

Court of Appeal upholds right to damages for imminent breaches of article 3 ECHR

By [Ben Amunwa](#)

3PB Barristers

1. In a judgment with potentially wide implications for damages claims for breaches of fundamental human rights, the Court of Appeal in *ASY & Others v Home Office* [\[2024\] EWCA Civ 373](#) has held that there is a right to damages for imminent breaches of article 3 of the ECHR (the absolute prohibition on torture and inhuman or degrading treatment).
2. The Court overturned the judgment of May J in the High Court (*Home Office v ASY & Others* [\[2023\] EWHC 196 \(KB\)](#)) and significantly broadened the test for determining whether article 3 rights have been breached by an administrative system that fails to prevent extreme destitution.

Background

3. The claimants are four migrant single mothers with at least one British child. The defendant had granted each of the mothers limited leave to remain ('LLTR') in the UK based on their right to family life but subjected their LLTR to the condition that they have no recourse to public funds ('NRPF'). The effect of this decision was that the mothers were prohibited from most mainstream welfare benefits.
4. Under the defendant's then policy, the NRPF condition could only be lifted where a person was 'destitute' or in compelling child welfare cases based on limited income. Each claimant fell on hard times and applied to the Home Office to lift the NRPF condition from their LLTR so that they could access Universal Credit. The defendant lifted the condition but took between 40 to 62 days to determine the applications. While waiting for their applications to be determined, the mothers (one of whom was heavily pregnant while facing eviction) were unable to meet their family's essential living needs.
5. On 21 May 2020, the Divisional Court in *R (W, A Child By His Litigation Friend J) v SSHD & Anor* [\[2020\] 1 W.L.R. 4420](#) ('*R (W)*') declared the NRPF scheme, as it was, unlawful for

failing to make clear to caseworkers that they were under a mandatory duty to lift, or not impose, the NRPF condition where there was an imminent prospect of a person suffering treatment contrary to article 3.

6. In December 2020, the claimants and their children brought civil damages claims under the Human Rights Act 1998, relying on the declaration of unlawfulness in *R (W)* and arguing that their article 3 rights had been breached by reason of being subjected to the unlawful NRPF policy and/or due to the defendant's failure to lift the NRPF condition from their LLTR promptly.
7. A key component of the Home Office's defence to the claim was that the claimants had no right to damages unless they could demonstrate that they had experienced inhuman or degrading treatment. A trial was listed to determine the point as a preliminary issue. The claimants won at first instance in the County Court before HHJ Ralton in January 2022. The defendant was granted permission to appeal by Foxton J and their High Court appeal was upheld by May J in February 2023. The claimants were then granted permission to appeal by Whipple LJ (having satisfied the stringent second appeals test in CPR r.52.7). The appeal came before Bean, Patten and Fraser LJJ in February 2024.

The Court of Appeal's judgment

8. The unanimous judgment delivered by Fraser LJ found that the High Court was wrong to conclude that the claimants' only right under article 3 ECHR was to have their applications to lift the NRPF condition determined correctly within a '*reasonable time*'.
9. The duty on the defendant, where a person faces the imminent (ie. immediate) prospect of being subjected to inhuman or degrading treatment must be proportionate but must take account of the urgency of the situation (§§91-92, applying *R (Limbuella) v SSHD* [\[2006\] 1 AC 396](#)).
10. The Court's answer to the preliminary issue was that the claimants may recover damages under the HRA 1998 if they were (i) at immediate risk of inhuman or degrading treatment; and (ii) suffered severe distress while the Home Office processed their applications to lift the NRPF condition. Processing times of 2 to 4 months were not acceptable in the context of an immediate risk of extreme destitution (§§97, 104 & 105).
11. The Court categorised this duty as within the '*low-level systems*' obligation implied under article 3. This is a positive, anticipatory duty that requires states to put in place a regulatory

and administrative framework to avoid the risk of treatment contrary to article 3 in a wide variety of situations (§§86-88).

12. The Court made several emphatic observations on the universality of the minimum standards of protection contained in human rights legislation and rejected the argument that the duty owed to the claimants should be less protective than duties owed to other categories of persons such as destitute asylum seekers who are not permitted to work (see §§20, 90 & 92).
13. The judgment approved the County Court's (modest) approach to the award of non-pecuniary damages and found that the measure of pecuniary damages that the claimants proposed was '*entirely justifiable*' and in keeping with the approach taken in *R (DMA & Others) v SSHD* [\[2021\] 1 W.L.R. 2374](#) (§100).

Comment

14. After over 3 years of litigation and two appeals, the claimants have obtained an authoritative judgment on a preliminary issue concerning a novel aspect of human rights law. The outcome may well have wider ramifications for damages claims in cases that concern fundamental human rights, promoting a significantly more liberal approach to liability and the award of (modest) damages in certain circumstances.
15. The Court's broadening of the scope of the article 3 systems duty is likely to reinforce the effectiveness of rights protection in the context of destitution and, potentially, well beyond it.
16. 3PB's Ben Amunwa was instructed for the claimants by Deighton Pierce Glynn. Ben was led by Alex Goodman KC of Landmark Chambers. The claimants' case was supported by evidence from Caroline Hattam at The Unity Project.
17. Colin Thomann KC and Tom Tabori of 39 Essex were instructed by the GLD for the defendant.

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Ben Amunwa

Barrister

3PB Barristers

020 7583 8055

ben.amunwa@3pb.co.uk

3pb.co.uk