Neutral Citation Number: [2024] EWCA Civ 965

Case No: CA-2023-000314

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Freedman
[2023] EWHC 117 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/08/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE LEWISON
and
LORD JUSTICE DINGEMANS

- -

Between :

MTA **(a protected party, by his litigation friend, the Official Solicitor)**	**Claimant/ Respondent**
- and -	
THE LORD CHANCELLOR	**Defendant/ Appellant**

- -
- -

Joanne Clement KC and **Riccardo Calzavara** (instructed by **the Treasury Solicitor**) for the **Appellant**
Martin Westgate KC and **Daniel Clarke** (instructed by **TV Edwards LLP**) for the **Respondent**

Hearing date: 23 April 2024
Written submissions: 9 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. The Claimant in these proceedings, who is the Respondent to this appeal, is a young man who suffers from severe mental ill-health, including episodes of acute psychosis. On 17 February 2020 he was made the subject of a County Court injunction, coupled with a power of arrest, under section 1 of the Anti-Social Behaviour, Crime and Policing Act 2014: I will refer to that as "the injunction". On 18 May 2020 he was arrested by officers of the Metropolitan Police for a suspected breach of the injunction, detained overnight and brought to Court the following day. He was remanded in custody for three weeks pending a decision on whether in view of his mental ill-health he had capacity in relation to the breach proceedings and, subject to that, whether he should be committed. On the return date he was found not to have the requisite capacity and was released. On two subsequent occasions, on 10 and 29 June 2020, he was again arrested and detained overnight, but he was discharged when brought to Court the following day. In due course the injunction was set aside, again on the basis that the Claimant lacked capacity. That is only a summary of a complicated procedural history: I give more details below.

2. In these proceedings, which were issued on 16 February 2021, the Claimant, acting by the Official Solicitor as his litigation friend, seeks (among other things) damages under sections 7 and 8 of the Human Rights Act 1998 against the Metropolitan Police Commissioner and the Lord Chancellor. In broad terms, it is his case that the episodes of loss of liberty referred to above constituted detention in breach of article 5.1 of the European Convention on Human Rights and were accordingly unlawful by virtue of section 6 of the 1998 Act. Specifically:

   - In the case of the Commissioner, the unlawfulness is said to consist in the fact that the injunction on the basis of which the officers detained the Claimant had no legal effect because of his lack of capacity.

   - As regards the Lord Chancellor, by section 9 of the 1998 Act a claim for damages may be brought in respect of a judicial act which results in unlawful detention, and the Lord Chancellor is the proper defendant in respect of such claims: I give more details below. The judicial acts complained of in this case are both the making of the original injunction, on the basis that that led to his arrest and detention on each of the three occasions, and the order of 19 May 2020 remanding him in custody: I will refer to those as "the impugned orders". Both orders are said to have had no legal effect because of the Claimant's lack of capacity.

   The Claimant also alleges that the making of the order was itself a breach of article 6 of the Convention, but in terms of damages that adds nothing because the injury consists in his consequent detention.

3. By an application dated 1 June 2022 the Lord Chancellor applied to strike out the claim against him[1] on the basis that it was an abuse of the process of the court for the Claimant to bring proceedings in respect of the impugned orders unless and until they had been overturned on appeal. His primary case is that there is a "blanket rule" to

[1] For convenience I will refer to the Lord Chancellor by the gender of the incumbent at the time that the proceedings were brought and the appeal heard.

that effect; but he also submits that even in the absence of such a rule it was an abuse in the circumstances of the present case to bring proceedings without having appealed against the impugned orders. The Commissioner was not a party to the application.

4. By an order dated 25 January 2023 Freedman J dismissed the Lord Chancellor's application. This is an appeal against that decision, brought with the permission of Coulson LJ. The Lord Chancellor is represented by Ms Joanne Clement KC, leading Mr Riccardo Calzavara, and the Claimant by Mr Martin Westgate KC, leading Mr Daniel Clarke. The representation was the same before Freedman J.

5. I will start by setting out the background law and summarising what was decided by this Court in the case of *Mazhar v Lord Chancellor*, which is an important backdrop to the issues. I will then proceed directly to address the Lord Chancellor's case that the current proceedings are an abuse of process, without reference to Freedman J's reasoning. In taking this course I mean no disrespect to his careful judgment; but the issue is one of law, and it is more straightforward to approach it directly rather than through the prism of how the case was argued and decided below.

THE BACKGROUND LAW

6. There is no dispute as to the effect of the various statutory provisions which are in play (with the possible exception of section 9 of the 1998 Act); and they can be fairly shortly summarised.

Anti-Social Behaviour Injunctions

7. The County Court is empowered to grant interim and final injunctions if it is satisfied that the respondent has engaged or threatened to engage in anti-social behaviour and it considers it just and convenient to do so for the purpose of preventing the respondent from engaging in anti-social behaviour: section 1 (1)-(3) of the 2014 Act. A court granting an injunction may attach a power of arrest if it thinks that the behaviour in question consists of or includes the use or threat of violence against others or there is a significant risk of harm to others from the respondent: sections 4 (1) and 20 (1). Where a power of arrest is attached, a constable may arrest the respondent without warrant if they have reasonable cause to suspect that the respondent is in breach of the provision: section 9 (1). The respondent must be produced at court within 24 hours of being arrested, whereupon the judge may remand them if the matter is not immediately disposed of: section 9 (3) and (5). There is further provision about remands in Schedule 1 to the Act (which is given effect by section 11). The judge may remand the respondent in custody or on bail: see paragraph 2 (1) of Schedule 1. A remand in custody may be for up to three weeks if the Court has reason to believe that a medical report may be needed: paragraph 5.

8. Section VIII of Part 65 of the Civil Procedure Rules ("the CPR") contains rules about anti-social behaviour injunctions. Rule 65.47 provides that where a person is brought before a judge following their arrest pursuant to a power of arrest attached to such an injunction the judge can either deal with the matter at the time or adjourn it.

Capacity in court proceedings

9. Nothing turns in this case on the details of the provisions of the Mental Capacity Act 2005. I need only note that by section 1 (1) a person must be assumed to have capacity unless it is established that they lack it.

10. Part 21 of the CPR contains special provisions which apply in proceedings involving parties who lack capacity to conduct the proceedings ("protected parties"). Rule 21.2 (1) requires that a protected party must have a litigation friend to conduct proceedings on their behalf. Rule 21.3 (4) reads (so far as relevant):

> "Any step taken before a … protected party has a litigation friend has no effect unless the court orders otherwise."

11. There was some discussion before us about whether the words "has no effect" mean that a court order made before the protected party has a litigation friend is invalidated retrospectively; and following the hearing counsel prepared a helpful joint note. I have no doubt that that is indeed what those words mean. That is the necessary basis of the decision of the Supreme Court in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933, and there have also been a number of first instance decisions in which the Court has proceeded on the same basis[2]. (That conclusion does not, however, mean that such an order may not be treated as effective for some purposes: see para. 64 below.)

The Human Rights Act

12. Section 6 (1) of the 1998 Act provides that it is unlawful for a public body to act incompatibly with a Convention right. Section 6 (3) provides that a public body includes a court or tribunal, and section 6 (1) is accordingly capable of applying to judicial acts.

13. The Convention rights are set out in Schedule 1. I need only set out the relevant parts of article 5:

> "*Right to liberty and security*
>
> 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) …;

[2] Out of deference to counsel's diligence I will list them: *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) (Norris J); *James v Chircop* [2014] EWHC 4670 (QB) (Hickinbottom J); *Blake-Coulter v Anne Alexander Hotels* [2016] EWHC 1457 (QB) (Soole J); *Jhuti v Jhuti* [2020] EWHC 2824 (Ch) (Falk J); *Secretary of State for Transport v Persons Unknown* [2021] EWHC 821(Ch) (Mann J); and *St George's University Hospitals NHS Foundation Trust v Casey* [2023] EWHC 2244 (Fam) (MacDonald J). The question was not the subject of argument in any of them, but I find that unsurprising since I cannot see how the rule could have any other meaning.

> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence …;
>
> (d)-(f)…
>
> 2-4 ….
>
> 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

14. Section 7 (1) (a) provides that a person who claims that a public authority has acted in a way made unlawful by section 6 (1) may bring proceedings against the authority in the appropriate court or tribunal, as defined by rules.

15. Section 8 provides that in relation to any act which the court finds to be unlawful it may grant such relief or remedy as it considers just and appropriate, including damages.

16. Section 9 is concerned with judicial acts. So far as relevant, it provides as follows:

> "(1) Proceedings under section 7 (1) (a) in respect of a judicial act may be brought only –
>
> (a) by exercising a right of appeal;
>
> (b) on an application … for judicial review; or
>
> (c) in such other forum as may be prescribed by rules.
>
> (2) …
>
> (3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than
>
> (a) to compensate a person to the extent required by Article 5 (5) of the Convention,
>
> (b) to compensate a person for a judicial act that is incompatible with Article 6 of the Convention in circumstances where the person is detained and, but for the incompatibility, the person would not have been detained or would not have been detained for so long.

> (4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.
>
> (5) In this section—
>
> 'appropriate person' means the Minister responsible for the court concerned, or a person or government department nominated by him
>
> … ."

The "appropriate person" in the present case is the Lord Chancellor. (See also CPR rule 19.5 (4) (c)). I will for convenience refer to a claim brought in accordance with section 9 (1) (c) as "free-standing proceedings".

17. Although claims for damages in respect of a judicial act are sometimes referred to as being made "under" section 9 (3), and I will sometimes do so myself in the interests of brevity, that is not strictly accurate. The entitlement to damages arises, as for any other act rendered unlawful by section 6, under section 8. What section 9 (3) does is limit, in the case of a judicial act, the basis on which such an award may be made.

18. CPR rule 7.11 provides both for the forum in which claims under section 7 of the 1998 Act generally may be brought and for the particular case of claims in respect of a judicial act. It reads:

> "(1) A claim under section 7 (1) (a) of the Human Rights Act 1998 in respect of a judicial act may be brought only in the High Court.
>
> (2) Any other claim under section 7 (1) (a) of that Act may be brought in any court."

19. Not every error or irregularity in a court order authorising detention gives rise to a breach of article 5 of the Convention. The relevant principles are authoritatively summarised in para. 88 of the judgment of Jackson LJ in *LL v Lord Chancellor* [2017] EWCA Civ 237, [2017] 4 WLR 162. So far as relevant for our purposes (and omitting his references to the case-law), he said:

> "(1) A period of detention is lawful if, and only if it complies with the applicable sub-paragraph of Article 5 (1).
>
> (2) …
>
> (3) Detention under Article 5 (1) (a) or (b) will not be lawful if:
>
> (i) The court acted without jurisdiction; or
>
> (ii) There was a gross and obvious irregularity in the court's procedure; or

(iii) The court made an order that had no proper foundation in law, because of a failure to observe a statutory condition precedent; or

(iv) X's detention was arbitrary. In other words the stated grounds for that detention did not comply with the general principle of legal certainty; or

(v) There were one or more breaches of Article 6 during the proceedings which were so serious as to amount to a flagrant denial of justice.

(4) In considering whether the court's errors amounted to 'gross and obvious irregularity' or 'flagrant denial of justice', where appropriate their cumulative effect can be considered."

Mr Westgate told us that the Claimant's case is that his lack of capacity meant that his detention was in breach of article 5 by reference to elements (ii)-(v) under para. (3) of that summary.

THE FACTS

20. The facts which give rise to the claim are set out fully at paras. 2-18 of the judgment of Freedman J, and I need only give an abbreviated summary here.

21. At the material times the Claimant lived in East London with his mother and his siblings in a flat of which his mother was the tenant. The landlord was the Gateway Housing Association ("Gateway").

22. Following repeated complaints of anti-social behaviour by the Claimant and his brother, on 8 January 2020 Gateway applied to the Clerkenwell and Shoreditch County Court for an injunction against them under section 1 of the 2014 Act.

23. The first hearing of Gateway's application was on 17 February 2020 before DJ Manners. The Claimant did not attend because he was in custody on an unrelated matter, from which he was not released until 24 March. However, his mother and sister were present, and they informed the Judge that the Claimant suffered from learning disabilities. The Judge made an interim injunction in the terms sought by Gateway, which imposed various prohibitions on the Claimant: I need not give the details, save that they included a prohibition on entering a particular area defined in the order. A power of arrest was attached. The term of the order was expressed to be for two years, i.e. to 17 February 2022; but the Judge directed a return date on 3 March 2020 at which an application could be made for it to be varied or discharged. She advised the Claimant's sister to seek legal advice for him and to obtain evidence of his mental health difficulties: permission was granted for a capacity assessment to be filed. This is the injunction of which the Claimant is said to have been in breach on the occasions which led to his arrest and detention.

24. The return date of 3 March 2020 was further adjourned to 19 May. On 27 April the Claimant's solicitors obtained a report from Dr Roy Shuttleworth, a clinical psychologist. This concluded that he had capacity, but they believed that the report

was flawed; and on the 19 May return date they asked for further time to obtain another report. DJ Hayes adjourned the hearing to 29 May.

25. In the meantime, on 18 May 2020 the Claimant was arrested for suspected breach of the injunction. He was detained overnight and brought before HHJ Hellman the following day (i.e. 19 May). Gateway apparently made an application for his committal for contempt[3]. His counsel sought permission to obtain expert evidence as to his capacity in relation to the committal proceedings. The Judge made such an order and remanded the Claimant in custody with a return date of 9 June at which the issue of capacity would be considered. He made it clear that he regarded the issue of whether the injunction should be discharged (which was in fact before DJ Hayes on the same day – see above) as distinct.

26. In the event no hearing was listed before DJ Hayes on 29 May 2020, perhaps because it was recognised that it was not sensible to consider the potential discharge of the injunction in advance of the return date in the committal proceedings. He did, however, make an order by consent amending the injunction in order to redefine the exclusion zone.

27. At the return date of the committal application on 9 June 2020 Judge Hellman considered both the report by Dr Shuttleworth and a report dated 4 June from a different clinical psychologist, Dr Emma Citron. Dr Citron's opinion was, as summarised by the Judge, that the Claimant suffered from "a severe global learning disability present since birth" as a result of which he was "incapable of conducting [*sic*], or instructing his solicitor in these proceedings". He also noted that in her opinion the Claimant "cannot understand what it is he is meant to do as the court ordered" (i.e. could not understand the effect of the injunction); but he observed, as he had at the earlier hearing, that the question of whether the injunction itself should be discharged was not before him on that occasion. He said that he accepted the gist of Dr Citron's findings and that he was accordingly satisfied that the Claimant "lacks capacity … to instruct his solicitors or otherwise make meaningful decisions about the present committal proceedings". He made a declaration accordingly (para. 1 of his order) and dismissed "the proceedings under CPR Part 65" (para. 2) and directed the Claimant's immediate release (para. 3). It is clear that the reference to "CPR Part 65" was to the committal proceedings. He also gave the Claimant permission, if so advised, "to make any application to discharge [the injunction] on the grounds that he lacks the capacity to understand and comply with its terms" (para. 5). In my view it is necessarily implicit in Judge Hellman's findings that the Claimant did not have capacity at the time of his remand in custody and accordingly that that order was wrongly made at the time and had, in the language of CPR rule 21.3 (4), "no effect".

28. The following day, i.e. 10 June 2020, the Claimant was again arrested for suspected breach of the injunction. He was detained overnight and brought before DJ Swan on 11 June. In the light of Judge Hellman's decision, he ordered the Claimant's immediate release and dismissed the "proceedings following from this arrest".

[3] I say "apparently" because we do not have any such application with the papers, but it is clear from the transcript of the hearing that Gateway was understood to have made one. The parties also appear to have proceeded on the basis that the power to commit for contempt in this case arose from Part 65 of the Civil Procedure Rules rather than Part 81, which contains the general rules governing committal for contempt.

29. On 23 June 2020 the Claimant applied, in accordance with para. 5 of Judge Hellman's order, for an order that the injunction "be set aside under 21.3 (4) and/or because [the Claimant] lacks injunction capacity".

30. On 29 June 2020 the Claimant was again arrested for suspected breach of the ASB injunction and detained overnight. On 30 June he was, again, brought before DJ Swan who again ordered his release. However, on this occasion DJ Swan thought it right to grasp the nettle of Dr Citron's opinion that the Claimant had lacked capacity in relation to the original injunction application. He accordingly ordered that:

> "The order of 17 February 2020 and the powers of arrest attached thereto are of no effect and are set aside pursuant to CPR 21.3 (4) insofar as they relate to [the Claimant]."

31. Although DJ Swan had set aside the injunction, Gateway's proceedings under the 2014 Act remained extant. At a hearing on 11 December 2020 these were dismissed by DJ Beecham. She made it clear in her judgment that she too accepted the evidence of Dr Citron.

32. In the light of the Lord Chancellor's case before us it is important to record that none of the orders referred to above was the subject of an appeal.

<u>Overview</u>

33. The focus in this case must be on the impugned orders, being the two orders which resulted, either directly or indirectly, in the Claimant's detention – namely, the original injunction (with power of arrest) granted by DJ Manners on 17 February 2020, and the order of Judge Hellman on 19 May 2020 remanding the Claimant in custody. The upshot of the history set out above is that both those orders have since been found to have been of no effect because of the Claimant's lack of capacity. That is the necessary implication of Judge Hellman's decision of 9 June 2020 to dismiss the committal proceedings, and it is the explicit basis of DJ Swan's decision of 30 June 2020 to set aside the order of 17 February 2020. Both decisions were made by the judges in question in the exercise of a relevant jurisdiction. In Judge Hellman's case it was part of his decision on the committal application, and in DJ Swan's case the question whether the injunction should be continued or discharged was before him on an (adjourned) return date.

<u>*MAZHAR*</u>

34. The decision of this Court in *Mazhar v Lord Chancellor* [2019] EWCA Civ 1558, [2021] Fam 103, was central to Ms Clement's submissions, and it will be convenient to set out what it decided, and why, before addressing the Lord Chancellor's case. I address one or two of Ms Clement's arguments in the course of doing so.

35. The claimant in *Mazhar* was a young man suffering from severe physical disabilities for which he required 24-hour care at home. At all times he had full mental capacity. As a result of a break-down in his care arrangements the responsible NHS Trust believed that he needed to be admitted to hospital. He did not consent to be admitted. The Trust obtained an out-of-hours injunction, on a Friday evening, from Mostyn J authorising the police and medical professionals to enter his home and remove him to

hospital and detain him there for the appropriate care. The order could be, and was, implemented forthwith, but Mostyn J set a return date of the following Monday or as soon as possible thereafter.

36. The claimant brought proceedings in the High Court against the Trust and the Lord Chancellor under the 1998 Act for a declaration that they had breached his rights under articles 5, 6 and 8 of the Convention and for damages against both: in the case of the Lord Chancellor the claim was (because of section 9 (3) of the Act) only for breach of article 5. In due course he compromised his claim against the Trust by accepting an offer of damages in the sum of £10,000; but he sought to proceed with his claim against the Lord Chancellor for a declaration only.

37. Ryder LJ (sitting as a High Court Judge) dismissed the claim ([2017] EWHC 2356 (Fam), [2018] Fam 257). I need not summarise his reasoning, though I will have to mention one aspect of it later.

38. This Court (Sir Terence Etherton MR, Singh and Baker LJJ) dismissed the claimant's appeal, though not for the same reasons as Ryder LJ. The essential basis of its decision was that the terms of section 9 (1) of the 1998 Act did not permit a free-standing claim for a declaration.

39. The full reasoning on the issue of principle raised by the appeal appears at paras. 38-55 of the judgment of the Court. It begins, at paras. 39-42, by summarising the provisions of sections 6-8 of the Act. It then continues:

> "43. If matters had stopped there, the scheme of the HRA would be clear. An act (including a judicial act) made unlawful by section 6 (1) would lead to the right to bring a claim under section 7 (1) (a) and obtain appropriate remedies (by no means confined to an award of damages) in section 8. In essence that is how [counsel for the claimant] invites us to interpret the HRA. But matters do not stop there. The HRA must be read as a whole.
>
> 44. In relation to *judicial* acts, section 9 goes on to make more specific provision. Subsection (1) provides that proceedings under section 7 (1) (a) in respect of a judicial act may be brought only (a) by exercising a right of appeal; (b) on an application for judicial review; or (c) in such other forum as may be prescribed by rules. As we shall see, the original version of the Human Rights Bill did not include para. (c) in subsection (1). If the original version of the Bill had been enacted, it would have been clear that the only two ways in which proceedings could be brought under the HRA in respect of a judicial act would have been by way of an appeal or by way of judicial review."

40. At paras. 46-53 the Court reviews the drafting history of section 9 as referred to in para. 44. Specifically, it notes that the original draft of subsection (1) only provided for two means of challenge, corresponding to the current (a) and (b); alternative (c) – a claim under section 7 (1) – was introduced only because it was appreciated at a late

stage of the passage of the bill that the United Kingdom would be in breach of article 5 (5) of the Convention if it were impossible to pursue a claim for damages where a judicial act had been in breach of the article.

41. On the basis of that review, the Court concluded, at para. 54:

> "In our view, when the final version of section 9 is read in the light of its legislative history, it is clear that the way in which a judicial act is usually to be the subject of proceedings under the HRA is by way of an appeal or (where it is otherwise available) by way of judicial review. The only circumstances in which a claim is permissible under section 9 (1) (c) is where that is necessary to enable a claim to be brought for damages for unlawful detention in breach of Article 5, in accordance with section 9 (3)."

At the risk of spelling out the obvious, the statement in the first sentence that a claim under section 9 will "usually" be brought by way of appeal or judicial review means only that those are the only available routes unless the claimant is claiming damages for breach of article 5. Where the claimant *is* claiming such damages, the usual course will be to bring free-standing proceedings (as the Court says in terms in para. 64, quoted below).

42. In the following paragraphs of its judgment the Court goes on to address some particular arguments addressed to it. I need to refer to two passages.

43. First, at paras. 57-61 the Court addresses an argument by counsel for the claimant that if it were impossible to bring a claim for a declaration by way of free-standing proceedings there would be some judicial acts which could not be challenged under the 1998 Act at all, because no appeal or application for judicial review was available. It rejects that argument, but it goes on to say, at paras. 60-61 (omitting some irrelevant parts):

> "60. In a case like the present, which frequently arises at first instance in all of the Divisions of the High Court, particularly when urgent applications have to be made out of hours, the question of whether a judge had jurisdiction to make an order is a question to be determined on appeal, not on a return date hearing. Leaving aside procedural issues arising specifically under section 9 of the HRA, as a matter of general principle whether a decision of a judge of the High Court can, on the one hand, be set aside by the same judge or a different judge of the same standing or, on the other hand, ought to be appealed to the Court of Appeal, will depend on all the circumstances. In the case of an order made after a without notice application, such as that made by Mostyn J in the present case, if the attack on the order is on the ground of failure to give full and frank disclosure of relevant facts, the same or another judge of the same standing can set it aside. If, however, the attack on the order is, as in the present case …, based entirely on a submission of an error of law, the appropriate course is to

> appeal the order to the Court of Appeal and ask for it to be set aside.
>
> 61. As it happens, that course was not followed in the present case … . The position, therefore, is that, irrespective of any bar which may exist under section 9 of the HRA to a claim for a declaration against the Lord Chancellor by originating process, any such claim ought to have been made by way of an appeal for an order setting aside Mostyn J's order on the ground of an error of law."

44. That passage is, explicitly, concerned not with any rule relating to claims under the 1998 Act but only with what is said to be the proper practice as regards challenges to orders made on a without notice application. Even on that basis it has no direct relevance to the issues before us: Ms Clement (unsurprisingly) did not seek to submit that once the original injunction had been made, or once Judge Hellman had remanded the Claimant in custody, any challenge to those orders on the basis of lack of capacity could not be made on the return date but only by way of appeal. I have quoted it only because it is indirectly relevant to a point which I will have to consider later: see para. 49 below.

45. Having said that, I am bound to say that I have some difficulty with the proposition that any challenge to a decision on a without notice application "based entirely on a submission of an error of law" (as opposed to a challenge based on non-disclosure) can only be made on appeal. That does not accord with my own experience; and in circumstances where the judge will have heard only one side it is hard to see any principled basis why on the return date, which is their first opportunity to be heard, the other party should not be entitled to contend that the original order was wrong in law. However, this difficulty is not material to any submission before us.

46. Second, at paras. 62-67 the Court addresses, and rejects, the Lord Chancellor's submission supporting the decision of Ryder LJ at first instance (see para. 78 of his judgment) that

> "… [T]he forum for [a claim under section 9 (3)] where the judicial act is that of a judge of the High Court cannot be a court of co-ordinate jurisdiction. On the facts of this case, the only court that can consider a damages claim is the Court of Appeal."

I need to reproduce the entire passage (save for two small omissions):

> "62. On the other hand, we also reject the submission of [counsel for the Lord Chancellor] that section 9 (1) is to be treated as imposing a statutory hierarchy, under which section 9 (1) (c) can never apply, even in the case of a section 9 (3) claim for damages against the Lord Chancellor, as it will be possible to proceed by way of appeal or judicial review, and section 9 (1) is to be interpreted against the background of the usual procedural rule favouring an appeal over an application to the same judge or a judge of equal standing to set aside the infringing order. There is nothing in the HRA that warrants

> such an interpretation and the combination of section 9 (1) (c), 9 (3), and the reasons … for those amendments in the course of the passage of the Bill through Parliament show that the submission is plainly wrong.
>
> 63. We accept that it may be an abuse of process to make a claim against the Lord Chancellor under section 9 (3) by way of originating process in respect of an order which, as a matter of proper process, can be and ought to have been appealed.
>
> 64. We disagree with [the] submissions [of counsel for the Lord Chancellor] (and the judgment of [Ryder LJ]) in that we do not think it right to say that a claim for damages under section 9 (1) (c)[4] in respect of an order by the High Court must be brought on an appeal. In our view, it can be (and usually would be) brought by way of an originating process in the High Court itself pursuant to section 9 (1) (c) and CPR rule 7.11 (1).
>
> 65. First, there is nothing in the express language of section 9 to limit a claim brought under subsection (1) (c) to one which is brought in respect of the judicial acts of inferior courts and tribunals. The language is general. It simply refers to the forum which is prescribed by rules made under the HRA. Those rules do not distinguish between the acts of inferior courts and tribunals on the one hand and the High Court on the other. CPR rule 7.11 simply states that any claim in respect of a judicial act can only be brought in the High Court, whereas a claim in respect of the acts of other public authorities may be brought in any court. … .
>
> 66. Secondly, we accept [the claimant's counsel's] submission that to require a person to bring a claim for damages in respect of a judicial act by the High Court only by way of appeal would have surprising and undesirable consequences. It would mean that a very short time limit would have to be complied with (21 days) compared to the normal time limit under section 7 (5) of the HRA (one year). It would also mean that the claim could not be brought as of right but only with permission to appeal. Further, it would lead to procedures, such as disclosure of documents and the need to make findings of fact, which are better suited to a court of first instance than to an appellate court."

47. The basic point made in that passage – namely that claims for damages under section 9 (3) can, and usually will, be brought by way of free-standing proceedings (see para. 64) – is neutral for the purpose of the issues before us: the Lord Chancellor's case is only that such proceedings cannot be brought unless the order in question has first been appealed.

[4] I think this must be a slip for "under section 9 (3)" (which I note is the formulation in para. 63). Otherwise the submission is self-contradictory: a claim under section 9 (1) (c) could not, by definition, be made by way of appeal.

48. The more important question for our purpose is the effect of para. 63, which says that it "may be" an abuse of process to bring free-standing proceedings in respect of an order "which, as a matter of proper process, can be and ought to have been appealed". Ms Clement argued that this supports the Lord Chancellor's case. Although she acknowledged that, as worded, the paragraph falls short of propounding an absolute rule, she submitted that the Court only used the phrase "may be" because it did not need to express a definitive view, and that the logic of its reasoning was that there would in fact always be an abuse in such circumstances.

49. I do not agree. Para. 63 must be read together with para. 62. In para. 62 the Court was considering the Lord Chancellor's case that on its true construction section 9 (1) imposed a "statutory hierarchy" as between the procedural routes identified at (a)-(c). The main argument in support of that submission had been that the subsection should be "interpreted against the background of the usual procedural rule favouring an appeal over an application to the same judge or a judge of equal standing to set aside the infringing order". The "usual procedural rule" in question appears to be the "rule" already referred to by the Court at para. 60 (see para. 43 above). The Court rejected the argument that the existence of that rule supported the Lord Chancellor's case on the issue of the construction of section 9 (1) (c). The apparent purpose of para. 63 is simply to acknowledge that the rule in question could nevertheless still be deployed in support of an argument in a particular case that it was an abuse to take free-standing proceedings rather than to appeal. The Court was certainly not seeking to define a rule, let alone an absolute rule, of the kind suggested by the Lord Chancellor in this case.

50. The Court stated its overall conclusion on this group of issues at para. 67, which reads:

> "We therefore conclude on the central question of statutory interpretation which arises in this appeal that: (1) section 9 (1) (c) must be read with section 9 (3) and only permits a claim for damages for breach of Article 5 and does not go further; but (2) [Ryder LJ] was wrong to hold that a claim for damages under section 9 (1) (c) can only be brought by way of appeal if it concerns a judicial act of the High Court."

51. It followed from the first of those conclusions that if the claimant wished to obtain an authoritative ruling on whether Mostyn J's order had breached his Convention rights he could only do so, in accordance with section 9 (1) (a) of the 1998 Act, by seeking permission to appeal against that order out of time. The Court gave such permission, for reasons explained at paras. 116-122 of its judgment. Since the Claimant's claim for damages had formally been stayed rather than dismissed, notwithstanding his explicit statement that he was not pursuing any such claim, the Court held that the Lord Chancellor should be a party to the appeal: see para. 121.

52. It is obvious from the foregoing account, but bears repeating, that the reason why it was held in *Mazhar* that the claimant could not obtain relief except by way of appeal is that his claim was only for a declaration. The actual decision in the case has no application to a claim for damages, which is what we are concerned with in these proceedings, notwithstanding that the Court found it necessary to make some observations about such claims.

53. The claimant's appeal against Mostyn J's order was heard by a differently constituted Court (Hickinbottom, Newey and Baker LJJ): see *Mazhar v Birmingham Community Healthcare Foundation NHS Trust* [2020] EWCA Civ 1377, [2021] 1 WLR 1207. The Lord Chancellor declined to take any part in the appeal, and since the Trust had no interest in doing so, an amicus was appointed: see para. 27 of the judgment. The appeal was allowed and the Court held, applying the principles in *LL*, that the claimant's rights under both article 5 and article 6 had been infringed, though it declined to make any declaration in the particular circumstances of the case.

THE LORD CHANCELLOR'S CASE

54. To recapitulate, it is the Lord Chancellor's primary case that there is, to quote from Ms Clement's skeleton argument before us, a "blanket rule … [that] … it is an abuse of process for a person to make a claim against the Lord Chancellor under section 9 (3) of the HRA by way of an originating process in respect of an order said to breach Articles 5 and 6 of the Convention, when that order can be, and ought to have been, appealed"; and that because the Claimant should have, but has not, appealed against the impugned orders, the present proceedings should be dismissed accordingly. His alternative case that, even if there is no blanket rule, to bring free-standing proceedings without having previously appealed is capable of being, and was in the circumstances of the present case, an abuse depends on essentially the same considerations, and I will deal with the two together.

55. Ms Clement emphasised that in many, perhaps most, cases a rule requiring a prior (successful) appeal against the impugned order would impose no additional procedural burden on claimants. A person who is detained as the result of a court order will typically appeal in order to obtain their release, irrespective of any intention to claim damages. If the appeal succeeds, and they believe they are entitled to damages under section 9 (3) of the 1998 Act, they can then bringing free-standing proceedings for damages as contemplated by the Court in *Mazhar* (see para. 64). That is no doubt so, but the fact remains that there will be many circumstances – most obviously where the period of detention was short and has elapsed – in which there would be no purpose in an appeal unless it were, as the Lord Chancellor contends, a necessary pre-condition to the bringing of a claim for damages.

56. Ms Clement helpfully clarified in the course of her oral submissions that it was not part of her case that it was necessary that the impugned order should have been held on the appeal to be incompatible with article 5. Although that would often be the basis on which a putative claimant would appeal and succeed, she accepted that they might do so on a ground that had nothing to do with the Convention and that that would be sufficient to satisfy the rule. The only difference between the two situations would be that if the appeal court found a breach of article 5 (as it would be entitled to do under section 9 (1) (a)) the claimant would be able to rely on that finding in the subsequent free-standing proceedings (though it might not be conclusive[5]), whereas in the absence of any such finding the breach would remain to be proved. (*LL* was a case of the latter kind. The claimant had been committed for contempt of court and

[5] There was some discussion before us of whether the Lord Chancellor would be bound by the appeal court's finding of a breach of article 5, since he would not typically have been a party to the appeal proceedings. Mr Westgate accepted that he would not be bound by it, and I am inclined to agree; but the point does not fall for decision.

had successfully appealed without any reference to her Convention rights. The findings of breach of article 5 were made in the subsequent free-standing proceedings.)

57. There were two main strands to Ms Clement's submissions in support of the Lord Chancellor's case that the present proceedings were an abuse of process, although there is some overlap between them. I can summarise them as follows.

58. *Collateral challenge.* Ms Clement contended that any free-standing claim for damages arising from the impugned decisions inevitably involved inviting the court to find that the decision of another court had been unlawful in circumstances where they had not been challenged on appeal. That constituted an illegitimate collateral challenge, circumventing the established appeal machinery with its concomitant requirements including time limits and the need for permission. That was a recognised form of abuse of process. She relied on the decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. In that case it was held to be an abuse for the defendants convicted of the Birmingham bombings to bring civil proceedings for assault against the police officers by whom they had been interviewed following their arrests, in circumstances where it had already been decided at the *voir dire* at their trial that no such assault had taken place and where no challenge had been made to that ruling on their appeal. Lord Diplock said at p. 541B of his speech:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

59. *"Constitutional quandary".* Ms Clement submitted that in the absence of the rule for which she contended the Lord Chancellor would be in what she described as a "constitutional quandary". The premise of her argument was that the Lord Chancellor is committed by statute to defending the independence of the judiciary and upholding the rule of law: see section 1 of the Constitutional Reform Act 2005 and the terms of his oath. The quandary that he would face if claimants who had not appealed were permitted to bring free-standing proceedings for damages was identified in her skeleton argument as follows:

> "He must either uphold judicial independence and defend to the utmost every single one of the claims made under section 9 (1) (c), regardless of the merits of the arguments advanced. Yet advancing unarguable contentions offends the rule of law. Alternatively, the Lord Chancellor must take a realistic view on the merits, not advance arguments that undermine the rule of law, and settle the claim. Yet in that situation, the Lord Chancellor would be agreeing with a claimant in a collateral challenge that a decision of the independent judiciary is wrong, and would be paying damages in respect of it. This is contrary to the Lord Chancellor's duty to uphold the independence of the judiciary."

60. I consider those strands in turn.

(1) COLLATERAL CHALLENGE

61. The short, but to my mind conclusive, answer to this strand is that the impugned orders – that is, those which led to the Claimant's detention – have already been held to have been of no effect: see para. 33 above. It is true that was done by the County Court itself rather than in the context of an appeal, but that is not a significant distinction in the present context. The reason why collateral challenges are objectionable is that they involve one court holding that the decision of another court of co-ordinate jurisdiction is unlawful. But if that other court has itself already held, in circumstances where it was entitled to review its own decisions, that the decision in question was of no effect that objection cannot arise. This was not, of course, the situation in *Mazhar*, and nothing that the Court said in that case was concerned with a case of the present kind.

62. When this difficulty was put to Ms Clement she initially sought to draw a distinction between the effect of an order being reversed on appeal and it being "set aside". This led to some discussion as to the meaning of that term, and the question was also addressed in the post-hearing note referred to above. The note quotes the definition in the Glossary to the CPR, which reads "cancelling an order or a step taken by a party in the proceedings". It lists a large number of provisions of the Rules in which the term is used to connote the cancellation by a court of its own decisions; but the significant point for our purposes is that rule 52.20 (2) (a) defines the powers of the appeal court as including the power to "affirm, *set aside* or vary any order or judgment made or given by the lower court [my italics]". It is therefore clear that the term is equally apt to describe the overturning of orders by the same court as on appeal.

63. Ms Clement's eventual answer came down to three points, which are to some extent related. First, she said that the pleaded claim against the Lord Chancellor proceeded on the premise that the impugned orders were effective. Second, she said that the orders were effective until they were set aside. Third, she said that, although the injunction had been set aside, Judge Hellman's order remanding the Claimant in custody had not.

64. I can take the first and second points together. It is well-established that for some purposes orders which have been wrongly made are nevertheless to be regarded as effective until they are set aside on appeal: I need only refer to the discussion in the judgment of Lord Reed in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461. The impugned orders were of course effective in the sense that they were acted on by the police officers and (initially) the Court and resulted in the Claimant's detention, and that is what matters for the purposes of his pleaded claim; but it is not inconsistent with them having been wrongly made from the start.

65. As regards Ms Clement's third point, it is correct that Judge Hellman did not set aside his earlier order remanding the Claimant in custody. That would have been pointless since it was already spent: all that was necessary was to order his immediate release. But in the context of abuse of process we are concerned with substance, not form. What matters is that, as identified at para. 33 above, the impugned order was found by a competent court to have been of no effect. That being so, it cannot constitute an illegitimate collateral challenge for the court hearing the Claimant's damages claim to be invited to make a finding to the same effect, albeit on a different ground.

66. That is sufficient to dispose of the collateral challenge objection. But one other difficulty with it emerged in the course of oral submissions. I understood Ms Clement to accept, in response to questions from the Court, that there was nothing objectionable in principle about the High Court considering the lawfulness of a decision of the County Court or another inferior tribunal, because they were not courts of co-ordinate jurisdiction. If that is so, it would appear to follow that the free-standing proceedings would involve no illegitimate collateral challenge even if the impugned orders had not been set aside: there would only be a problem in cases (like *Mazhar*) where the impugned order was itself made in the High Court. However, the point was not fully explored with counsel, and it might be arguable that even though the High Court was in one sense a superior Court there was still a problem about circumventing the prescribed routes of appeal. In the circumstances I would prefer not to treat this is as an alternative basis for my decision on this aspect of the Lord Chancellor's case.

(2) "CONSTITUTIONAL QUANDARY"

67. At first sight the answer to this strand of Ms Clement's argument is that my conclusion on the first strand resolves the difficulty. The Lord Chancellor will not, if the claim proceeds, be in the position of having (in short) to take a position about whether the impugned decisions were right: that has already been decided by the County Court itself, and he is, in effect, in the same position as he would have been if they had been set aside on appeal.

68. I accept, however, that the position may not be quite as straightforward as that. Although the impugned orders have been set aside, or found to have been of no effect, that was not on the basis of any breach of article 5 or article 6. The issue of whether there was any such breach remains to be decided, unless it is conceded, at the trial. If the Lord Chancellor is advised that the orders were incompatible with the Convention, or in any event that there is a real chance that they will be held to be, he will face the choice between settling the claim or defending it. If the quandary described by Ms Clement is real, it would appear to arise just as much in that situation as if the issue were whether the orders themselves should be set aside.

69. That being so, I should say that I do not believe that the quandary is real. Specifically, I do not believe that it would undermine the independence of the judiciary, or any other aspect of the rule of law, if the Lord Chancellor, acting, as he would, on legal advice, were to choose to settle a claim for damages in respect of a judicial act, even if the order in question has not been set aside on appeal or otherwise. Formally, any such settlement will have no effect on the order itself, so there is no question of the Lord Chancellor undermining the independence of the judiciary in any direct sense. In substance, of course, it may (to the extent that the

settlement becomes known) be understood as an implicit acceptance by him that a judge has acted unlawfully. In other circumstances that is not a statement that it would be appropriate for the Lord Chancellor to make. But the effect of section 9 (3) is that he has liability as a principal in respect of judicial acts which are incompatible with the Convention. Parliament must have intended that in that capacity he should enjoy the ordinary rights and responsibilities of a litigant, albeit to be exercised with a full awareness of the respect to be accorded to a judicial decision. In those very particular circumstances I do not think that a responsible decision by the Lord Chancellor to settle a claim which he is advised should not be defended could properly be described as undermining the independence of the judiciary. It would also be seriously unfair to the victim of a judicial act which contravened the Convention if his or her evidently well-founded claim were defended *à l'outrance* out of a sense of loyalty to the judiciary.

70. Ms Clement was at pains to point out that in *Mazhar* the Lord Chancellor had declined to take any part in the appeal against Mostyn J's order: see para. 53 above. She said that that was because of precisely the kind of concern which she urged on us in the present case. The two cases are not in fact comparable because, although the claim for damages against the Lord Chancellor had as a matter of form been stayed rather than dismissed, it was not being pursued, and it is not surprising that he took the view that he had in substance no interest in the appeal. The position is quite different where a claim for damages is being pursued in free-standing proceedings against the Lord Chancellor as defendant. In *LL*, as already noted, the issue of whether the judge had acted in breach of the Convention had not been determined in the appeal, and the Lord Chancellor defended the claim. Obviously we cannot know whether he had received adverse advice about the merits but nevertheless felt unable to settle it for constitutional reasons; but if that was in fact the position his scruples were unnecessary.

DECISION

71. In my view the essential feature of the present case is that the County Court has already itself found that the impugned orders were of no effect, with the result that no issue arises about any collateral challenge to them. In those circumstances I can see no basis on which it could be an abuse of process for the Claimant to pursue his claim for damages under the 1998 Act, in the forum prescribed by the Act, without having first had them set aside in an appeal court. It also necessarily follows that I do not accept that there is any blanket rule such as that contended for by the Lord Chancellor. I would dismiss the appeal.

FURTHER OBSERVATIONS

72. It is accordingly unnecessary to consider in what circumstances it could or would be an abuse for a claimant to pursue free-standing proceedings under section 9 (1) (c) without the impugned order having been first set aside (or in any event found to be of no effect) by an appeal court – or, in circumstances where it had power to do so, by the court which made the order. Ms Clement urged us to address that question, irrespective of our decision in this particular case, because it was important that there be a well-understood rule applying to cases of the present kind.

73. I am not prepared to offer any definitive guidance of the kind sought by Ms Clement. It is dangerous to try to define a general rule which may fall to be applied in a variety of circumstances which are not before the Court. As Lord Bingham said in *Johnson v Gore-Wood & Co* [2000] UKHL 65, [2002] 2 AC 1, at p. 31 D-E, claims that a party is acting abusively by raising a point that could have been raised in other proceedings require:

> "… a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

74. Having said that, I understand the Lord Chancellor's wish for some guidance; and this seems to me one of those comparatively rare cases where the Court is justified in saying something about the question, albeit obiter and subject to the caveat stated in the previous paragraph. I will accordingly say that in the generality of cases I would not expect it to be an abuse of process for a claimant to bring a claim under section 9 (1) (c) without first having had the impugned order set aside. I will give my reasons shortly.

75. I start with para. 63 of the judgment in *Mazhar.* I accept that that contemplates that it may be an abuse for a claimant to bring free-standing proceedings under section 9 (1) (c) where they have not appealed against the order in question. However, as noted at para. 49 above, the Court's focus seems to have been primarily on the distinction between orders which have to be set aside on appeal and those which can be set aside by the original court. I accept of course that that distinction is only relevant if it is necessary for the order to be set aside by one route or the other, but the Court says nothing about the circumstances where that might be the case; the issue did not arise in *Mazhar* itself since there was no damages claim. In any event, it should be noted that the Court's reference was to "an order which … can be *and ought to have been* appealed". That appears to accept that there will be circumstances where it will have been legitimate for the claimant not to have appealed against the impugned order even though they could have done so. The "could and should" formulation is used in the classic cases considering re-litigation abuse – see, for example, Lord Sumption's succinct summary, at para. 17 of his judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] 1 AC 160, of the jurisprudence deriving from *Henderson v Henderson* (1843) 3 Hare 100. Deciding whether an order "should" have been appealed inevitably involves considering balancing the reasons why it is said that an appeal should have been brought against any countervailing considerations.

76. As regards that balance, the starting-point is that in the cases with which we are concerned the claimant will almost certainly have already been released from detention: otherwise the order would no doubt have been appealed. That being so, there is no substantive advantage to them in bringing a post-release appeal, and the only reason for imposing an obligation to do so is in order to avoid a situation where one first-instance court is being asked to find that the decision of another first-

instance court was unlawful. As to that, the authorities do not go so far as to say that such a situation is axiomatically unacceptable. Ms Clement relied only on *Hunter,* but that is not the last word. At pp. 699-703 of his judgment in *Arthur J.S. Hall and Co v Simons* [2000] UKHL 38, [2002] AC 615, Lord Hoffmann reviewed the authorities as they stood at that date and demonstrated that, although collateral challenge was discouraged as a matter of public policy, there was no universal or absolute rule. As regards the passage from Lord Diplock's speech in *Hunter* relied on by Ms Clement, Lord Hoffmann said that, properly understood, it decided "not that the initiation of such proceedings is necessarily an abuse of process but that it may be" (p. 703C). In a case of the present kind, section 9 (1) (c) of the 1998 Act positively mandates the High Court to award damages for the unlawful act of a judge of co-ordinate jurisdiction: in that context it is not obvious that public policy precludes it from ruling for itself on the lawfulness of that act – particularly if, as Ms Clement accepted, it is unobjectionable for it to do so in the case of an order of the County Court or another inferior tribunal (see para. 66 above).

77. As for the countervailing considerations, the appeal (assuming that it succeeds) is not likely in most cases to yield anything else of value for the purpose of the damages claim. The most that the appeal court might do – and it may not even do that (see para. 56 above) – is decide that the impugned order was incompatible with articles 5 and/or 6. But that decision may be reached on an unsatisfactory basis because the respondent may have no interest in contesting the appeal (as the NHS Trust did not in *Mazhar*), and in any event the Lord Chancellor, whom the decision would chiefly affect, would not ordinarily be a party.[6] It is also unclear whether it would be binding in any event: see n. 5 above. The appeal court would not of course necessarily be the Court of Appeal: it might be the High Court, a Circuit Judge or the Upper Tribunal. The claimant would thus be being required to spend time and resources in surmounting an essentially procedural hurdle in order to get themselves into a position where they could bring a claim for damages for breach of a fundamental right. The points made at para. 66 of the judgment in *Mazhar* are also apposite in this connection.

Lewison LJ:

78. I agree that this appeal should be dismissed for the reasons given by the Vice-President at paras. 1-71.

Dingemans LJ:

79. I agree with the judgment of the Vice-President.

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[6] If the Lord Chancellor were aware of the appeal he could in principle apply to intervene; but he would only be aware if the claimant had adumbrated a potential claim.