that courts are engaging with a difficult, flawed jurisprudence, characterised by conflicting practices, and judicial pronouncements which conflict with practice. In light of such difficulties it may be inevitable that the courts' approach varies from one case to another. But while one might understand the cause of such inconsistency this does not mean it is defensible, especially given such variations are not explained even where it is the same judge adjudicating the same matter in two cases—*Faulkner* and *Osborn*—months apart. If such inconsistencies are a natural consequence of the mirror approach this is another reason for its abandonment. A victim's claim for damages should not depend on the idiosyncrasies of the judicial approach to interpreting the Strasbourg material in their particular case: if the focus in

(20 November 2012) App no 58688/11, [176] (ECtHR Third Section); *Ozerov v Russia* (18 May 2010) App no 64962/01, [62] (ECtHR Third Section); *Gajewski v Poland* (21 December 2010) App no 27225/05, [53] (ECtHR Fourth Section).

397 *Osborn* (n 1) [2](xiii). Text to n 291 above.
398 *Faulkner* (n 1) [31]; see s 1.I above.
399 Text to n 379 above.
400 Text to n 289 above.
401 *Faulkner* (n 1) [61].

Greenfield had been on ECtHR practice rather than dicta the claimant may well have obtained an award. Similarly, if Osborn's case had been joined in the *Faulkner* litigation an award may well have been made.

On the other hand stark inconsistencies of approach raise the spectre of judges interpreting Strasbourg material guided by unstated concerns. Lord Reed in *Faulkner* was willing to reason around ECtHR statements that told against liability, and yet rely on similar statements which supported liability, as well as highlighting practice favouring liability. This was all within a judgment notable, exceptionally so in the HRA damages context, for its willingness to open up liability. In stark contrast Lord Bingham in *Greenfield* accepted uncritically and at face value a statement of the ECtHR indicating compensation ought not to be awarded ordinarily, and did not explore Strasbourg practice in detail. This was all within a decision the general tenor of which was that damages ought not to be part of the ordinary response to rights-violations. It is not difficult to see how an observer might suspect that different normative concerns underpinned each Judge's 'interpretation' of Strasbourg materials. But it is more difficult to explain how the same judge, Lord Reed, took such different approaches to the same issue from *Faulkner* to *Osborn*, decisions made within months of one another. One may only speculate, given the lack of reasoning in *Osborn*. But one wonders whether Lord Carnwath's strong separate judgment in *Faulkner*, emphasising his experience as an ad hoc judge of the ECtHR and calling for a focus on express statements by the ECtHR, may have made an impact between innings. Further, as we shall see, Lord Reed's frustration at having to dedicate much time and effort to reading myriad Strasbourg decisions in order to discern clear and consistent practice was manifest in *Faulkner*, and one wonders whether the Court in *Osborn* was simply not willing to incur the same burden, in terms of time and effort, finding it more convenient to simply rule out awards.

Whatever the explanation, the foregoing highlights the *potential* at least for inconsistent approaches to Strasbourg material based in unstated concerns. The ECtHR jurisprudence is particularly open to 'massaging' in line with one's own normative concerns. Unreasoned decisions can be reconstructed to support particular propositions or distinguished based on fine distinctions; general statements can be selectively disposed of or relied upon depending on the desired narrative; practice can be analysed at a greater or lesser level of generality; while where there are conflicting streams of decisions one may selectively emphasise one over the other, or inconvenient cases may be ignored. Putting to the side that such approach entails a lack of transparency, inconsistency and possible reliance on subjective concerns which may not stand up to scrutiny if made explicit, a state of affairs in which different courts massage a flawed jurisprudence one way or the other on an ad hoc basis seems unlikely to produce a satisfactory law of damages.

IV. '[O]NE DAMN THING AFTER ANOTHER'[402]

The mirror approach imposes significant time and cost burdens on parties and the judiciary. This is because ECtHR 'practice' can only be discerned by trawling potentially vast numbers of decisions. For example in *Faulkner* large tracts of Lord Reed's judgment were occupied by summary descriptions of one Strasbourg case after another.[403] As Lord Reed observed, around 75 Strasbourg cases were cited to the Court. He explained that it had been time-consuming for counsel to take the Court through these cases, the appeal taking up over three days of hearing time. Seeking to extract 'principles' from a 'blizzard of authorities' had required 'painstaking effort'.[404] Indeed, one of Lord Carnwath's reasons for favouring express statements of principle made by the ECtHR ahead of practice was that it would be 'less laborious';[405] 'The court should not be subjected to a "blizzard of authorities" (as Lord Reed describes it)'.[406] In *Anufrijeva* Lord Woolf similarly observed that the Court had 'been deluged with extensive written and oral arguments and citation from numerous lever arch files crammed to overflowing with authorities', and that the Court had sought to save the parties costs 'by engaging in an intensive reading programme out of court'.[407] It was this experience that led Lord Woolf to prescribe that only three authorities should ordinarily be cited to the court;[408] this guidance has had virtually no effect in practice. In a recent case the High Court dedicated 39 paragraphs, spanning 20 pages of the Law Reports, to considering Strasbourg cases one by one in accordance with the mirror method articulated in *Faulkner*.[409] Avoiding costs associated with trawling endless Strasbourg decisions and seeking to reconcile them has been one reason why the courts have begun to favour the 'ordinary approach'[410] of looking to domestic law ahead of Convention jurisprudence in adjudication of substantive rights matters.[411]

[402] *Faulkner* (n 1) [103].
[403] eg ibid [41]–[54]. See also, eg, *Van Colle* CA (n 6) [106]–[110]; *DSD* (n 17) [69]–[108].
[404] *Faulkner* ibid [103].
[405] ibid [104].
[406] ibid [114]. Perhaps the experience in *Faulkner*, of painstaking effort, was one further explanation for why, in the follow-up case of *Osborn* a few months later, Lord Reed simply asserted that awards would not be made for procedural breaches of Article 5(4) with no real analysis of why this should be so, and nowhere near the level of engagement with Strasbourg practice that had gone into *Faulkner*. There is surely a limit to how much judicial time and effort can sensibly be spent trawling through Strasbourg cases, and it seems the time and effort that went into *Faulkner* may well have exhausted that quota during the time period in which *Faulkner* and *Osborn* were decided. See also the similarly cursory approach to consideration of Strasbourg cases in the Supreme Court's post-*Faulkner* decision in *Shahid* (n 1) [88], the analysis of Strasbourg cases taking up a solitary paragraph.
[407] *Anufrijeva* (n 5) [79], [81](vi).
[408] ibid [81](v).
[409] *DSD* (n 17) [69]–[108].
[410] See s 1.III above.
[411] *Kennedy* (n 87) [46].

Perhaps this expense of time, effort and cost could be justified if it led to distillation of helpful guidance or a satisfactory law of damages. Yet it is typical that little or no guidance is derived from Strasbourg, while a problematic domestic jurisprudence has emerged. As we saw above, in *Faulkner* itself despite Lord Reed's efforts, very little guidance was distilled, while the more detailed guidance articulated was not based in Strasbourg material. Thus, the concern is not merely one of cost but *wasted cost*.

One might consider that in important appellate cases in which courts attempt to articulate general guidance such as *Anufrijeva* and *Faulkner* the burden, in terms of time and effort, will naturally be greater than in other cases. Yet, wherever a first instance court is confronted with a HRA damages claim, the mirror approach, according to the methodology elaborated in *Faulkner*, binds them to investigate Strasbourg practice, which in turn requires the judge to trawl Strasbourg cases. Of course, some lower court judges have simply ignored Strasbourg material, perhaps because they do not have the same resources available to them as appellate judges, to undertake the time-intensive task of surveying a potentially vast jurisprudence, and also, perhaps, because quick examination of Strasbourg material indicates that little of significance may be gleaned from it. However, in the wake of *Faulkner* lower court judges may be rather anxious to ensure they analyse Strasbourg material exhaustively given the Court of Appeal's decision in *Sturnham* was overturned on the basis that the Court of Appeal had 'erred in its interpretation of the Strasbourg case law' and had not considered a key Strasbourg case which bore on the matter before them, apparently because the case had not been cited to the Court.[412] And indeed this has been the result. In the recent case of *DSD*, which involved damages claims for breach of procedural obligations under Article 3, the High Court followed the approach laid down in *Faulkner*; the result was that on top of a liability judgment spanning 315 paragraphs, the Judge issued a separate damages judgment spanning 145 paragraphs and 58 pages of the Law Reports.[413]

One may argue that as guideline appellate decisions are given, lower courts will no longer be required to trawl Strasbourg material, because the task will have been undertaken at appellate level. This is a not untenable argument. However, we are a very long way off such a state of affairs.

[412] *Faulkner* (n 1) [96]. Missing relevant Strasbourg cases is likely to be a not uncommon occurrence given that for any given type of rights-violation there are likely to be myriad ECtHR cases in which violations have been found and Article 41 considered. There is no other way to ensure one has not missed a relevant case other than by literally going through every case of violation one by one. Keyword searches on electronic databases such as the ECtHR's HUDOC database (www.hudoc.echr.coe.int/sites/eng/) are of very little help in narrowing the field of cases in this respect, not least because there is little judicial reasoning in respect of Article 41 to search. To make matters worse, there is also limited commentary on Article 41 jurisprudence.

[413] *DSD* (n 17). Liability judgment: [2014] EWHC 436.

One must bear in mind that for all the time, cost and effort that went into *Faulkner*, the Court only determined the approach to damages in respect of one type of breach (delay) of one sub-section of one Article, while the judgment left many issues unresolved even in this narrow context.[414] The 58 pages dedicated to the damages judgment in *DSD* only resolved the approach to one type of violation of Article 3 (and that is a type of violation for which domestic courts have considered damages in the past, so that there was prior authority to draw on). Given the higher courts reiterate that the approach to damages for one type of breach of a particular right cannot necessarily be read across to other types of breach, there is a great deal more trawling of Strasbourg material ahead. Further, guidance offered by higher courts not uncommonly offers little detailed guidance and/or refers lower courts back to Strasbourg; for example, in *Faulkner* the guidance as to quantum of damages for loss of liberty was that judges should determine what is just and appropriate on the facts, in the light of any guidance from Strasbourg.

In *Faulkner* Lord Reed laid out guidance aimed at ameliorating the burden posed by the mirror approach, including requiring counsel to produce a table summarising key information about Strasbourg cases and a chronological list of cases, while in their submissions counsel are instructed to explain the principles they consider derive from Strasbourg decisions and how the cases support those principles.[415] Perhaps this guidance will ameliorate the burdens of the mirror approach, or perhaps it will fare the same fate as Lord Woolf's procedural guidance in *Anufrijeva*. Even if the guidance is strictly adhered to, a judge would still need to be taken through the Strasbourg cases by counsel, read for himself all relevant cases cited, and come to his own conclusion on what, if anything, can be discerned from the material; the mirror approach will therefore still require painstaking effort, while the guidance does not prevent counsel from releasing a deluge of cases upon the court. Indeed, the mirror approach positively encourages this, given the focus on practice which requires analysis of aggregate trends in ECtHR decision-making. Notably Lord Reed did not criticise the volume of cases cited to the Court in *Faulkner*. Further, while Lord Reed's procedural guidance may reduce the burden on judges and perhaps save parties some costs by shortening the length of the hearing, the guidance may also increase time spent by counsel preparing the case, imposing costs on parties. A not unlikely outcome of a state of affairs in which proceedings are costly and potential awards modest is that claims are not made.

[414] Including the nature of the loss of liberty head, the scale on which awards for that head should be awarded, factors going to assessment of damages for distress, and whether it is permissible for courts to take into account the victim's moral character in deciding damages (all discussed above).

[415] *Faulkner* (n 1) [99]–[103].

SECTION 4. THE FUTURE OF THE MIRROR APPROACH POST-*FAULKNER*

I. DELPHIC DICTA

In *Faulkner* Lord Reed made a number of remarks concerning the development and future of the damages remedy. He said: '*At the present stage of the development of the remedy* … courts should be guided, following *Greenfield*, primarily by any clear and consistent practice of the European court';

> over time, and as the practice of the European court comes increasingly to be absorbed into our own case law through judgments such as this, *the remedy should become naturalised*. While it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.[416]

The implications of Lord Reed's observations are not clear. Some, who favour adoption of a tort-based approach such as that propounded in this book, argue that Lord Reed (1) 'saw the position as being what one might term an evolutionary one, offering the prospect of a shift away from the current approach once the remedy has become "naturalised"'; (2) that Lord Reed's observations 'suggest[] that over time the approach to HRA damages may shift away from predominance of Strasbourg authority. As part of that "naturalisation" process, domestic principles may be applied to the extent that they are not inconsistent with Strasbourg practice'; and that (3) 'Lord Reed's judgment in *Faulkner* … holds out a prospect for further developments as the HRA damages remedy gradually becomes "naturalised", approximating the higher level of damages in English tort law'.[417] The strongest support for this reading is tucked away at the end of Lord Reed's judgment where, in determining Sturnham's appeal, Lord Reed juxtaposes rejection of a common law starting-point with an observation that Strasbourg practice is the proper starting-point '*at this stage* in the development of the remedy'.[418] This might be read as rejection of a common law approach *for the time-being*. And recall that neither party in *Faulkner* had argued for *Greenfield* to be overruled,[419] such that complete abandonment of the mirror approach was not open.

On the other hand, putting to the side one's normative preferences for how the jurisprudence should develop, there are reasons to be cautious about whether Lord Reed's dicta contemplate an eventual shift in general approach, especially when those observations are placed in the context of

[416] ibid [29], [39] (emphasis added).
[417] M Andenas et al, 'A Fair Price for Violations of Human Rights?' (2014) 130 *LQR* 48.
[418] *Faulkner* (n 1) [96] (emphasis added).
[419] ibid [29].

his judgment as a whole. In particular it is difficult to foresee alignment of quantum of HRA awards with those at common law, at least in the short-run.

What Lord Reed seemed to be emphasising, particularly in his discussion of 'naturalization' of the remedy, was that once a critical mass of damages decisions are made under the HRA there will be less reason to continually look to Strasbourg. But this does not in itself suggest a future change in the *general approach* to damages, away from a domestic jurisprudence which seeks to replicate Strasbourg practice, only that *the sources* that domestic courts draw upon may change.[420] For example, where a domestic court relies on the Supreme Court decision in *Faulkner* or the House of Lords decision in *Greenfield*, it will be relying on domestic sources, but those sources enunciate an approach designed to ensure that domestic damages practice matches Strasbourg practice. If there were some novel issue to determine, Strasbourg practice would continue to be the first port of call.

A strong clue as to the reason for Lord Reed's emphasis on a gradual shift in sources lies in the final paragraphs of his judgment, in which—as we have seen—he observed the painstaking effort involved in traversing myriad Strasbourg decisions (strongly echoed by Lord Carnwath). It was within this discussion that he stated that it would no longer be necessary for counsel to cite numerous Strasbourg cases in Article 5(4) damages claims, given *Faulkner* would now be the 'starting point'.[421] This suggests that rather than necessarily being a prelude to abandonment of the mirror approach, Lord Reed's observations as to naturalisation of the remedy may be motivated by pragmatic concerns over the amount of resources consumed by analysing myriad Strasbourg decisions wherever a damages claim arises.

One must also recall Lord Reed's views in *Faulkner*, expressed in no uncertain terms, that HRA damages are 'an entirely novel remedy', 'not tortious in nature', of 'international origin' and lacking in 'native roots', whose 'native habitat' is the international plane.[422] Read alongside these statements, it is more difficult to conclude that Lord Reed's observations that the remedy is at an intermediary stage of development contemplate that the end-point of that development is a tort-based approach.

It is entirely possible that a future Supreme Court, (rightly) concerned by the manifest problems with the mirror approach, may rely on Lord Reed's observations to justify a shift in general approach, reasoning away the

[420] Thus in the subsequent High Court decision in *DSD* ((n 17) [32]) the Judge said, following Lord Reed's dicta in *Faulkner*, '[o]ver time the domestic courts (applying Strasbourg guidance) will evolve their own corpus of jurisprudence in relation to HRA damages claims and hence the trend to look west towards Strasbourg for guidance will diminish'. The words in brackets are important—the domestic corpus of jurisprudence will flow from applying Strasbourg guidance.

[421] *Faulkner* (n 1) [100].

[422] ibid [29].

mirror approach as an intermediate step in the remedy's development. It is to be hoped that this transpires. However it is not obvious that Lord Reed's judgment, taken as a whole, envisions such course.

There are more specific reasons to be sceptical about the prospect that quantum in particular will come to be aligned with domestic scales. In *Greenfield* and *Faulkner especial* emphasis was placed on a core feature of the mirror approach being that quantum should follow Strasbourg levels; for example Lord Reed in *Faulkner* on a number of occasions followed up a general pronouncement as to the nature of the mirror approach with statements such as the following: '*In particular*, the quantum of awards … should broadly reflect the levels of awards made by the European court'.[423] In *Greenfield* Lord Bingham explicitly rejected a submission that awards should follow domestic scales, elaborating some of his core justificatory reasoning for adoption of the mirror approach by reference to the issue of levels of awards.[424] Lord Reed repeated all of that reasoning in *Faulkner*, reiterating that *Greenfield* had rejected the proposition that HRA damages should not be on the low side relative to awards in tort.[425] In the more recent decision in *Michael* the Supreme Court described the idea of awarding damages for human rights breaches on a common law basis as 'gold plating the claimant's Convention rights';[426] this does not suggest enthusiasm for increased awards.

Further, there was a perfect opportunity in *Faulkner* to align levels of awards under the HRA and in tort in a context where the argument for alignment is plain—that is, in respect of damages for loss of liberty, given the obvious analogy with false imprisonment. As we saw above,[427] there was a complete dearth of guidance as to levels of awards for such loss in the Strasbourg material. As Lord Reed indicated in *Faulkner*, absent such guidance it is for domestic courts to determine what is just and appropriate.[428] Given this leeway Lord Reed could have set levels so that they broadly aligned with common law levels, following the Court of Appeal's approach in *Faulkner* where, in making a higher award, the Court emphasised that awards should not be insubstantial where something of 'real value' is at stake, recalling the English tradition of affording strong protection to liberty.[429] Yet the Supreme Court did not take this path. Rather it reduced the Court of Appeal's award, which had been closer to common law levels for loss of liberty, to a level well below common law scales. Perhaps the

[423] ibid [13](4) (emphasis added).
[424] *Greenfield* (n 1) [18]–[19].
[425] *Faulkner* (n 1) [27].
[426] *Michael v Chief Constable South Wales* [2015] 2 WLR 343, [125].
[427] Text to n 248 above.
[428] *Faulkner* (n 1) [36], [75].
[429] *Faulkner* CA (n 231) [12], [18].

higher courts' emphasis on aligning quantum to Strasbourg levels is unsurprising given maintaining awards at a low level addresses anxieties that often arise in relation to public authority liability, such as concerns not to deplete public funds.

What seems more likely than the uplifting of awards or a sudden move away from replicating Strasbourg practice is that in implementing a general approach based in Strasbourg practice domestic damages rules, principles or methods will, to some extent, influence development of rules, principles or methods within HRA damages jurisprudence. This influence may be conscious or not; for example, it may be difficult for domestic judges who routinely try common law damages claims, to shake off engrained habits of common law thinking. As we have seen, there is already some evidence of common law reasoning infiltrating domestic damages jurisprudence.[430] Further examples include Lord Reed's prescriptions that loss must be proved 'according to the normal domestic principle' that the claimant bears the burden of proving loss on the balance of probabilities, and that courts should determine questions of fact 'in the usual way'.[431] One key reason courts are likely to have ad hoc recourse to domestic rules etc is the lack of detail in the Strasbourg material. Also, whereas typical policy concerns may support limiting frequency of awards and maintaining awards at low levels, such concerns have less relevance to more 'technical' aspects of damages law such as the burden of proving consequential losses or method for fact-finding.

II. BEGINNINGS OF A LIBERALISATION OF APPROACH?

Another important matter is whether *Faulkner* represents a break from the exceptionally restrictive approach established by *Anufrijeva* and *Greenfield*, and a first step towards a less restrictive law of human rights damages, given the decision should result in awards more regularly being made in Article 5(4) delay cases.

In respect of the particular type of violation in *Faulkner*, the law as to *availability* of damages is now less restrictive. The general practice in pre-*Faulkner* cases on Article 5(4) had been for courts to routinely deny damages, especially where the claim was for distress alone. Now damages should routinely be awarded for distress where the rights-violating delay was over three months, and for any loss of liberty. However, this was only one aspect of the Supreme Court decision. Damages will continue to be very low; the final award to Faulkner for loss of liberty was substantially below common law scales, while awards for distress will be *exceptionally* modest,

[430] s 2.II.D above.
[431] *Faulkner* (n 1) [82].

as evidenced by the £300 award to Sturnham for six months of distress.[432] Various other restrictions on recovery were imposed, such as the presumption that awards will not be made for distress where the rights-violating delay was less than three months. Further, claimants may face difficulties in practice; for example it may be difficult to establish loss of liberty given the tricky task of proving that the Parole Board would have ordered the prisoner's release earlier but for the delay. Other 'liberalising' aspects of the decision will have little impact. For example Lord Reed accepted that pecuniary losses suffered by a prisoner as a result of being detained for longer than they ought to have been are recoverable. However it will be nearly impossible for a prisoner to prove specific losses; for example claims for lost wages the prisoner could have been earning if free will be rejected absent specific evidence of, say, a job offer, which a prisoner is most unlikely to possess, especially given they will have been waiting for the delayed Parole Board hearing to determine whether they would in fact be freed. *Faulkner* does not mention non-compensatory awards such as exemplary damages.

So, relative to the *exceptionally* restrictive approach in previous Article 5(4) cases, *Faulkner* does mark a liberalisation of approach as far as availability of damages goes. Nonetheless the decision is consonant with previous decisions insofar as awards shall remain very low, control devices such as the 'sufficiently serious' criterion were endorsed, and it seemingly remains the case that only compensation is available.

The more important matter is whether *Faulkner* signals a more *general* liberalisation of approach. Clearly it does not in respect of quantum. But does it suggest courts will generally be more willing to make awards than before *Faulkner*? Only time will tell. The following observations may aid the reader who wishes to make an informed prediction.

The decision does seemingly challenge certain oft-repeated propositions in the damages jurisprudence, such as the proposition formulated in *Anufrijeva* and endorsed in *Greenfield* that damages play a limited, secondary role in human rights claims, in that at least for Article 5(4) delay cases awards will not be an uncommon remedy. But nonetheless in *Faulkner* Lord Carnwath, at least, invoked the proposition from *Anufrijeva*.[433]

Another feature of the decision which stands out is that where an individual suffers unlawful delay of three months or more they are assumed to suffer compensable distress. This is significant insofar as lower courts have, in human rights damages cases, often required direct proof of distress before making awards, and generally been unwilling to infer distress. However, several points are relevant to provide perspective.

[432] On how scales of awards under the HRA compare to common law scales see further ch 3.I.E.

[433] *Faulkner* (n 1) [110].

First, this rule is specific to Article 5(4) delay cases involving 'a convicted prisoner awaiting review of his case by the Board'.[434] The Court in *Faulkner* signalled that the general rule is that the claimant must prove loss on the balance of probabilities. This leaves open the possibility that outside the specific context considered in *Faulkner*, courts may still insist on direct evidence and be unwilling to infer loss.[435] One might argue that *Faulkner* sends a signal that claims of inferred distress are to be taken seriously and that evidence of distress is not a prerequisite, but the obvious counter is that the Supreme Court in *Osborn* did not even engage with the claimant's submission that distress should be inferred, flatly denying the claim.

Second, it may be tempting to associate adoption of a presumption of loss with presumptions of loss within vindicatory approaches to damages.[436] However, common law presumptions relate to normative damage, whereas such a head of damage is not recognised in the Strasbourg Article 41 case law. Also, the motivations for adoption of the presumption are other than to give effect to human rights law's vindicatory function. As Lord Carnwath expressly indicated, the three month rule and associated presumptions are motivated by a desire to ensure legal certainty.[437] From the wider context of the *Faulkner* litigation one may infer that such certainty was desirable so as to facilitate out-of-court settlements and avoid repeat litigation: *Faulkner* and many other Article 5(4) cases were the product of systemic delays in the parole system, caused by chronic underfunding, such that the class of potential claimants is sizeable. This contextual feature also hints at why the Court erected a presumption against recovery for rights-violating delays under three months; note that there are no such presumptions within vindicatory torts, the law only recognising presumptions that damage *has* been suffered. The presumption against loss might be viewed as a control mechanism, to avoid a hypothetical flood of small claims. This explanation is consonant with Lord Carnwath's explanation of the three month threshold as not only being justified by the value of certainty but also 'proportionality';[438] the reference to 'proportionality' is reminiscent of Lord Woolf's call in *Anufrijeva* for proportionality between litigation costs and awards, and that small claims should be discouraged.[439] Thus, features of *Faulkner* which at first glance might appear vindicatory, are more likely based in *public interest concerns*.

Third, delay cases are the single context in which the Strasbourg Court has explicitly held that a rebuttable presumption that non-pecuniary loss has been suffered arises, which further explains the Supreme Court's approach

[434] ibid [66].
[435] eg *R (MA) v Independent Adjudicator* [2014] EWHC 3886, [61].
[436] See ch 2.III.C.ii.
[437] *Faulkner* (n 1) [127].
[438] ibid.
[439] *Anufrijeva* (n 5) [79]–[81].

in *Faulkner*, albeit the Court did not place especial weight on these statements of principle, placing more weight on practice.[440] This unique phenomenon is not the result of some consideration of principle but rather the result of the ECtHR facing a flood of claims concerning rights-violating delays, due to systemic delays in the court systems of several European states.[441] As a result the Court, in this context, has had to function as a de facto court of first instance for many clone cases caused by systemic violations at the domestic level; the Court has arguably assumed loss and more readily made awards so as to incentivise respondent states to put in place effective national remedies; and it has laid down more detailed guidance so as to facilitate provision of effective redress at the domestic level, so that more clone cases do not further clog up the Court's docket. Given these contextual features one cannot draw more general conclusions from the ECtHR's (or Supreme Court's) approach in the field of delay.

There are further reasons to be cautious about resting general claims about trends in the jurisprudence on one decision. One reason is that in the sequel to *Faulkner*, *Osborn*, Lord Reed, who only a few months earlier penned the lead judgment in *Faulkner*, summarily proscribed awards for distress consequential upon breach of Article 5(4) outside delay cases. In another post-*Faulkner* decision Lord Reed, again giving the judgment of the Supreme Court, in *Shahid*, having found that the defendant had breached a prisoner's Article 8 rights by keeping him in solitary confinement continuously for an extraordinarily long period of five years, gave short shrift to the prisoner's claim for damages, considering a declaration constituted 'just satisfaction'.[442] This hardly suggests a trend towards liberalisation; rather this is one of the most restrictive damages determinations made under the Act.

Another reason is that there is a strong emphasis in HRA jurisprudence on a violation-by-violation approach, such that a less restrictive approach for one type of violation cannot be taken to suggest a less restrictive approach more generally; *Osborn* and *Shahid* again prove this point. Furthermore, we have seen that the mirror approach affords courts wide scope to extend or limit availability of awards depending on how they interpret Strasbourg materials. In this light it may be that, as in the field of public authority liability in negligence, the jurisprudence proceeds in fits and starts, with some

[440] *Scordino* (n 96) [204]; *Faulkner* (n 1) [53].

[441] See, eg, Directorate-General (n 92) 38ff; Council of Europe Directorate-General (Human Rights and Rule of Law), *Applying and Supervising the ECHR: The Improvement of Domestic Remedies with Particular Emphasis on Cases of Unreasonable Length of Proceedings* (2006); *Committee of Ministers Recommendation to Member States on Effective Remedies for Excessive Length of Proceedings*, CM/Rec(2010)3 (2010); *Round Table on 'Effective Remedies Against Non-Execution or Delayed Execution of Domestic Court Decisions*', Ministers' Deputies, CM/Inf/DH(2010)15 (2010).

[442] *Shahid* (n 1) [87]–[90].

decisions, such as *Greenfield*, *Osborn* and *Shahid* taking a more restrictive approach, and others, such as *Faulkner*, taking a less restrictive approach, the result being an incoherent and unsatisfactory jurisprudence.

One must also recall that there is limited guidance from higher courts and Strasbourg. Because of this lower court cases will be settled according to case-by-case exercises of judicial discretion. If the pre-*Faulkner* Article 5(4) jurisprudence is anything to go by,[443] whether damages are awarded will depend on the factors the individual judge, in her subjective judgement, happens to think relevant. Given the general statements, repeated in *Anufrijeva*, *Greenfield* and *Faulkner*, that damages are of secondary, if any, importance in human rights adjudication, and given the general trend at first instance has been for courts to deny damages, it would be a brave punter who staked the house on across-the-board liberalisation of approach, at least in the short-run. It also seems likely that concerns which tell against making awards such as the victim's moral character[444] and floodgates are likely to continue to influence decision-making given that *Faulkner* did not specifically address their invocation by lower courts, nor address the status of the *Anufrijeva* guidance that public interest concerns are relevant.

Also significant in considering whether *Faulkner* indicates a broader trend is that there were an unusual number of factors that came together in the case which made it difficult for the Court to adopt the sort of restrictive approach which has characterised HRA damages.

As already discussed, and most significantly, the delay context is a unique one in which the ECtHR has given express and specific guidance that where individuals suffer rights-violating delays before adjudicative tribunals and specific relief is not available to expedite their case, Article 13 requires compensation to be available for non-pecuniary losses. Lord Reed may not have given especial weight to such statements in *Faulkner*, focusing on practice as per the mirror method, but it must have been clear that failure to observe these statements risked the ECtHR finding the UK in breach of Article 13.

This leads on to another factor: because the ECtHR happens to have dealt with so many delay claims there is a critical mass of Article 41 decisions made in similar factual matrices to that in *Faulkner*. Further this is an area where many awards have been made, for reasons already discussed. It will not often be the case that there will be such a body of jurisprudence addressing a particular factual matrix and in which awards have been made with regularity; the presence of such a significant body of decisions in turn makes it difficult for domestic courts, operating under the mirror approach with its focus on ECtHR practice, to rule out awards. Furthermore, the ECtHR had, just prior to *Faulkner*, handed down a decision against the UK,

[443] s 2.II.C.ii above.
[444] Courts continue to rely on this factor: *DSD* (n 17) [37]–[39].

Betteridge, in which it made an award in very similar factual circumstances to *Faulkner*.[445]

Also significant is Article 5(5), which prescribes an enforceable right to compensation where Article 5 is breached. This Article, like Article 13, was not mentioned in *Faulkner*. However, it is unlikely that the Court was unaware that the ECtHR has previously found violations of Article 5(5) against the UK, specifically for not making awards for distress in Article 5(4) cases;[446] indeed several such cases were cited in *Faulkner*.

It is not insignificant that *Faulkner* concerned violations of rights geared towards protection of liberty, an interest long protected at common law. Though Lord Reed rejected Laws LJ's view in *Sturnham* that if 'the violation involves an outcome for the claimant in the nature of a trespass to the person, just satisfaction was likely to require an award of damages'[447]—on the basis that it was inconsistent with the mirror approach[448]—it will be much more difficult for a court to justify refusing awards where awards are available in domestic law for interferences with identical interests:

> It is clearly an embarrassment for judges to have to say of a right with constitutional status that it merits a lesser remedy than those in traditional tort actions. When the right invoked overlaps with or mirrors a standard tort action, the embarrassment will be all the greater.[449]

Equally courts will naturally be less hesitant to make awards for interferences with interests they are accustomed to awarding compensation for, and which the common law has long protected.[450] This observation harks back to the hypothesis in chapter 4, that domestic courts tend to absorb new developments into pre-existing habits of thought. This helps to explain why, notwithstanding the approach to awards for distress alone, a violation of Article 5(3) or (4) which results in a claimant being imprisoned where they would not have been otherwise (ie a loss of liberty) will generally result in damages. Similarly the other areas where courts have shown relatively warmer attitudes to damages have been breaches of Articles 2 and 3,[451] and Article 1, Protocol 1,[452] which protect interests traditionally protected through damages liability in domestic law.

Overall, it is unlikely that this array of features, which in combination strongly favour the making of awards or at least make it difficult for domestic courts to rule out awards, will come together too often. Given the pattern

[445] *Betteridge v UK* (2013) 57 EHRR 7.
[446] Above n 177.
[447] *Sturnham* (n 228) [22].
[448] *Faulkner* (n 1) [96].
[449] Harlow (n 109) 79–80.
[450] See further ch 3.II.B.iv.
[451] *Rabone* (n 1); *DSD* (n 17); *OOO* (n 295); *Savage* (n 216); *Van Colle* CA (n 6); *Re Jordan's Application* [2014] NIQB 71.
[452] See text to nn 336ff above.

of jurisprudence so far it seems that at appellate level the HRA damages jurisprudence is likely to proceed in fits and starts, with some decisions being more restrictive, others less so, but with the overall approach to HRA damages remaining one far more restrictive than approaches to damages across the law of torts. At lower court level, excluding very early decisions under the Act, damages claims have often been denied outside of Article 2 and 3 cases, while claims for pecuniary loss have generally only succeeded where a corporate claimant suffers violation of Article 1, Protocol 1. It is telling that notwithstanding the features just mentioned that told strongly in favour of making awards in *Faulkner*, lower courts had, prior to the Supreme Court decision, adopted an *exceptionally* restrictive approach to awards in Article 5(4) delay cases, more or less ruling them out altogether. One thing is abundantly clear: whether courts make awards more or less frequently, damages will remain depressed at exceptionally low levels relative to common law scales, such that human rights victims will continue to be radically undercompensated relative to domestic standards.

III. A BRITISH BILL OF RIGHTS?

It has become an almost constant feature of British politics over the last few years that Governments wish to explore the idea of replacing the HRA with a 'British Bill of Rights'. The Labour Government, which originally passed the HRA, floated the idea of such a change just seven years after the HRA entered force,[453] while the 2010–2015 Conservative-Liberal Democrat coalition set up a Commission to examine the idea.[454] So far the idea of replacing the HRA with such a Bill has remained just that; the Commission's report, for example, was described by one commentator as 'a damp squib in the long grass', its proposals going nowhere.[455] However, the Conservative Party, before winning the 2015 general election, produced a policy document on changing Britain's human rights laws,[456] their party manifesto included a pledge to 'scrap the [HRA] and introduce a British Bill of Rights'[457] and, having won the election, the first Queen's Speech of the new Government included a commitment to 'bring forward proposals for a British Bill of Rights'.[458]

[453] *The Governance of Britain*, Cm 7170 (2007) [204]–[210].
[454] Commission on a BOR (n 100).
[455] M Elliott, 'A Damp Squib in the Long Grass: the Report of the Commission on a Bill of Rights' [2013] *European Human Rights Law Review* 137.
[456] Conservative Party, *Protecting Human Rights in the UK* (2014) [Policy Document].
[457] Conservative Party, *The Conservative Party Manifesto 2015* (2015) 60 [Manifesto].
[458] *Her Majesty's Most Gracious Speech to Both Houses of Parliament at the State Opening of Parliament 2015* (27 May 2015) (www.gov.uk/government/speeches/queens-speech-2015).

At the time of writing it is not clear what those final proposals will be, the proposals in the policy document and the manifesto are rather vague, it is widely reported that the proposals have been through many iterations, while there is to be a consultation on any proposals before they are made final. It is further unclear whether such proposals would ever find their way into law, not least because the Conservative Government has a slim majority in the House of Commons, for the first time a Conservative Government does not enjoy a majority in the House of Lords, and repeal of the HRA would be highly contentious. Like other proposals for major constitutional reform, such as perennial proposals for a written constitution or reform of the House of Lords, there may be some agreement that reform is required but real difficulties in formulating detailed proposals of what should replace the status quo capable of garnering widespread support.

Notwithstanding these points a number of common themes emerge from the Conservative Party's various documents and pronouncements which bear directly on the future of the mirror approach, and therefore warrant consideration briefly.

In particular both the policy document and manifesto stress[459] that any proposals brought forward would break the formal link between British courts and the ECtHR so that British courts would no longer be required to take into account Strasbourg decisions.[460] It is thus highly likely that any new British Bill of Rights (or amended HRA) would not include equivalents of sections 2(1) and 8(4). This should mark the end of the mirror approach to damages, given English courts' justification for adopting such approach has rested nearly entirely on section 8(4), and as we have seen there are no convincing normative arguments for following the mirror approach—and plenty against. This would be a welcome development, putting the mirror approach out of its misery, and offering a prime opportunity for the law of human rights damages to be 'reset' and placed on a principled footing. The arguments for a tort-based approach to human rights damages are strong. They would be irresistible in the context of a British Bill of Rights, given such approach reflects the home-grown, longstanding and orthodox approach to protecting basic, constitutional rights in British law. In this respect it is worth noting that the Conservative policy document explicitly recalls the British tradition of protecting human rights 'over the centuries through our Common Law tradition'.[461] Further, in observing that 'the UK's protection of human rights has always been grounded in real circumstance, rather than simply being a matter of abstract principle'[462] the document

[459] Policy Document (n 456) 4–6; Manifesto (n 457) 60. See also HC Deb vol 598 col 311 (8 July 2015) Prime Minister.
[460] Policy Document, ibid 8.
[461] ibid 2.
[462] ibid.

echoes Dicey's[463] preference for the common law tradition of starting with concrete remedies which respond to specific factual matrices rather than abstract statements of right, which may appear grand but ring hollow.

SECTION 5. OVERVIEW

The mirror approach ought to be repudiated. Ideally, sections 8(3) and (4) of the Act should be repealed. Replacement of the HRA with a British Bill of Rights would provide an opportunity for such repeal, and for human rights damages to be set on a principled course consonant with longstanding domestic traditions. 'Our own jurisprudence and legal culture require a more analytical approach'.[464]

Aspects of the analysis in *Greenfield* and *Faulkner* are patently inconsistent with the plain terms of the Act. The Act does not mandate a mirror approach. Absent such requirement, the normative basis for the mirror approach is unclear. Those arguments that might support adoption of a mirror approach in adjudication of substantive rights have no application to damages, while courts are moving away from the mirror approach even in adjudication of substantive rights.

There is no requirement under the Convention or within ECtHR jurisprudence that domestic courts must follow Strasbourg practice under Article 41. Indeed, the ECtHR emphasises that domestic courts are free to develop remedies in line with domestic traditions as long as the basic requirements of Article 13 are met. Article 13 governs the remedial obligations of Member States, rather than Article 41, which solely governs the ECtHR's own remedial jurisdiction.

On a normative level the ECtHR's remedial approach is fundamentally shaped by the supranational context within which it operates, which makes its approach inappropriate for importation into the very different context of domestic law. The ECtHR is a supranational, supervisory and subsidiary court. Remedying individual injustice is not its primary function, whereas domestic courts have primary responsibility for redressing individual violations. There is a strong argument that the normative basis of liability on the supranational plane—breach of obligations owed to other states or free-standing standards—is distinct from that in domestic law—breach of individual, personal rights. Additionally, there is a significant risk that the mirror approach will lead to the UK falling afoul of Article 13.

The mirror approach requires domestic courts to follow a deeply problematic supranational jurisprudence, characterised by unreasoned

[463] AV Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn (MacMillan, 1960) 198–99.
[464] *KB* (n 5) [25].

decision-making, lack of coherence, consistency and principle, and a discretionary approach which encourages decision-making freed from the rigours of ordinary legal reasoning and based in highly subjective concerns. Unsurprisingly little meaningful guidance can be derived from such jurisprudence, while the result of following such jurisprudence has been that the domestic law of damages is coming to mirror many of the most problematic aspects of the supranational jurisprudence. Where domestic courts have elaborated more detailed guidance, it has not been sourced in Strasbourg material, but resembles common law rules, principles and modes of reasoning. In turn this casts doubt on the credibility of the mirror approach, and demonstrates the artificiality of seeking to insulate human rights damages from the ordinary law of damages.

The general methodology of the mirror approach is unsafe, courts have employed different methods without explanation, interpretation of the Strasbourg material is open to manipulation and arguably has been manipulated by domestic courts according to unstated normative concerns, while the mirror method imposes significant costs which are not counterbalanced by discernible benefits.

Assuming sections 8(3) and (4) remain in place the preferable approach is the 'ordinary approach' which the Supreme Court has recently endorsed in adjudication of substantive rights, and which was favoured by the Law Commissions in their report on human rights damages: domestic courts ought to apply those English damages principles and scales of awards applied in tort, while seeking to ensure broad consistency with general principles applied by the Strasbourg Court. This should not be difficult as far as compensatory damages go, given the principle of *restitutio in integrum* is common to the English law of damages and Strasbourg jurisprudence. Under the tort-based approach the exact manner in which the principle is applied domestically may vary from the way in which it is applied at Strasbourg. But, as we have seen, there are good reasons why the domestic approach to damages should be different from that applied by a supranational institution, and such variation is entirely consistent with the Act and has been endorsed by the ECtHR.

English courts should also feel free to depart from Strasbourg principles where they consider such a course justified. For example, while the ECtHR does not award exemplary or aggravated damages, consistent with the traditions of the English legal system a domestic court may consider that such award is warranted for a very serious rights-violation. As Starmer argues, the Strasbourg Court's reluctance to award exemplary damages 'is in keeping with its role as an international supervisory body'—'[d]omestic courts have a different role'.[465] In respect of aggravated damages the ECtHR, within its Article 13 jurisprudence, 'accepts that, applying the compensatory

[465] Starmer (n 184) [2.46]–[2.47].

principle, national courts might make an award taking into account the motives and conduct of the defendant'.[466]

Overall, it is difficult to see why English courts have adopted the mirror approach as opposed to a tort-based approach given neither section 8 of the HRA nor the Convention require English courts to follow Strasbourg practice, or bar an approach informed by domestic law. In turn one wonders whether unstated concerns underlie the mirror approach. One possible explanation is judicial anxiety over imposing liability on public bodies. Indeed this concern is conspicuous by the lack of any express reference to it in decisions such as *Greenfield* and *Faulkner*; *Anufrijeva* is a notable exception. Tying the approach under the HRA to Strasbourg practice has the effect of limiting the financial impact of human rights liability on government coffers, as awards will be uncommon and modest. As we have seen, even on the odd occasion where courts have opened up the availability of awards, they have continued to emphasise strongly that awards should be kept at Strasbourg levels, which are low—often exceptionally low—relative to domestic scales. If this is the unspoken reason for adoption of the mirror approach, it is a bad one. It is for the Chancellor to worry about the government books, not courts.

[466] *Shilbergs* (n 182) [78].