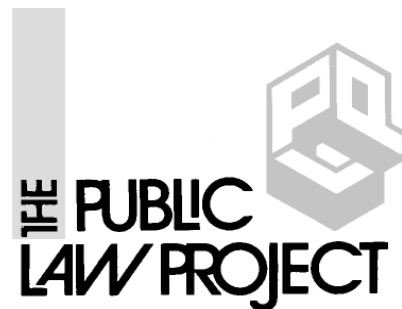


Between a rock and a hard place
– ADR after Anufrijeva

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One of the big decisions in human rights and public law towards the end of last year was *R (on the application of Anufrijeva) v London Borough of Southwark* [2003] EWCA Civ 1406. This was the Court of Appeal's decision on three cases involving claims for damages under the Human Rights Act arising largely from the failure of public bodies to do their jobs properly. The first case concerned housing and community care issues, the second (N) was an asylum-seeker whose badly handled application led to him suffering from depression and the third was a refugee (M) whose attempts to be reunited with his family were frustrated by delay and poor service on the part of the Home Office.

The main focus of the decision was on the entitlement to HRA damages. However, the judgment also included Cowl¹-type guidance concerning ADR including a number of very specific points to consider in terms of ADR before embarking on a claim for damages under the HRA. These should also be considered in terms of applying for public funding; see the December 2003 edition of *Focus*, page 4.

However, these points come with a proviso, as they only apply to a claim for damages for breaches arising from maladministration. This is why it is worth being familiar with the facts of the three cases in question as they were presumably all considered to be examples of maladministration, and thus the guidance in the judgment on ADR is confined to such claims. Clearly the Anufrijeva family's situation was different to that of N or M. The latter two cases revolved around bureaucratic errors and delay, whereas the former was a dispute (as in *Bernard*²) as to whether accommodation was suitable or not. Whilst the cases of N and M are clearly maladministration in the traditional sense of the concept (see the Crossman catalogue³), a failure to provide suitable accommodation is not so easy to fit into this category, unless the Court of Appeal was saying that the specific cause of complaint was the delay in assessing the family and providing suitable alternatives.

It is therefore worth considering whether a case can be characterised as one of maladministration.

¹ *Frank Cowl v Plymouth City Council* [2001] EWCA Civ 1935

² *Bernard v London Borough of Enfield* [2002] EWHC 2282 Admin; £10,000 awarded.

³ The list of examples of maladministration given to Parliament during the passage of the first bill to create an Ombudsman, including delay, bias, neglect etc.

Turning to the substantive points about ADR at paragraph 81 of the judgment, the most significant are those at subparagraphs (iii) and (iv) which read as follows:

- “(iii) Before giving permission to apply for judicial review the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance.
- (iv) If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction.”

Thus, it may now be wise to include very specifically in the claim form or grounds an explanation as to why it is not more appropriate to use a complaints procedure or Ombudsman - or that this has been tried already and failed - to satisfy (iii). Similarly, any arguments as to why permission on the damages part of the claim should be granted at the same time as permission for other relief should be included to meet the requirements of (iv) as appropriate.

The Court of Appeal were clearly seeking a pragmatic solution to what they perceived to be a problem (scant judicial resources, disproportionate legal costs and so on). The quantum of damages in such cases should be assessed by reference to Ombudsman cases, so why not go the whole hog and have the entire damages claim decided by him? However, it is questionable whether this approach can fully vindicate an individual's rights. There is no duty upon an Ombudsman to investigate any case referred to him, he has no jurisdiction to investigate questions of law such as whether there has been a breach of a Convention article, (he is confined to investigating maladministration) and his recommendations are not enforceable. There is also very limited CLS funding available to advise clients on Ombudsman complaints or other ADR options.

Claimants may therefore find themselves caught between a rock and a hard place – the Ombudsman says he can't deal with human rights violations, but the Court says if it's a breach caused by maladministration, you should go to the Ombudsman first. Take your pick as to which is the rock and which is the hard place in this scenario.

PLP understands that leave to appeal to the House of Lords is being sought in one of the cases.