Neutral Citation Number: [2023] EWHC 117 (KB)

Case No: QB-2021-000579

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

MTA

(a protected party, by his litigation friend, the Official Solicitor)

Claimant/ Respondent

- and –

(1) THE COMMISSIONER OF POLICE OF THE METROPOLIS

First Defendant

- and –

(2) THE LORD CHANCELLOR

Second Defendant/ Applicant

- -

Mr Martin Westgate KC and Mr Daniel Clarke (instructed by **TV Edwards LLP**) for the **Claimant/Respondent**

Ms Joanne Clement KC and Mr Riccardo Calzavara (instructed by **The Government Legal Department**) for the **Second Defendant/Applicant**

The First Defendant did not participate in the application

Hearing date: 15 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE FREEDMAN

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I Introduction

1. The Claimant claims damages against the Lord Chancellor under sections 7 and 9 of the Human Rights Act 1998 ("the HRA 1998") for breach of Articles 5 and/or 6 of the European Convention on Human Rights ("ECHR") by judicial acts in relation to an injunction and power of arrest under the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") in proceedings brought against the Claimant by Gateway Housing Association ("the Landlord"). The Lord Chancellor seeks to strike out the claim on the basis that it is an abuse of process.

II The Facts

2. The Claimant was born on 2 August 1998. He has had severe global development delay since birth. He lives with his mother and a number of siblings at a property in East London ("the Property") pursuant to a secure tenancy agreement granted to his mother by the Landlord.

3. On 8 January 2020 the Landlord issued a claim in the County Court at Clerkenwell and Shoreditch ("the County Court Claim") against the Claimant and his brother (known as "SA") for an injunction with a power of arrest under the 2014 Act.

4. On 7 February 2020 the Claimant was sentenced to six months' imprisonment for reasons unconnected to the County Court Claim. On 17 February 2020, the first hearing of the application in the County Court Claim took place before DJ Manners. The Claimant did not attend as he was in custody, although the Claimant's brother and sister attended. DJ Manners granted an interim injunction ("the Injunction"), with a power of arrest. Reference was made to the Claimant having some degree of learning disabilities. The Claimant's sister was advised to seek legal advice, and to provide evidence of the Claimant's difficulties. Permission was granted for a capacity assessment to be filed.

5. The return hearing was duly fixed for 3 March 2020 which duly took place before DJ Revere. The judge was informed by the Claimant's counsel that he had substantial learning difficulties and that there was "an issue with capacity". The court was not asked to vary or discharge the Injunction; indeed the Claimant's counsel said explicitly that she would not make submissions as to the same as the Claimant remained in custody and the Injunction did not affect him. Permission was granted for the filing of an expert report from a psychologist. Dr Roy Shuttleworth concluded by a report dated 27 April 2020 that the Claimant had litigation and injunction capacity ("the Shuttleworth Report"). The Claimant did not file or serve the Shuttleworth Report.

6. On 24 March 2020, the Claimant was apparently released early from custody. No application was made at this stage to vary or discharge the Injunction. On 18 May 2020, the Claimant was arrested on suspicion of breach of the Injunction and held in custody overnight.

7. At 10am on 19 May 2020 DJ Hayes heard the adjourned return hearing for the Injunction. The judge was informed by the Claimant's counsel that an unfavourable expert report had been obtained, and an extension of time for filing a new expert report was sought. The judge directed that the Claimant should disclose the Shuttleworth Report if he wanted permission to adduce a new report. The court was not asked to vary or discharge the Injunction; indeed the Claimant's counsel explicitly said that she did not oppose its continuation and the court had made no findings that the Claimant was a protected party. The return date was adjourned until 29 May 2020.

8. The Claimant later brought an appeal against para. 2 of the order of DJ Hayes, alleging that the judge did not have the power to attach the condition to the making of the application for an extension of time, that it amounted to an impermissible restraint on his ability to participate in the proceedings, and was contrary to the fair administration of justice. The appeal was subsequently withdrawn after an order was made in the committal proceedings before HHJ Hellman for the production of a further report, as below. The appeal did not challenge the continuation or otherwise of the Injunction and/or the power of arrest.

9. At 11am on 19 May 2020, the Claimant was produced before HHJ Hellman following his arrest the previous day. His counsel sought permission to obtain an expert report as to his litigation capacity in the committal proceedings. In the light of his concerns that there was a real risk that there would be further breaches if the Claimant were released and a report obtained in the community, the judge remanded him in custody pursuant to para. 5 of Schedule 1 to the 2014 Act in order for such report to be obtained. The court was not asked to vary or discharge the Injunction.

10. On 29 May 2020, DJ Hayes amended the boundary line on the plan annexed to the Injunction, without the parties' attendance. That order was not sealed until 16 July 2020, by which time it had been set aside by orders of DJ Swan on 30 June 2020 and of DJ Hayes on 9 July 2020.

11. The report ordered by HHJ Hellman was completed by Dr Emma Citron on 4 June 2020 (following a remote interview with the Claimant on 2 June 2020). She expressed the view that the Claimant lacked litigation and injunction capacity by reason of a learning disability that he has had since birth ("the Citron Report"). The Claimant's solicitor confirmed that an approach was made to the Official Solicitor to act as the Claimant's litigation friend, and the Official Solicitor agreed to act as such should the court find that the Claimant lacked litigation capacity.

12. The Citron Report was considered at the adjourned committal hearing on 9 June 2020. HHJ Hellman found that the Claimant lacked litigation capacity in respect of the committal proceedings, which were dismissed, and released him from custody. This was the first occasion on which any evidence as to the Claimant's capacity had been adduced. The court was not asked to vary or discharge the Injunction. The judge was not dealing with the claim for an injunction, did not declare that the Claimant lacked litigation capacity in respect of the injunction claim, nor that he lacked injunction capacity, nor the date from which he lacked litigation capacity in respect of the committal proceedings. The parties agreed a timetable by which an application would be made to discharge the Injunction.

13. On 10 June 2020 the Claimant was arrested on suspicion of breach of the Injunction and held in custody overnight. On 11 June 2020 he was produced before DJ Swan. The judge rejected the Landlord's entreaties to remand the Claimant in custody, instead discharging him from the arrest and dismissing the proceedings resulting from it. No application was before the court to vary or discharge the Injunction.

14. It was not until 23 June 2020 that the Claimant applied to have the Injunction set aside and/or for the underlying claim to be dismissed. On the same day the Official Solicitor filed a certificate of suitability to be his litigation friend. On 29 June 2020, the Claimant was arrested on suspicion of breach of the Injunction and held in custody overnight. On 30 June 2020 he was produced before DJ Swan. The judge concluded that the effect of HHJ Hellman's decision on 9 June 2020 was that the Claimant generally lacked litigation capacity since birth, such that the Injunction was void and required to be set aside under CPR 21.3(4) (which provides that any step taken in litigation before a protected party has a litigation friend has no effect unless the court orders otherwise). DJ Swan discharged the Claimant from the arrest and gave directions for the hearing of the application to dismiss the underlying claim. No findings were made as to whether the Claimant lacked injunction capacity.

15. The application to set aside the Injunction was listed before DJ Beecham on 7 December 2020. On that day, DJ Beecham declared that the Claimant lacked injunction capacity and dismissed the underlying claim. The judge did not declare the date from which he so lacked capacity.

16. Aside from an ultimately abortive appeal against the decision of DJ Hayes on 19 May 2020, the Claimant has never sought to appeal against any of the orders made in the conduct of the proceedings detailed above.

17. On 14 December 2020 the Claimant threatened judicial review proceedings and, following the Lord Chancellor's response on 19 January 2021, he accepted on 27 January 2021 that no such proceedings should be brought. On 2 February 2021 the Lord Chancellor directed the Claimant's attention to the decision in *Mazhar v Lord Chancellor* (No.1)[2021] Fam 103 ("*Mazhar 1"*), and invited him to appeal the underlying orders instead of instituting a Part 7 claim.

18. The Claimant declined to do so, and on 16 February 2021 this claim was issued, initially contending that various judicial acts gave rise to a breach of his rights under Article 5 of the ECHR in respect of which he was entitled to damages as against both defendants (and as against the Lord Chancellor, pursuant to section 9(3) of the HRA 1998). The claim was amended on 13 May 2021 to include a further claim in relation to Article 6 of the ECHR. The Lord Chancellor filed his defence on 9 July 2021, in which he foreshadowed the making of an application to strike out the claim on the basis that it amounted to an abuse of process. On 1 June 2022 this application to strike out the claim as being an abuse of process was made. The Claimant responded to that application on 11 July 2022.

III The nature of the claim

19. In the claim against the Commissioner of Police of the Metropolis ("MPC"), the Claimant alleges that the injunction orders were of no effect because of CPR r.21.3(4) and that therefore each of the arrests was without lawful authority, whether before or after 9 June 2020, when HHJ Hellman recognised that the Claimant lacked capacity. CPR r.21.3(4) provides:

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

20. In the alternative, the claim against the Lord Chancellor relies on the individual and cumulative effect of the orders made as amounting to a breach of Article 5 (see the summary of principles in *LL v Lord Chancellor* [2017] EWCA Civ 237, [2017] 4 WLR 162). The effect was to make the Claimant subject to an order with which it was not feasible for him to comply. The consequence was that the process as a whole amounted to a gross and obvious irregularity and a flagrant denial of justice in breach of Article 6 (Particulars of Claim para. 43).

21. In his defence, the Lord Chancellor records that he was not a party to the proceedings and that he relies on transcripts and other records (para. 3). His substantive defence comments in detail on what was said at each of the hearings (e.g. paras. 15-16, 19-20, 25-6, 31, 46, 49-62). He puts the Claimant to proof as to deterioration in his mental health (para. 38), as to when then Claimant's lack of litigation capacity and lack of injunction capacity commenced (para. 45) and as to whether he was a protected party prior to 9 June 2020 (paras. 47, 59). He denies breach of Articles 5 or 6 ECHR (para. 46).

IV The statutory framework

(a) © 2014 Act

22. 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 ("ASB"), and it considers it just and convenient to do so for the purpose of preventing the respondent from engaging in ASB (section 1(1)-(3) of the 2014 Act). A court granting an injunction may attach a power of arrest if it thinks that the subject ASB 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, which includes serious ill-treatment or abuse (sections 4(1), 20(1) of the 2014 Act). Where a power of arrest is attached to an injunction, a constable may arrest the respondent without warrant if he has reasonable cause to suspect that the respondent is in breach of the provision (section 9(1) of the 2014 Act). The respondent must be produced at court within 24 hours of being arrested whereupon the judge may remand him if the matter is not immediately disposed of (section 9(3), (5) of the 2014 Act).

23. Section 11 is concerned with remands and gives effect to Schedule 1 to the 2014 Act. The judge may remand the respondent in custody or on bail (see para. 2(1) of Schedule 1 to the 2014 Act). A respondent may not be remanded in custody for a period exceeding eight clear days unless the judge has reason to think that a medical report will be needed, and the judge remands the respondent in order to enable a medical examination to take place (in which case he may be remanded in custody for up to three weeks (see para. 4(1)(a) and para. 5(1)-(2) of Schedule 1 to the 2014 Act)). A respondent who is brought back before the court after remand may be further remanded (see para. 2(4) of Schedule 1 to the 2014 Act).

24. Those aggrieved by a decision of the County Court may seek permission to appeal against such order (section 77 of the County Courts Act 1984). Such appeals are governed by CPR Part 52, and PD52.

(b) The HRA 1998

25. Article 5 of the ECHR protects individuals' rights to liberty and security, and Article 6 in summary secures the right to a fair and public hearing. By section 6 of the HRA 1998 it is unlawful for a public body to act incompatibly with a Convention right. A public body includes a court or tribunal: section 6(3) of the HRA 1998.

26. Section 7(1)(a) of the HRA 1998 states 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 under the HRA 1998 in the appropriate court or tribunal (i.e. such court or tribunal determined in accordance with rules).

27. Section 9 of the HRA 1998 is specifically concerned with judicial acts. Section 9(1) states 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 (in Scotland a petition) for judicial review; or*
>
> *(c) in such other forum as may be prescribed by rules."*

28. Section 9(3) and (4) state that:

> *"(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"*

29. The Lord Chancellor is the appropriate Minister in respect of the judicial acts in question.

30. Various court rules make provision for a claim to be brought under the HRA 1998 in respect of judicial acts. Rule 7.11(1) of the CPR provides that a claim under section 7(1)(a) of the HRA 1998 in respect of a judicial act may be brought only in the High Court. Rule 7.11(2) states that any other claim under section 7(1)(a) may be brought in any court.

(c) The Constitutional Reform Act 2005

31. The Lord Chancellor has a number of key duties under Part 1 of the Constitutional Reform Act 2005 ("the 2005 Act") reflecting the ancient history of the role. Section 1 of the 2005 Act states that the 2005 Act does not adversely affect the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. By section 3(1), the Lord Chancellor (as well as other Ministers of the Crown) must uphold the continued independence of the judiciary.

32. The Lord Chancellor must not seek to influence particular judicial decisions through any special access to the judiciary and must have regard to the need to defend that judicial independence: section 3(5), (6)(a). The Lord Chancellor's oath of office stipulates that the Lord Chancellor will (a) respect the rule of law; (b) defend the independence of the judiciary; and (c) discharge his duty to ensure the provision of resources for the efficient and effective support of the courts: see section 17.

(d) Relevant powers under the Civil Procedure Rules

33. PD 16 para. 15.1 (Human Rights):

> *"A party who seeks to rely on any provision of or right arising under the Human Rights Act 1998 or seeks a remedy available under that Act … (2) must state in his statement of case … (f) where the claim is founded on a judicial act which is alleged to have infringed a Convention right of the party as provided by section 9 of the Human Rights Act 1998, the judicial act complained of and the court or tribunal which is alleged to have made it".*

34. CPR r.19.4A:

> *19.4A Human Rights*
>
> *…*
>
> *Section 9 of the Human Rights Act 1998*
>
> *(3) Where a claim is made under that Act for damages in respect of a judicial act—*
>
> 1. *that claim must be set out in the statement of case or the appeal notice; and*
>
> 2. *notice must be given to the Crown.*
>
> *(4) Where paragraph (3) applies and the appropriate person has not applied to be joined as a party within 21 days, or such other period as the court directs, after the notice is served, the court may join the appropriate person as a party."*

35. CPR Part 3.4(2)(b) provides that the court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court's process.

V The submissions on behalf of the Lord Chancellor

36. The Lord Chancellor submits that in the circumstances of this case, it is an abuse of process to bring a claim by way of an originating process for damages when the underlying orders could – and should - be challenged by way of an appeal. The submission is that in the light of the approach of the Court of Appeal in *Mazhar 1*, the Claimant should have appealed against the judicial orders under challenge. The submission is that the Claimant can only pursue a claim for damages against the Lord Chancellor if the appellate courts conclude that the judicial orders in question breached the Claimant's rights under the ECHR, in this case Articles 5 and 6, so as to fall within Article 9(3) of the HRA 1998. In order to understand the submission, it is necessary to consider the case of *Mazhar 1*.

37. In *Mazhar 1,* the claimant brought a Part 7 claim for damages and/or a declaration against an NHS Trust (the body that had applied for the court order in question) and the Lord Chancellor, contending that a High Court order breached the claimant's rights under Articles 5, 6 and 8 of the ECHR. The order authorised his deprivation of liberty (by the use of reasonable and proportionate force to remove him from his home and to convey him to hospital in an ambulance). The relevant part of the order was discharged on the return date, and the claimant indicated that he wished to challenge the lawfulness of the original order.

38. The claim proceeded by way of a Part 7 claim for damages. Shortly before the final hearing, the claimant accepted a Part 36 offer from the NHS Trust, and then sought a

declaration only against the Lord Chancellor. The Lord Chancellor contended that the claim was barred by the principle of judicial immunity and/or by section 9(1) and (2) of the HRA 1998. The Lord Chancellor also contended that the court had no jurisdiction to make the declaration sought and/or that the claim was an abuse of process.

39. The claim was determined at first instance by Ryder LJ, sitting as a first instance judge of the High Court. Ryder LJ first held that the claim was barred by the common law principle of judicial immunity (which had not been abrogated by the HRA 1998), and that the Lord Chancellor could not be vicariously liable for the acts of the judiciary. Ryder LJ also held that the claim would constitute an abuse of process. This was because Mr Mazhar's claim for damages for breach of Article 5 could not be pursued in the High Court (as it was a court of co-ordinate jurisdiction to Mostyn J who made the original order). Any claim for damages could therefore only be advanced on appeal to the Court of Appeal.

40. It is necessary to concentrate on the decision of the Court of Appeal. Whilst the decision of Ryder LJ provides useful background, the decision and reasoning of the Court of Appeal may be lost by excessive concentration on the background of the first instance decision. The decision in *Mazhar* 1 in the Court of Appeal was summarised in *Mazhar v Birmingham Community Healthcare Foundation NHS Trust* [2020] EWCA Civ 1377, [2021] 1 WLR 1207 ("*Mazhar No. 2*") as follows (per Baker LJ at para. 24):

> *"(1) an action cannot be brought against the Lord Chancellor for a declaration under the HRA in respect of a judicial act;*
>
> *(2) the only permissible free-standing claim under the HRA in respect of a judicial act is for damages for unlawful detention in breach of article 5;*
>
> *(3) save in those circumstances, a judicial act can only be the subject of proceedings under the HRA by way of an appeal or (where available) judicial review."*

41. It is to be emphasised that Mr Mazhar, having settled his claim for damages, was seeking only a declaration (see para. 8). This is the reason why the Court decided that he could not proceed by way of a claim under CPR Part 7. Instead of this, the Claimant was granted permission to appeal out of time against the refusal to grant a declaration (see e.g. paras. 98 and 118).

42. The instant case is a case of damages and not for a declaration. It is apparent from the above summary that there can be a free-standing claim for damages under the HRA 1998 in respect of a judicial act. Notwithstanding this, the submissions of the Lord Chancellor are that in the instant case, this is not permitted. His reasoning is as follows:

    (i) In *Mazhar 1*, the Court of Appeal found that *"it may be an abuse of process to make a claim against the Lord Chancellor under section 9(3) by way of an originating process in respect of an order which, as a matter of proper process, can be and ought to have been appealed."* (para. 63).

The question is whether this is one of those cases where it is an abuse of process to make a claim against the Lord Chancellor without first appealing the orders thus far made.

(ii) As occurred in respect of the claim for a declaration in *Mazhar*, an appeal out of time is still possible with the permission of the Court. It is not academic to have an appeal in that in the instant case, as in *Mazhar*, the deprivation of liberty of Mr Mazhar had been set aside long before permission to appeal had been granted. There is also no difficulty about appealing more than one order at a time: appropriate orders may be made under the Access to Justice Act 1999 (Destination of Appeals) Order 2016/917 so that all the decisions whether of district judges or circuit judges can be heard at the same time by a judge of the High Court or by the Court of Appeal: see section 57(1)(b) of the Access to Justice Act 1999.

(iii) It is first necessary for the appellate court to determine whether the judicial order was wrong and whether there has been a breach of the Claimant's Convention rights before any claim for damages can be brought.

(iv) It is irrelevant if there was some delay in the launching of the application. The abusive nature of the action was flagged in the defence, and the application was brought once transcripts of the relevant hearings had been obtained. If the claim is abusive, it should be struck out irrespective of whether such application could have been made earlier.

VI The submissions on behalf of the Claimant

43. This is a strike out application based on abuse of process which is to be reserved for clear and obvious cases. The Claimant relies on a recent Court of Appeal decision summarising the principles relating to abuse of process in *Municipio De Mariana v BHP Group (UK) Ltd* [2022] 1 WLR 4691 including:

(a) *"The categories of abuse of process are varied and not closed; the courts have declined to define or circumscribe the circumstances in which an abuse may be established. There are nevertheless now certain well-established categories of abuse"* (para. 172).

(b) *"A finding of abuse of process does not lead automatically to a striking out of the claim. The court then retains a discretion as to the appropriate response, which must always be proportionate"* (para. 177).

(c) *"Litigants should not be deprived of their claims without scrupulous examination of all the circumstances and unless the abuse has been sufficiently clearly established: 'the court cannot be affronted if the case has not been satisfactorily proved' … Thus it has been stated repeatedly that it is only in 'clear and obvious' cases that it will be appropriate to strike out proceedings as an abuse of process so as to prevent a claimant from bringing an apparently proper cause of action to trial"* (para. 178).

44. The particular abuse of process is of collateral attack or re-litigation. As regards re-litigation, in *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 Clarke LJ summarised the position as follows (at para. 49):

> *"The principles to be derived from the authorities, of which by far the most important is Johnson v Gore Wood & Co [2002] 2 AC 1, can be summarised as follows:*
>
> *i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.*
>
> *ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.*
>
> *iii) The burden of establishing abuse of process is on B or C or as the case may be.*
>
> *iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.*
>
> *v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.*
>
> *vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."*

45. The concern of the Court is about conflicting judgments which would bring the administration of justice into disrepute, which is particularly exemplified in the context of a criminal conviction: see *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, 706F. In the instant case, the Claimant submits that the effect of the setting aside of the original order is that the public interest concerns militating against re-litigation fall away. In *Arthur JS Hall & Co v Simons* above, the principle that without an appeal it will ordinarily be an abuse yields to exceptional cases where the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute.

46. The concern in the instant case of the Lord Chancellor is that the claim for damages against the Lord Chancellor without an appeal is a collateral attack on the decisions of the circuit and district Jjudges who made the orders referred to above. The Claimant's submission is that if the Lord Chancellor's position were correct, it would never be permissible to bring a claim under Part 7 in respect of a judicial decision without first having sought to appeal or claim judicial review.

47. Had the Court in *Mazhar 1* intended a blanket principle that an appeal or judicial review was a pre-requisite of a claim for damages, the Court of Appeal would have said so expressly in *Mazhar 1*. On the contrary, the language is to contrary effect at paras. 62-64 as follows (with emphasis added):

> *"62. [We] reject the submission of Mr Grodzinski 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 1998 Act that warrants such an interpretation and the combination of section 9(1)(c), 9(3), and the reasons (see above) 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 <u>may</u> 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 <u>and ought to have been</u> appealed.*
>
> *64. We disagree with Mr Grodzinki's submissions (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) in respect of an order by the High Court must be brought on an appeal. In our view, it can be (<u>and usually would be</u>) brought by way of an originating process in the High Court itself pursuant to section 9(1)(c) and CPR r 7.11(1) ."*

48. The Claimant submits that the position of the Lord Chancellor is not consistent with the following:

(i) the Court's position that there was no hierarchy in section 9(1) HRA 1998 (para. 62);

(ii) the words *"may be an abuse of position"* rather than *"will"* or *"would"* be an abuse of position in para. 63;

(iii) the words "*can be (<u>and usually would be</u>) brought by way of an originating process in the High Court itself"*, which shows that a claim for damages need not be brought by way of an appeal.

49. The Claimant submits that there is no reason to imply words to require an appeal or a judicial review in all cases as a pre-requisite to a claim for damages, and that it would be difficult to formulate the same in any event.

50. The Court of Appeal in *Mazhar 1* stated (para. 66) that to require a person to bring a claim for damages in relation to a judicial act only by way of appeal would have "surprising and undesirable" consequences including imposing a 21 day time limit under CPR Part 52 rather than one year (section 7(2) HRA 1998) and a requirement to obtain permission to appeal.

51. There may be cases where it would be a collateral challenge to proceed under section.9(1)(c) in respect of a decision which has been allowed to stand and where an available route of appeal has not been taken. However, in the instant case, the question of legal capacity was determined in that on 30 June 2020, the order of DJ Swan determined that the injunction and power of arrest were of no legal effect and setting them aside by reason of incapacity. The consequences are as follows:

    (i) there is no risk of inconsistent decisions because the order that could have amounted to a breach has been swept away;

    (ii) an appeal in those circumstances would serve no purpose.

52. The Claimant submits that case management considerations favour a Part 7 claim in the present case. The contrary course involves a multiplicity of proceedings, which is contrary to the overriding objective. The Lord Chancellor contemplates a case with a number of orders which are the subject of appeals, all heard together, and transferred to the High Court or the Court of Appeal as appropriate, followed by a further Part 7 claim in to quantify damages in any event: see skeleton argument of the Lord Chancellor at paras. 48 and 49(1).

VII Discussion

53. I accept broadly the submissions made by the Claimant. In particular, the Claimant is right to emphasise paras. 62-64 of *Mazhar 1*. *Mazhar 1* was a claim for a declaration that the court order was an unlawful violation of his right to liberty guaranteed by article 5 of the ECHR. The Court for different reasons at first instance and in the Court of Appeal rejected the claim for a declaration. In that context, in paras. 62-64, the Court of Appeal made remarks about the circumstances in which a claim for damages for the violation would be available. They provide important guidance on the approach to be taken.

54. The judgment in *Mazhar 1* contains detailed reasoning about the legislative history of section 9 of the HRA 1998. This led to the Court making the following finding as regards the right to challenge a judicial act. At para. 54, it was stated:

> *"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*

> *1998 Act 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).”*

55. It was stated that there was no right to a declaration: on the contrary, at para. 56:

> *“…Rather the express provisions of section 9(4) and (5) make it clear that the only kind of action that is contemplated by section 9(1)(c) is a claim for damages for breach of article 5.”*

56. There is a danger of emasculating the provision for the free standing claim for damages if it were a rule that it must be parasitic on a successful appeal or application for judicial review. The language at paras. 62-64 and at para. 66 in particular have as their effect that the claim for damages has a broader scope. This is subject to the possibility that there are cases where the claim for damages may be an abuse of process.

57. In the light of the foregoing, the submissions made on behalf of the Claimant by reference to paras. 62-64 cited above have a particular resonance. If it had been the case that the Court of Appeal had intended to limit the right to damages to the sequel to a successful appeal, then it would have said so. It would not have said (at para. 62) without more that it rejected the submission about a statutory hierarchy under which section 9(1)(c) can never apply. It would not have said (at para. 63) without more that it may be an abuse of process to make an originating claim for damages where as a matter of proper process, an order *“can and ought to have been appealed”.* It would have said that there was a blanket rule to that effect. On the contrary, in para. 64, it stated expressly that there was no such rule that a claim for damages must be brought on appeal.

58. The Lord Chancellor submitted that the reference to “necessary” in the last sentence from para. 54 (quoted above) is that it would not be necessary to bring a claim for damages outside the context of an appeal, and that the claim for damages could be made following a successful appeal, even by the appeal court. The Claimant submits that the Court of Appeal in context was simply referring to “necessary” in order to achieve just satisfaction. There was no reference by the Court of Appeal to the right being so limited to the sequel to a successful appeal. That is correct for the following reasons, namely (a) it is an unjustified gloss on the word “necessary” in para. 54, (b) it is not borne out by other parts of the judgment of the Court of Appeal and especially paras. 62-64 or by the subsequent paragraphs of the judgment e.g. paras. 65-67, (c) if it had been intended that the right was dependent on a prior appeal, the Court of Appeal would have stated that expressly and clearly.

59. This conclusion is also borne out by para. 60 of the judgment of the Court of Appeal which recognises that sometimes an appeal will be the necessary way forward e.g. when the attack is based entirely on a submission of an error of law. However, there are cases

when the decision can be set aside by a decision of the same judge or a different judge of the same standing e.g. a claim that there has not been full and frank disclosure. The relevance here is that although there might not have been full detail as to the extent of the order, the courts of the same standing in the instant case pronounced on the setting aside of orders in view of subsequent findings as to litigation capacity and injunction capacity.

60. The case of the Lord Chancellor is predicated upon a contention that if the courts allow as a matter of routine claims for damages without successful appeals or applications for judicial review of prior judicial decisions, the gates will be open to inconsistent decisions and to re-litigation and in the end an unfairness to litigants or the potential to bring the administration of justice into disrepute. In this way, the Lord Chancellor has made a case based on points of principle of general application. This then enables the Lord Chancellor to submit that insofar as the point has to be clear and obvious in the context of a strike out application, this is amply demonstrated.

61. I do not accept the premise that the free-standing right to damages is so limited. The court has to guard against re-litigation and collateral challenge. On the other hand, the cases relied upon on behalf of the Claimant cited above such as *Dexter Ltd v Vlieland-Boddy* show that cases have to be decided on their own facts. Without this, it is not possible to do justice in each case and to adopt a broad merits-based approach. If each case is examined according to its own facts, there will be no harassment or oppression of a party because all of this will be taken into account. Likewise, there will be no affront to the administration of justice provided that due respect and primacy is given to what has been decided in previous cases, especially between the same or related parties. I accept the submission of the Claimant that each case is fact sensitive and that the court need not define where the boundaries lie in that each case. It suffices simply to concentrate on the facts of the case, and to analyse them subject to the above considerations such as to reach a just conclusion.

62. The striking facts in the instant case are that although proceedings were brought against the Claimant including injunctions and committal proceedings, there came a point when the Court decided that the Claimant lacked litigation capacity and ultimately even injunction capacity. The facts as a whole and especially certain characteristics indicate that a judicial review or an appeal may not be a pre-requisite of a claim for damages under s.9(1)(c) in the instant case. In short, it may be unnecessary and procedurally cumbersome. Attention is drawn to the following features:

    (i) the decision on 9 June 2020 of HHJ Hellman that the Claimant lacked litigation capacity in respect of the committal proceedings, which were dismissed, and the order releasing him from custody.

    (ii) the order of DJ Swan of 30 June 2020 contained a recital that the effect of the decision of HHJ Hellman was that the Claimant lacked litigation capacity since birth, such that the Injunction was void and required to be set aside by reason of incapacity under CPR 21.3(4).

    (iii) the decision of 7 December 2020 of DJ Beecham declaring that the Claimant lacked injunction capacity and dismissing the underlying claim.

63. The action for damages is predicated upon orders of the Court having been made which ought not to have been made due to want of capacity on the part of the Claimant. The contention is that orders have been made by the Court in the nature of injunctions and committal when the Court was on notice about questions of capacity. The alleged consequence is that the Court made orders which ought not to have been made and which had consequences for the Claimant including his being arrested for breaches of the orders.

64. The Lord Chancellor submits that the orders have not been reversed by reason of the orders made above. The decision of HHJ Hellman was time specific at the time of the order that the Claimant lacked litigation capacity: it did not say that he lacked litigation capacity at an earlier time. The order of DJ Swan took the matter a stage further in that it was noted in a recital that the order of HHJ Hellman was based on a report of Dr Citron dated 4 June 2020 to the effect that the Claimant had lacked litigation capacity since birth. On that basis, it was ordered that the order of 17 February 2020 and the power of arrest were of no effect and were set aside pursuant to CPR 21.3(4). That provision was to the effect that any step taken in respect of a protected party before they had a litigation friend was of no effect unless the court ordered otherwise. Despite this, the proceedings as a whole were not dismissed at that stage, but the application of the Claimant dated 23 June 2020 was treated as an application for the summary dismissal of the proceedings against the Claimant. In the event, there was no pronouncement about lack of injunction capacity and the underlying claim was not dismissed until the above mentioned order of DJ Beecham of 7 December 2020.

65. It can be said that despite the above, there was no formal determination as to the dates when the Claimant first lacked (a) litigation capacity (despite the recital in the order of 30 June 2020) or (b) injunction capacity (despite the order of 7 December 2020). It can therefore be said that the consequences of the starting dates of the lack of capacity and the precise nature of the lack of capacity was not fully explored or set out. Indeed, as noted above in the defence of the Lord Chancellor, who was not a party to the earlier proceedings and who may not be bound by the findings therein, issue is taken with these questions of capacity and whether, if he did, when the Claimant lacked litigation or injunction capacity and the consequences of the answers to these questions.

66. Despite the above, this is not a case where there is a clear and obvious case proven to the effect that the claim is abusive. On the information available at this stage to the Court, it appears that the issues of capacity have been determined sufficiently in the County Court Claim for a claim for damages to be capable of being brought without this being inconsistent with that claim. If and to the extent that not all of the matters have been determined e.g. the dates when there was not litigation capacity or litigation injunction, they do not render the claim for damages under section 9(1)(c) abusive or an affront to the administration justice, or such as to cause harassment or oppression to the parties to the County Court Claim. On the information available at this stage, it is a sufficient answer to the strike out application that it appears artificial and unnecessary to require that there be an appeal of the orders of the County Court Claim as a pre-requisite to the damages claim.

67. The case management issues which have been identified favouring a Part 7 claim support the submission that the claim is not abusive. Having regard to the findings thus far of the decisions of HHJ Hellman, DJ Swan and DJ Beecham, it is very cumbersome to require appeals against orders as a pre-requisite of the Part 7 claim. The essence of

the position has been established about a lack of litigation capacity and injunction capacity such that an ensuing claim for damages does not have the vices of re-litigation or inconsistent decisions, let alone an abuse or an affront to the administration of justice.

68. A question is whether it is necessary or even simply desirable for the points in time when there was a lack of litigation capacity or injunction capacity to be established by an appeal. If this were to occur by way of appeal, there are a number of significant case management issues, namely:

(i) a real possibility that there would be issues of fact and opinion to be established (as regards timing) of the kind that an appellate court may determine, but which would be more usually be the subject of live evidence in a first instance court. In addition to that concern, in the instant case, the Lord Chancellor in his defence has raised other issues going beyond timing on the basis that he was not a party to the proceedings in the County Court, and it is possible that these points will be in issue in the course of a claim for damages. An appeal in those circumstances may be too limited a prism for these issues to be determined.

(ii) there are a number of orders to be appealed. The Lord Chancellor submitted that this is not an insuperable obstacle. That is true because appeals can be conjoined. However, it is an added feature about the cumbersome nature of the appeal route in circumstances where it has already been established that at some point, proximate to the orders made by the court, the Claimant lacked litigation and injunction capacity.

(iii) if appeals proceeded, it is likely that the Landlord would have no interest in being heard because the matters are now academic to the Landlord. The Lord Chancellor would have an interest in being joined because in reality the points are germane to the damages claim, and not for any other purpose. There is an artificiality in these matters being ventilated in the context of appeals, especially in the circumstances adverted to in the third sentence of sub-paragraph (ii) immediately above.

69. It has not been sought that the passages of the defence raising the abuse of process issues be struck out, and so it is not necessary to decide this matter definitively. It suffices simply to conclude that at this stage, the information before the Court is to the effect that the section 7 claim can proceed without the dangers of re-litigation and/or an affront to the administration of justice and/risk of harassment or oppression to other parties.

70. In addition to the foregoing, the decision to strike out is discretionary. There are a number of factors which indicate as a matter of the exercise of discretion that the case should not be struck out, namely:

(i) there are sufficient nuances to indicate that the Court should not deprive the Claimant of this claim without a more scrupulous examination of the circumstances of the kind which would occur in the context of a trial.

The grounds of the application are not sufficiently clear and obvious as to indicate that the claim was inappropriate.

(ii) There was not a prompt application to strike out the claim. Although the strike out possibility was identified in the defence, the defence went into the merits of the claim and identified potential defences other than those based on abuse. There was a lapse of more than a year from service of the claim before the Lord Chancellor made the application to strike out the claim. Whilst this factor by itself is not decisive because a clear and obvious case for a strike out may not be lost by delay by itself, this is a factor which the Court is entitled to take into account in the context of the application as a whole.

(iii) There is no particular prejudice to the Lord Chancellor in proceeding in this way through a Part 7 claim without an appeal.

71. There is a further matter which requires consideration, which has some of its genesis in the judgment of Ryder LJ at first instance in *Mazhar 1*. A consideration which led to the refusal of the declaration sought was the constitutional position of the Lord Chancellor. This was to the effect that the Lord Chancellor had a number of key duties under Part I of the 2005 Act reflecting the ancient history of the role. Section 1 of the 2005 Act states that the Act does not adversely affect the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. By section 3(1), the Lord Chancellor (as well as other Ministers of the Crown) must uphold the continued independence of the judiciary. The Lord Chancellor must not seek to influence particular judicial decisions through any special access to the judiciary and must have regard to the need to defend that judicial independence: section 3(5), (6)(a). The Lord Chancellor's oath of office stipulates that the Lord Chancellor will (a) respect the rule of law; (b) defend the independence of the judiciary; and (c) discharge his duty to ensure the provision of resources for the efficient and effective support of the courts: see section 17. The submission was made that in view of the Lord Chancellor's role, it was not for him to "enter into the arena" in a claim to which he was not a party, to express a view as to whether actions of the independent judiciary were lawful or not. Parliament has set out an appellate system to determine that question. Maintenance of that constitutional separation requires that such questions are canvassed by way of appeal between the parties to the underlying proceedings.

72. I reject this argument at least in the context of a strike out application. The existence of a right to claim damages against the Lord Chancellor has as a possible consequence that the Lord Chancellor will, unless he or she wishes to capitulate, *"enter into the arena"* in order to defend the position. This may occur even if there is to be an appeal in that if damages were claimed under section 9(1)(c), the court could choose to join the Lord Chancellor as a party to the appeal in any event (CPR 19.4A(4)). It would be artificial for him to desist. It is apparent at least from the first instance decision in *Mazhar* that these considerations did not cause the Lord Chancellor to desist. Para. 9 of the judgment of Ryder LJ refers to the Lord Chancellor taking issue with procedural failings, and if there were any, that they were not gross and obvious. The issues which arise at the damages stage might be at least as contentious as the stage of whether there

was a breach of the ECHR. In any event, even in respect of the first stage, given the claim for damages which may follow the first stage, the Lord Chancellor is a person interested in the outcome of the appeal, and would be an appropriate person to be joined to it. Nothing in *Mazhar 1* supported the submission that the Lord Chancellor should not be able to defend either at the first stage or the second stage, or that his participation would or might undermine any part of his constitutional function.

73. I am satisfied in the light of the above that the claim for damages should not be struck out for the following reasons, namely:

(i) on the information before the Court on this application, there is no abuse of process in proceeding with the claim without an appeal against each or any of the orders to which the Claimant objects, particularly in view of the fact that the Court has found in broad terms that the Claimant lacked litigation capacity and injunction capacity;

(ii) on the information at this stage, there is no affront to the administration of justice or harassment or oppression to the other parties in the case for the claim for damages to be brought without a prior appeal or a judicial review;

(iii) in all the circumstances, this is not a case where it is clear and obvious that the claim is an abuse of process such as to require a strike out;

(iv) on the contrary, there are case management reasons which indicate that the sensible course is to allow the claim for damages to proceed without an appeal;

(v) in any event, a strike out is a discretionary remedy, and it is one for various reasons which ought not to be exercised, especially by reference to the factors which militate against a strike out and the absence of prejudice to anybody else in the case;

(vi) I reject the alleged constitutional reasons for striking out the claim: if they exist at all, they do not in the context of the case as a whole militate in favour of depriving the Claimant of his remedy under section 9 (if the claim is otherwise well made out).

VIII Disposal

74. It follows that the application to strike out the claim is dismissed. It remains for me to thank all Counsel for their expertise and for presenting their oral and written arguments in such a clear and concise manner.