

# UK Damages Cap Threatens Rights of Sanctions Targets

By **Charles Enderby Smith** (December 8, 2022)

There has been no shortage lately of legislative tinkering with the framework governing the U.K.'s sanctions regime. With sanctions becoming an increasingly important and prolific foreign policy tool, these alterations are growing in consequence.

It must be said at the outset that the Foreign, Commonwealth and Development Office and HM Treasury, in the form of the Office of Financial Sanctions Implementation, are doing outstanding work in keeping pace with the multitude of demands for new listing arising from the invasion of Ukraine as well as other factors.

That said, the latest legislative developments involve a dramatic curtailing of the compensation a person who has been wrongly designated under sanctions can recover from the U.K. government. The consequences for the rights of individuals targeted by sanctions are startling and significant.



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## Damages for Wrongful Designation

The U.K.'s post-Brexit sanctions regime was introduced into law through the implementation of the Sanctions and Anti-Money Laundering Act 2018. This legislation set out the mechanisms through which the government could impose sanctions, in line with its foreign policy objectives, and also the restraints, checks and balances that would be imposed on this power.

When first enacted, SAMLA allowed for the award of damages, following successful challenges to sanctions designations in circumstances where the government was found to have acted either negligently, in line with the common law tort of negligence, or in bad faith. The former is a notably lower bar than the latter, which requires a decision to be deliberately wrong.

The Economic Crime (Transparency and Enforcement) Act 2022 amended the relevant provisions of SAMLA, however, in two substantial ways.

First, the negligence criterion for entitlement to damages was removed, which means that the court can now award damages in relation to sanctions cases only if it determines that the government acted in bad faith.

Secondly, the Economic Crime (Transparency and Enforcement) Act 2022 paved the way for a cap on the amount of damages that could be awarded to a claimant who had been wrongly designated, reserving the fixing of the exact amount for later regulations.

These later regulations have now arrived in the form of the Sanctions (Damages Cap) Regulations 2022, which were approved by each house of Parliament in October. These regulations specify the maximum cap on damages at £10,000 (\$12,200).

## Administrative Accountability and Respect for Individual Rights

The direction of travel here is quite clear — toward an easing of administrative

accountability in the exercise of the government's sanctions powers. There are four main issues with this approach.

First, it is perhaps reasonable for the government to endeavor to limit its exposure to large damages claims for sanctions-related cases, in particular given the importance of sanctions in giving effect to the government's foreign policy with respect to Russia's actions in Ukraine.

Nonetheless, it will likely be uncontroversial to point out the dramatic mismatch between the capped recoverable amount and the level of unjustified damage that can be inflicted by sanctions on those who are wrongly designated.

Damage is, after all, one of the main intentions behind designation, with targeted natural and legal persons sustaining freezes of their international business operations, exclusion from the international financial system and untold reputational fallout. There is then the indirect harm caused to the sometimes hundreds or even thousands of other individuals working within the affected organizations.

Against this backdrop, a ceiling of £10,000 presents a remarkably low limit to compensation.

Second, the damages cap is set at such a low level that it will rarely be proportionate to instruct lawyers to pursue a claim in the first place.

While there is an element of vindication and reputational rehabilitation available from a successful claim in damages, which is of course not without value, the financial realities of pursuing such action mean that only the most wealthy would ever be able to reasonably consider bringing such a claim.

Third, if a claimant is able to overcome these first two issues, as mentioned above, it will be incumbent upon them to establish that the government acted in bad faith in making the designation. Compensation will not be available at all otherwise. This is a high hurdle and notoriously hard to establish.

It essentially requires a claimant to prove that the government deliberately acted unlawfully in making its designation decision. For a claimant to surmount this hurdle only to have compensation so drastically restricted is clearly problematic and unfair.

Fourth, adequate redress for wronged persons aside, there is also concern that the restrictions implemented over the last year will leave the government free rein to act unchecked in relation to its sanctions powers.

The threat of accountability has been whittled down so small that there arguably remains little incentive for the government to invest properly in ensuring the life-changing decisions it is making are made with due care and skill.

The removal of the negligence trigger for a damages claim gave the government license to lower the level of care it applies in making designation decisions. The significant restriction on recoverable damages moves the dial even further.

All of this has potential adverse consequences for the rights of those targeted by sanctions, including most obviously those relating to access to justice.

When introducing the Sanctions (Damages Cap) Regulations to the House of Lords, Zac Goldsmith, the minister of state for overseas territories, commonwealth, energy, climate and environment, said that it would:

minimise the risks to His Majesty's Government of spurious or vexatious litigation from deep-pocketed oligarchs, as we continue to ratchet up the pressure on [Russian President Vladimir] Putin. It is right and proper that the Government protect public funds in this way.

He added that:

the cap will send a strong signal that Putin's oligarchs and kleptocrats cannot draw on the public purse in this country to boost their coffers, that this Government will not be distracted from the task in hand by endless litigation and that we will not be knocked off course by the risk of damages claims.

However, what Goldsmith does not refer to is the potential collateral damage caused to designated persons who are not Putin's oligarchs and kleptocrats, in particular those designated pursuant to one of the many non-Russia-related U.K. sanctions regimes to which the sanctions damages cap also applies.

Moreover, to successfully claim damages, a claimant must by definition have established that their designation was not only wrong but that the government acted in bad faith when imposing it. One would have thought this ought to be a stringent enough barrier to ensure adequate controls are placed on spurious or vexatious litigation.

There is some effort in the Sanctions (Damages Cap) Regulations to address these issues. Section 2(2) gives the court a limited power to not apply the damages cap when it would otherwise amount to a breach of the person's human rights under the European Convention on Human Rights, as codified in the Human Rights Act 1998.

There are problems with this, though, not least the burden placed upon the claimant to establish a breach, the litigation risk inherent in attempting to do so and the fact that many designated persons will be corporations or entities and therefore may have a more limited level of Human Rights Act protections.

## **Looking Forward**

It is clear that the government is attempting to lessen the legal burden imposed upon it when implementing and imposing sanctions. This is unsurprising, given the strains the Foreign, Commonwealth and Development Office is currently under dealing with the rafts of new sanctions rolled out over the course of this last year. Indeed, the attempts are understandable given the challenges currently faced by foreign policymakers.

However, it is imperative that the right balance is struck between the government's foreign policy objectives and the rights of those targeted by sanctions. The damages cap is yet another shift away from the latter, in particular given its broad brush and rather blunt application across all SAMLAs sanctions regimes.

This lack of proper balance raises real questions as to whether the government's enthusiastic pursuit of its sanctions program risks straying too far from the rule of law.

While few would argue that the foreign policy objectives being pursued are not

commendable, it is important that in this pursuit the government does not lose sight of the critical importance of the protection of the rights of those caught in the crossfire.

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