Neutral Citation Number: [2017] EWHC 2536

Case No: FD16P00221

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2017

Before:

THE SENIOR PRESIDENT OF TRIBUNALS

- -

Between:

AAMIR MAZHAR	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**

- -
- -

Mr Pushpinder Saini QC & Mr Nick Armstrong (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Mr Sam Grodzinski QC & Miss Joanne Clement (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 24 & 25 May 2017

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Approved Judgment

Sir Ernest Ryder, Senior President:

1. This is a claim brought under sections 6, 7(1)(a), 8(1) and 9(1)(c) of the Human Rights Act 1998 ['HRA'] against the Lord Chancellor in respect of a judicial act. The act in question is an order made by a High Court judge, Mr Justice Mostyn, who was the Family Division out of hours applications judge on the late evening of Friday, 22 April 2016 ['the order']. The order was made on the application of Birmingham Community Healthcare NHS Foundation Trust ['NHS Trust']. It was an urgent, without notice, out of hours application made in respect of the claimant, Mr Aamir Mazhar.

2. The order complained of is as follows:

> "(I) It is lawful for the police and any medical professionals, as are required, to enter [address] (the property) and use reasonable and proportionate force to do so.
> (2) It is lawful for the police and any medical professionals, as are required, to remove Mr Aamir Mazhar from the property and to convey him to an ambulance.
> (3) It is lawful for the ambulance service, together with any other medical professionals and police as are required, to convey Mr Aamir Mazhar to the Queen Elizabeth Hospital, Birmingham.
> (4) It is lawful until further order for Mr Aamir Mazhar to be deprived of his liberty at the Queen Elizabeth Hospital, Birmingham for the purposes of receiving care and treatment from his arrival on 22 April 2016 and then to be conveyed to the specialist respiratory centre at Guy's Hospital, London until suitable care can be put in place for him at home, or to be transferred to an alternative specialist respiratory unit.
> (5) The matter shall be listed for urgent hearing on the first available date after 25 April 2016 (upon application to the Clerk Rules (sic)).
> (6) There be leave to serve this order without a Court seal until 16:00 on Monday 25th April 2016."

3. Clause 4 of the order was discharged by Holman J on 23 May 2016 after the order had been put into effect but the balance of the order remains in force. It has neither been appealed, nor otherwise varied or set aside.

4. Mr Mazhar's claim as originally pleaded is for a declaration that the NHS Trust and the Lord Chancellor breached his rights under articles 5, 6 and 8 of the European Convention on Human Rights ['the Convention'] and for damages against the NHS Trust for breaches of articles 5, 6 and 8 of the Convention and against the Lord Chancellor for breaches of article 5 of the Convention.

5. On 8 December 2016 Mr Mazhar compromised his claim against the NHS Trust by accepting a CPR Part 36 offer of damages in the sum of £10,000. Accordingly, that part of the claim is stayed by operation of law (see CPR 36.14). The Lord Chancellor was notified of that in writing on 14 December 2016. Mr Mazhar confirmed that in light of the settlement of his claim against the NHS Trust he no longer seeks damages against the Lord Chancellor. The remedy pursued in these proceedings is for a declaration.

6. The pleaded consequence of the order made by Mostyn J is the forcible and what is described as the highly distressing removal of Mr Mazhar from his family home at 3 am on Saturday 23 April 2016 by two police officers and the ambulance service. Mr Mazhar was and is a young man who has the capacity to make decisions for himself. It is submitted on his behalf that

there was no basis in law for the order to be made or for the actions taken in accordance with it.

7. Mr Mazhar seeks to argue that the inherent jurisdiction cannot be used to detain a person who is not of unsound mind for the purposes of article 5(1)(e) of the Convention and that a vulnerable person's alleged incapacity as a result of duress or undue influence is not a basis to make orders in that jurisdiction that are other than facilitative of the person recovering, retaining or exercising his capacity. His removal and detention were accordingly unlawful and in breach of article 5. He also seeks to argue that his article 6 rights were engaged such that the absence of any challenge by the judge to his capacity and/or the evidence of the NHS Trust and the absence of any opportunity to challenge those matters himself or though his family or representatives before the order was executed was an unfair process. He says that his article 8 right to respect for family and private life was engaged and that the order was neither necessary nor in accordance with the law.

8. The Lord Chancellor concedes that Mr Mazhar was deprived of his liberty when he was removed from his home and taken to hospital and accepts that he was not a person of unsound mind within the meaning of article 5(1)(e) at the date of the order. He does not however accept the broader proposition that the inherent jurisdiction is limited in the way suggested on behalf of Mr Mazhar and in particular that it can only be used to facilitate the re-establishment of autonomy. He argues that its use to detain and remove a person who has mental capacity to make decisions about his care (but who is a vulnerable adult) to a safe place such as a hospital is a well recognised jurisdiction which acts as a safety net to protect persons who fall outside the scope of the Mental Capacity Act 2005. He contends that use of the jurisdiction to detain is neither arbitrary nor unlawful because there are procedural safeguards ie it is a procedure prescribed by law, governed by Rules of Court, Practice Directions and Guidance. It is clearly established by case law which is sufficiently accessible and foreseeable with advice and the jurisdiction's flexibility is reasoned and justified so that, for example, where detention is permitted there are rigorous safeguards that include regular review.

9. The Lord Chancellor does not accept that there were procedural failings such that the detention was unlawful within the meaning of article 5 of the Convention or unfair at common law. He avers that in any event the threshold of 'gross and obvious irregularity' is not met. The procedural protections for anyone deprived of their liberty are the *lex specialis* of article 5(4) and provide equivalent protection to article 6 which the Lord Chancellor submits is not engaged. Any breach of article 8, which is not admitted, is justified by being in accordance with the law, necessary and proportionate.

10. As will become plain and for the reasons I set out below, I have decided not to make determinations about the breaches that Mr Mazhar alleges are the consequence of the judicial act. I have come to that conclusion because it is inappropriate for this court to determine the substantive and procedural issues that the parties describe.

11. On any basis, it is common ground that the without notice hearing before the judge was urgent because the NHS Trust's case was that there was an imminent risk to Mr Mazhar's life and welfare and Mr Mazhar was overborne by the oppressive influence of his relatives. The judge was told that Mr Mazhar breathed through a tube that required suctioning four to five times every hour. Without the skilled care that was necessary to provide suctioning Mr Mazhar would have been severely injured or would have died. The NHS Trust made the application on the basis that skilled care ceased at 2130 on Friday 22 April 2016. The order

was made almost exactly two hours later. It is part of the jurisprudence that the Lord Chancellor submits is applicable to an urgent without notice application in the inherent jurisdiction that a court in such circumstances is "not to risk the incurring of damage … which it cannot repair, but rather to prevent the damage being done": *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 18 as applied to vulnerable adults in *In re SA* [2006] 1 FLR 867 at [103]. Whether that is what was done in this case and, if so, whether that is right must be questions for another place.

12. There are important procedural issues which need to be addressed in setting the context of this claim. Before I do so, it is important to focus on Mr Mazhar. He has given oral evidence in these proceedings and facilities were made available to convert a family court in the Royal Courts of Justice into a medically appropriate space for him, his family, professional carers and healthcare support. He participated in the first day of the proceedings. He gave oral evidence by using family intermediaries in order that all of his speech might be understood. No objection was taken to this course, indeed it was welcomed by everyone. Where comprehension became difficult, and it did, the question and the answer as understood by the intermediary were put in to writing to enable Mr Mazhar to confirm or deny the record of his evidence. Mr Mazhar was able to communicate his agreement or disagreement and the essence of what he wanted to say.

13. This court has heard no oral evidence other than that of Mr Mazhar and his mother. No other witnesses were tendered to give evidence. That is not surprising given the limited nature of the issues that remain and the fact that the disputed issues of fact surrounding the application have been overtaken by the settlement of the claim against the NHS Trust who do not formally take any part in the proceedings that remain between Mr Mazhar and the Lord Chancellor. As a consequence of case management that I undertook on 11 May 2017, there is a statement of agreed facts. No party seeks to pursue findings of fact that go beyond the agreed facts in circumstances where the NHS Trust would not have the opportunity to protect their interests.

14. The order was made on a specific evidential basis which was recorded in the recitals to the order. It is important to acknowledge that this *prima facie* evidential basis was the evidence, at that stage unchallenged because the application was made without notice, which the judge had available to him and which he decided was sufficient to lead to the order that he made. It is part of Mr Mazhar's claim against the Lord Chancellor that the judge should not have accepted the evidence without an opportunity being given at that stage for challenge and, in any event, that it was insufficient in law to justify the order made. It is also important to acknowledge that some of the evidence provided to the judge was wrong and may have been untruthful. The difference between the recorded *prima facie* evidence and the agreed facts is stark. The claim against the NHS Trust which deals with those issues has been settled and it is not for this court to give judgment on the failings of the NHS Trust. Some of those failings are however apparent in the differences revealed between the recitals and the agreed facts. The implications are very worrying indeed.

15. There were four recitals and a preamble in the following terms:
    a. The application was made under the inherent jurisdiction of the High Court;
    b. The application was made by counsel instructed by the NHS Trust;
    c. The judge read a witness statement made by an employee of the NHS Trust;
    d. The court was informed in that witness statement that:
        i. Mr Mazhar resides at home with his mother where he receives care from specialist carers trained in providing tracheostomy care to ensure that his

ventilator continues to function safely including suctioning 4 to 5 times every hour;

ii. Mr Mazhar's mother has refused to allow carers to continue to provide such care and has otherwise behaved in such a way as to cause the care providers to refuse to continue to provide such care;

iii. The NHS Trust has been unable to secure alternative care at home at such notice despite taking proper steps to do so;

iv. Mr Mazhar told a senior nurse from the NHS Trust that he was allowed to stay at home while also saying that he needed care and treatment but not appearing to understand that he could not receive such care and treatment at home and that without it he would be at serious risk of harm or even death; and

v. Mr Mazhar's mother has been repeatedly asked to agree to Mr Mazhar being admitted to hospital but has refused such requests stating that she has been trained to provide specialist care when she has not received any such training.

16. The agreed background facts on which the claim is based are set out in full in an annex to this judgment. Without prejudice to the full context that the agreed facts provide, I extract the following facts so that the narrative of this judgment can be understood:

a. Mr Mazhar is a young man (26 at the time of the order) who suffers from Duchene's Muscular Dystrophy. He has a tracheostomy and is ventilated. He requires 24 hour care. He has mental capacity in all material respects including specifically with regard to decisions about his care. He is not a person of 'unsound mind' for the purpose of article 5(1)(e) of the Convention.

b. At the relevant time, during April 2016, the claimant's care was provided in his home by carers working on behalf of the NHS Trust. His mother and sisters, with whom he lived, had also been given training in caring for him.

c. The NHS Trust was unable to provide carers over the weekend of 23 and 24 April 2016. From 2130 on Friday 22 April, no nurses were available.

d. In the absence of an agreement that would have made appropriate provision for Mr Mazhar's care, and at around 2130, the NHS Trust made an urgent, without notice, out of hours, telephone application to the High Court for authority to remove Mr Mazhar from his home and transfer him to hospital for treatment, thereby depriving him of his liberty.

e. The NHS Trust relied upon a short written statement and a draft order as their application materials. The terms of the statement are repeated in the annex to this judgment. It was made by an employee of the trust who opined that without care the claimant could suffer injury or death. It stated that the claimant's mother was saying that she could provide care and was trained to do so but that was not the case. The statement recited the opinion of another of the trust's employees to the effect that the number of family members around Mr Mazhar was oppressive; the stated implication drawn from that opinion being that the employee could not say that Mr Mazhar was not influenced by their views which were forcefully expressed.

f. The Lord Chancellor acknowledges that there is evidence that Mr Mazhar's mother and sisters had received training to care for him at home and were capable and willing to do so. This was not the evidence put before Mostyn J.

g. At around 2327 hours, Mostyn J made the order. The order recorded the application as being made under the inherent jurisdiction of the High Court. It authorised the use of reasonable and proportionate force by police and medical professionals to

enter Mr Mazhar's home and take him by ambulance to hospital. It authorised his deprivation of liberty while there. Such deprivation was declared to be lawful until suitable care could be put in place and until any further order.

h. In the early hours of the morning, Mr Mazhar was woken by two police officers and three paramedics. He was taken to the Queen Elizabeth Hospital, Birmingham. On the Sunday he was transferred to Guy's and St Thomas' Hospital in London, and then, on the Monday, to the Lane Fox Respiratory Centre at East Surrey Hospital.

i. Mr Mazhar was deprived of his liberty. The events surrounding that deprivation caused him distress and he reports feeling undignified, worthless, irrelevant and frightened. He experienced pain, discomfort and stress and says that he was in shock, had seizures so that he became incontinent of urine, cried and was unable to speak properly for two weeks. There is an extract of Mr Mazhar's description of the effect the incident had on him in his own words at Annex A.

17. The following procedural timetable can be discerned from the documents that the court has seen:
    a. The solicitor for the NHS Trust was engaged at 1630 on 22 April;
    b. Counsel for the NHS Trust was instructed at 1800;
    c. The first contact with the court's duty officer was made by telephone at 2130;
    d. The materials provided by the Trust were received by the duty officer shortly after 2239 and the judge was standing by at 2244;
    e. The judge received the written materials from the Trust via the duty officer between 2255 and 2300;
    f. The judge did not hear oral submissions;
    g. The judge made the order at 2327;
    h. The order was emailed by the duty officer to counsel for the NHS Trust at 2340;
    i. In accordance with the undertaking given on behalf of the NHS Trust, an application was lodged by 4 pm on Monday 25 April 2016.

18. After the order was made, the proceedings continued but not in the way that Mostyn J had envisaged. Paragraph 5 of the order provided for an urgent return date ie a further *inter partes* hearing on the first available date after 25 April 2016 on application to the Clerk of the Rules (who administers the lists in the Family Division of the High Court). Neither the NHS Trust nor Mr Mazhar made such an application until 9 May 2016.

19. It was Mr Mazhar's solicitor who made the application for a further hearing on 9 May 2016. That was listed to be heard by Holman J on 23 May 2016. Mr Mazhar's counsel indicated in his position statement an intention to seek damages against the NHS Trust. At the hearing before Holman J, Mr Mazhar consented to the continuation of his treatment at the Lane Fox Respiratory Centre with the consequence that the judge discharged the paragraph of Mostyn J's order that authorised Mr Mazhar's deprivation of liberty.

20. On 13 June 2016 Keehan J ordered that Mr Mazhar's claim under the HRA be determined within the existing proceedings. On 28 June 2016 Keehan J directed that the claim be treated as if brought under part 7 of the Civil Procedure Rules 1998 ['CPR'] with dispensation of the need to file a new claim form and that the Lord Chancellor be joined as a party.

21. On 22 June 2016 the Lord Chancellor stated in correspondence that he would not, as matters then stood, seek to rely on judicial immunity other than that provided for in section 9(3) HRA. That position was confirmed in a recital to the order of Keehan J made on 28 June 2016. The hearing of the claim had originally been set to commence on 15 December 2016.

It was twice adjourned on account of the Lord Chancellor's desire to rely upon additional submissions. The second adjournment was agreed after the Lord Chancellor sought to rely upon a broad defence of judicial immunity dropping his prior concession to the contrary.

22. On 30 March 2017 the President of the Family Division allocated the proceedings to the Senior President of Tribunals, sitting as a judge of the Division, pursuant to a request made under section 9 of the Senior Courts Act 1981. A case management conference was heard on 11 May 2017 and the full hearing took place on 24 and 25 May 2017.

23. Although Mr Mazhar's claim is made in the family proceedings that relate to him which are governed by the Family Procedure Rules 2010 ['FPR'], it is common ground that the effect of the case management directions made by Keehan J have caused the claim against the Lord Chancellor to be governed by the CPR and in particular rule 7.11.

24. The claim could have been pursued under the FPR and notice would then have been given to the Crown in a similar way (see FPR rule 29.5). Practice directions 29A and B of the FPR make provision for the joinder of the Crown and the hearing of a claim in the High Court by a judge of the High Court or in the Family Court by a judge of High Court level.

25. It is common ground that there is no rule that a claim in respect of a judicial act must be brought in the Queen's Bench Division of the High Court and such claims are not assigned to any particular Division. A HRA claim in respect of a judicial act in family proceedings does not fall within the description of family proceedings to which the FPR apply (see section 61 and schedule 1 of the Senior Courts Act 1981 for proceedings assigned under section 75 of the Courts Act 2003 to which the FPR apply by FPR rule 2.1). If Mr Mazhar's claim is a species of claim arising out of family proceedings that is not assigned, the consequence is that there is no rule that prevents the claim being heard as a CPR part 7 claim in the Family Division. If contrary to the parties' agreement that is wrong, then the power of transfer exists in this court and I would, if necessary, have transferred the claim to the Queen's Bench Division under section 65 of the Senior Courts Act 1981 and heard the claim as a judge of that Division.

26. I am indebted to Mr Saini QC who with Mr Armstrong has presented the case for Mr Mazhar, and Mr Grodzinski QC who with Miss Clement has presented the case for the Lord Chancellor. The quality of their oral and written submissions and the preparation by their specialist teams of solicitors has been invaluable.

The statutory framework:

27. The following provisions of the HRA are relevant:

> "**6 Acts of public authorities.**
> 6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
> (2) […]
> (3) In this section "public authority" includes-
> (a) a court or tribunal …
>
> **7 Proceedings.**
> 7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; …

[…]

(9) In this section "rules' means-

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court, …

[…]

8 Judicial remedies.

8(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

[…]

9 Judicial acts.

9(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 (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(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.

[…]"

28. Section 6(1) HRA makes it unlawful for a public authority to act in a way that is incompatible with a Convention right. By section 6(3) a public authority includes a court. Section 7 allows proceedings to be brought for the unlawful act before an appropriate court or tribunal. An appropriate court or tribunal is by section 7(2) such court or tribunal as may be determined in accordance with rules. There are no rules in England other than rules of court although it is worth noting that in Scotland rules were made that provide clarity and, it might be said, not only reflect the supervisory jurisdiction of the Court of Session but also maintain the priority of appeals and judicial review as against collateral claims. Rule 4(1) of the Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000, SSI 2000/301 provides:

> "The Court of Session is prescribed for the purposes of paragraph (c) of subsection (1) of section 9 of the Act in cases where proceedings in respect of the judicial act in

question could not, at any time since the date of that act, have competently been brought under paragraph (a) or (b) of that subsection"

29. Section 9(1) limits claims made under section 7(1)(a) which Mr Mazhar accepts is the subsection which governs his claim. Accordingly, the claim may only be brought in a forum prescribed by rules of court. Mr Saini submits that the claim is brought as a part 7 CPR claim and CPR 7.11 provides that forum ie the court that is competent to entertain the claim. CPR 7.11 provides:

> (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."

30. Mr Saini submits that there was a judicial act which caused the breaches complained of, the High Court is competent to hear proceedings concerning those breaches and in accordance with section 8(1) the court may grant such relief or remedy or make such order as it considers just and reasonable. On his analysis of the legislation, the fact that Mr Mazhar no longer pursues his remedy in damages for the article 5(5) breach does not preclude him from obtaining declaratory relief.

31. Mr Grodzinski submits that CPR 7.11 does not satisfy section 9(1)(c) of the Act ie it does not create a jurisdiction or a competent court or tribunal in which a claim about a judicial act can be pursued with the consequence that this court has no jurisdiction to entertain a claim for declaratory relief or damages arising out of a breach of the Convention either as a matter of statutory construction and/or by operation of the principle of judicial immunity. He submits that what is created is a limited right to damages for an article 5(5) breach as a consequence of section 9(3) which cannot be pursued in the High Court in respect of a judicial act of a judge of the High Court. Further, there is no basis upon which the Lord Chancellor can be vicariously liable for a judicial act. In the alternative he submits that whether or not a claim for a judicial act can be pursued to this court in respect of an inferior tribunal, where the act is an order of a superior court, in this case the High Court, it is an abuse of process for a judge of co-ordinate jurisdiction to make a determination about the lawfulness of the judicial act of a colleague.

32. It is common ground that if the order of Mostyn J had been appealed to the Court of Appeal, the jurisdiction exists in that court to consider any judicial act that might be alleged to be unlawful by reason of a breach of the Convention. Likewise, where an order is made by an inferior court or tribunal, either or both of the appropriate appellate forum and judicial review may be available to consider the alleged Convention breach. The problem here is that the remedy Mr Saini pursues is not pursued by way of an appeal and judicial review is not available as against an order made in the High Court. In fairness Mr Saini does not suggest that it is and section 9(2) preserves the rule of law which prevents a superior court of record from being the subject of judicial review. More pertinently, the High Court is a court of unlimited jurisdiction which cannot be subject to review.

33. In *Re Racal Communications (sub nom In re A Company)* [1981] AC 374 at 384F Lord Diplock held that:

> "Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of an appeal to an appellate court."

This claim is pursued in the High Court ie before a judge of co-ordinate jurisdiction in accordance with sections 7(1)(a), 8(1) and 9(1)(c) HRA and CPR rule 7.11. Section 9(3) specifically limits any damages claim that may be made against the Crown in respect of a judicial act to an article 5(5) breach and that claim is not pursued.

34. Accordingly, other than on an appeal, the only basis for granting a declaration relating to any Convention breach that arises out of the judicial act is said to be the wording of the HRA and CPR rule 7.11. The first question is accordingly one of statutory construction. Does section 7 HRA read in the context of sections 8 and 9 and CPR 7.11 create a power to grant a declaration in respect of a judicial act that breaches the Convention?

Statutory Construction:

35. Perhaps Mr Saini's best point is that the remedy frequently awarded by the Strasbourg court is a finding that there has been a breach. That, he submits, is all that is often necessary to obtain just satisfaction rather than financial compensation. He equates such a finding with a declaration in this jurisdiction. He submits that this was tacitly recognised in *R (Faulkner) v Secretary of State for Justice* [2013] 2 AC 254 at [65] to [66] and that domestic practice has followed Strasbourg (see, for example, Stanley Burnton J in *R (KB) v South London Mental Health Tribunal* [2003] EWHC 193 (Admin), [2004] QB 936 at [26]).

36. It is certainly the case that there is a power in the High Court to make a declaration whether or not any other remedy is claimed. The jurisdiction is now statutory (see, for example sections 19 and 31 of the Senior Courts Act 1981) and CPR rule 40.20. That the general jurisdiction exists does not answer the question which arises in this claim as to whether a declaration can be made against the Crown in respect of a judicial act.

37. It is submitted that the Court of Appeal accepted in *Webster v Lord Chancellor* [2016] QB 676 that the CPR and specifically CPR 7.11 provide the forum prescribed by rules for the purposes of section 9(1)(c). That acceptance however was based not on argument from first principles but on a concession from the Lord Chancellor: see *Webster* at [4] and [22]. The concession is withdrawn for the purposes of this claim with the consequence that *Webster* is not sufficient authority for the proposition: the issue falls to be considered from first principles. In any event, the broad *ratio* of *Webster* supports the Lord Chancellor's submission that all that the HRA provides is an enforceable right to compensation for an article 5 breach not other claims for damages or declarations, for example, for an article 6 breach (see Sir Brian Leveson P at [41] and [37] to [39]).

38. The doctrine of the separation of powers and the principle of the independence of the judiciary and its corollary, judicial immunity from suit, are not mere tokens or slogans. They are constitutional principles out of which common law protections have been derived. The principles protecting fundamental rights described by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131 must equally apply to 'principles of constitutionality':

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because it is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of

the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

39. There are no express words in the HRA which do other than create a limited jurisdiction in the court to award damages for an article 5(5) breach. There are no express words that create a power in the court to grant a declaration against the Crown in respect of a judicial act. Section 8 HRA is permissive but not creative in the sense that it might empower the court to do something that it could not previously do. To derive from section 8 a power to make a declaration would require an exercise in construction by necessary implication. Necessary implication is a strict test based on express language and logic not interpretation. As Lord Hoffmann concluded in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax & Anor* [2002] UKHL 2, [2003] 1 AC 563 at [45]:

> "It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely on legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

In my judgment there is nothing sufficient in the language of the HRA that permits such an implication nor is the statutory purpose frustrated by not implying the power.

40. Given the conclusion to which I have come about the statutory construction of the HRA, the wording of CPR 7.11 cannot go further than the primary legislation. In any event, the rule is, in my judgment, far too vague to create a power in the High Court to grant a declaration in these circumstances. The purpose of rule 7.11(1) is to draw a contrast with rule 7.11(2) which permits claims other than those relating to a judicial act to be brought in any court. Accordingly, the power that is created by the statutory scheme is the power to award damages for breach of article 5(5). For the reasons which follow, I have also come to the conclusion that a free standing power to grant a declaration outside of the appellate or judicial review context runs the risk of a Minister being able to agree with a claimant in collateral proceedings that a judge is wrong without having to have recourse to an appeal or a review of the substantive proceedings by an appropriate court or tribunal.

41. For the avoidance of doubt, I am also of the view that the equivalent wording in the FPR and their practice directions fails to create a power in the Family Division of the High Court or the Family Court to grant a declaration that a judicial act of a judge of the High Court is a breach of the Convention.

Judicial Immunity:

42. Ancient justifications for judicial immunity such as the sanctity of the King's records and the origins of our appellate system precede by three centuries the relatively modern concept which is a component of judicial independence as developed from the early seventeenth century. I have not had the benefit of submissions on the detail of that history but it may be important to acknowledge that the principle of immunity is not monochromatic: it has been incrementally developed and there are important nuances which reflect the differences in judicial functions in different jurisdictions. There are differences in the protections that are afforded to judges of a superior court of record from inferior courts and tribunals. The existence of the principle of judicial immunity is not in issue in these proceedings.

43. Lord Denning MR described the principle of judicial immunity in *Sirros v Moore* [1975] QB 118 at 132D:

> "Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the excess of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred or malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to the Court of Appeal or to apply for *habeas corpus* or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action in damages. The reason is not because the judge has any privilege to make mistakes or do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well state by Lord Tenterden CJ in *Garnett v Ferrand* (1867) 6 B&C 611 625:
>
> > "This freedom from action or question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be"

44. I need not set out in detail the history referred to by Lord Denning and Buckley LJ in *Sirros v Moore* but a careful reading of the authorities which are referred to by them amply justifies their conclusion that there is no record of a judge of a superior court being held personally liable for an act done in the exercise of his judicial office (per Buckley LJ at 146D). Mr Grodzinski submits that the principle and the public policy rationale remain good law. Mr Saini submits that whether it is good or not is not to the point, the HRA has provided remedies for Convention breach including but not exclusively limited to a remedy in damages arising out of an article 5(5) breach which the UK is required to make available and which thereby avoid the principle of judicial immunity. The article 5(5) right that the UK recognises is as follows:

> "Everyone who has been the victim of arrest or detention in contravention of this Article shall have an enforceable right to compensation"

45. The modern justification for the principle of judicial immunity is one of public policy. As recently as in 1985 Lord Bridge set out the principle underlying the rule in *Re McC (a minor)* [1985] AC 528 at 540:

> "The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of the party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the proper exercise of their jurisdiction"

46. The *dicta* in *Re McC* reflects the principle described by Lord Denning in *Sirros v Moore* but also describes the additional protection that a judge of the senior courts has in relation to a judicial act undertaken with malice or in bad faith. It forms no part of these proceedings that Mostyn J acted either maliciously or in bad faith. The consequence is that I have not been addressed on the authorities that deal with these circumstances, save to acknowledge that the authorities exist.

47. Mr Grodzinski submits that there is nothing in the HRA which expressly abolishes the long standing constitutional principle of judicial immunity and that explicit words would be required to have that effect. Such case law as there has been since the Act came into force supports that submission. In *FM v Singer* [2004] EWHC 793 (QB) at [37] Newman J held that "section 9 … confirms the common law". In *Hinds v Liverpool County Court* [2008] EWHC 665 (QB) at [18] Akenhead J held that "the immunity granted by the common law to judges is preserved in effect, at the very least with regard to acts done within the jurisdiction". In *Forrester's Ketley v Brent* [2012] EWCA Civ 324 at [17] to [19] Lewison LJ (with whom Longmore LJ agreed) held that High Court judges are immune from suit when acting judicially:

> "[19]. I do not consider that the Human Rights Act or CPR 7.11 alters that fundamental principle, which is in part preserved by section 9(2). In my judgment, therefore, the only way in which Mr Brent can complain about alleged violation of his human rights in the course of proceedings in the High Court is by way of appeal and that, for the reasons I have given, is not a route open to him. But, even if I am wrong about that, the third problem is that success in an action under section 7 of the Human Rights Act will not result in the setting aside of the order under appeal, because one High Court judge does not have the power to set aside an order of another High Court judge. So once again, the only way of achieving the result that Mr Brent desires is by way of appeal."

48. The *ratio* of the decisions in *Forrester's Ketley* and *Sirros v Moore* are binding on this court. In any event, I do not understand the central hypothesis that the principle still exists to be in dispute in this case. The question is whether the HRA has avoided it by carving out a jurisdiction that is an exception to it in which case the principle of judicial immunity has no part to play in the consideration of a claim made under the HRA or, in the alternative, whether a free standing jurisdiction to award damages has been created for a judicial act that involves an article 5(5) breach, in which case judicial immunity continues to apply save to the extent that the rules prescribe how the jurisdiction is to be exercised when article 5(5) damages are claimed.

49. There are no express words in the HRA abrogating or limiting the principle of judicial immunity. To accept that a constitutional principle and protection can be limited without

express words would be a dangerous development unless reliance is placed on a clear principle grounded in authority. No such principle or authority is relied on in this case.

50. Furthermore, the practical effect of what is suggested is dangerous as it may fundamentally undermine the principle of judicial independence. If one exposes Mr Saini's hypothesis to analysis, then the lack of application of the principle of judicial immunity would permit a Minister as a member of the Executive, in this case the Lord Chancellor, to disagree with a decision of a judge of the High Court and settle a collateral claim arising out of and subsequent to an order made by the judge simply because the Lord Chancellor and the claimant agree that the judge was wrong. Mr Saini goes further: In the absence of a damages claim he pursues a claim for a declaration. His submission taken to its logical end point would involve a Minister being able to agree with a litigant that a judge had made an order unlawfully without that issue ever having to be appealed.

51. The Lord Chancellor explicitly acknowledges that this possibility is inimical in principle to the constitutional concepts of separation of powers and the independence of the judiciary. He wants no part of it.

52. Strictly, there is a rule of practice though not of law that the court does not grant declarations without trial including by consent (see, for example *Wallersteiner v Moir* [1974] 1 WLR 991 CA and *Animatrix Ltd v O'Kelly* [2008] EWCA Civ 1415 unrep). A declaration is a judicial act that requires the exercise of discretion and hence scrutiny by the court. Whether the rule of practice is sufficient to prevent the abuse identified above is moot given that it is always open to parties to agree a basis for an order that falls short of a formal declaration and which might arguably achieve the same effect.

53. Mr Grodzinski argues that section 9 HRA both preserves the common law principle of judicial immunity and gives effect to the UK's obligations under article 5(5) of the Convention. If that is right then the lack of express words to abrogate the protection of immunity will mean that the decision of a senior court cannot be impugned by a judge of lower or co-ordinate jurisdiction and that the HRA and the CPR have not created a mechanism other than by appeal within which the alleged breach by a judge of the High Court can be brought and compensated for.

54. On its face all that section 9 appears to contemplate is an award of damages for the breach of article 5(5) by a judicial act. It does not provide for any other remedy including a declaration. The section provides for the remedy to be obtained against the Crown not the judge concerned as long as the relevant Minister for the court concerned (in this case the Lord Chancellor) is joined as a party to the proceedings.

55. Mr Grodzinski accordingly submits that a declaration is not available in respect of a judicial act that breaches the Convention. Even on Mr Saini's argument, a remedy for a judicial act that breaches any other article of the Convention cannot be inferred as otherwise the constitutional principle would be overriden by implication. The logical consequence is that judicial immunity is preserved but there is an enforceable right to compensation for the victim of a breach of article 5(5) even where a judge has acted in good faith.

56. That preserves the long standing view that just as actions for declaratory relief are not maintainable against quasi-judicial bodies such as a board of visitors then *a fortiori* they should not be available against judges. In *O'Reilly v Mackman* [1982] 3 WLR 604 (affirmed in the House of Lords at [1983] 2 AC 237), Lord Denning MR in denying that the relief sought

was available equated the judicial function of a board of visitors with that of justices of the peace and held at 253C:

> "…I see no difference between an action for damages and an action for a declaration. If a prisoner or litigant is not allowed to sue a justice of the peace for damages, neither should he be allowed to sue him for a declaration. Have you ever heard of an action against a magistrate asking for a declaration that he was biased? Or was guilty of any other kind of conduct? I have not. Nor has anyone else. I am quite sure that no such action lies."

57. If I had come to the conclusion that there was ambiguity in the relevant provisions, and I have not, or if I am wrong about that, then recourse may be had in accordance with the principle in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 to the Hansard record. At HL Deb Vol 585 c.388-390, 29 Jan 1998, at the Report stage in the House of Lords when the provisions that became section 9 were introduced, Lord Irvine of Lairg LC described the amendments that are now the substance of section 9 as having two purposes: giving a right to compensation for breaches of article 5 and preserving judicial immunity generally:

> "May I explain the overall purpose and the detailed provisions of this amendment, because they are of some importance. It has two purposes. The first is to provide an enforceable right to compensation for breaches of Article 5 by judicial acts. The second is to preserve judicial immunity generally for judicial acts undertaken by judges, magistrates, tribunal members and court staff performing judicial functions or acting on behalf of the judge or on the instructions of the judge.
>
> […]
>
> Subsection (3) has two purposes. It restates the current position under the common law and statutory rules that the Crown is not liable in respect of judicial acts and that judges and magistrates acting within their jurisdiction, or outside their jurisdiction if doing so in good faith, are immune from proceedings for damages. But it also makes provision that damages may be awarded to compensate a person to the extent required by Article 5(5) of the Convention in respect of a judicial act of a court. "

58. During the House of Commons Committee stage the Home Secretary made clear that the only substantive remedy that was intended to be that provided by the HRA was through section 8 (HC Deb Vol 312 c. 979, 20 May 1998), Lord Irvine having previously said during the House of Lords Committee stage (HL Deb Vol 583 c.785, 24 November 1997) that:

> "the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights and remedies."

59. The rights and remedies available at common law when the HRA came into force precluded the grant of a declaration against a judge and were governed by the principle of judicial immunity. For the reasons given by Mr Grodzinski on behalf of the Lord Chancellor I have come to the conclusion that the HRA and the CPR do not limit, abrogate or carve out an exception to judicial immunity in respect of HRA claims nor by section 8 do they create a new remedy save in respect of damages for an article 5(5) breach. To do so, express words would have to have been used. They were not and accordingly, the principles previously

described continue to have full effect. What the statutory scheme does is to create a free standing remedy in limited circumstances which has to be pursued before a competent court. For inferior courts and tribunals the remedy is available by exercising a right of appeal, judicial review (where applicable) or a claim to a judge of the High Court in accordance with CPR rule 7.11 or the FPR. For senior courts and for reasons which I shall explain, the third option cannot have effect and the damages claim has to be brought in appeal proceedings in the Court of Appeal.

60. If I am wrong about the principle retaining its full force, then section 9(3) only modifies the principle to the limited extent of giving effect to article 5(5) of the Convention which is limited to a right to damages against the Crown including where a judge acts in good faith. That is not what is pursued in this claim. In this jurisdiction, a declaration cannot be granted against a judge personally and there is no provision in the HRA for it to be granted against the Crown.

61. It is not the case that the principle of judicial immunity has remained absolute or inviolate everywhere. There are common law jurisdictions that have limited its effect, for example, to allow the affirmation of a private law right/remedy against the Attorney General for malicious prosecution as distinct from the bar to the vindication of a public wrong against the Crown (*Nelles v Regina in right of Ontario* [1989] 2 SCR 170 per Lamer J in the Supreme Court of Canada) and the approval of the practice of granting equitable relief (including declaratory relief) by federal courts against state judicial office holders in *Pulliam, Magistrate for the County of Culpeper, Virginia v Allen et al* 466 US 522 (1984) in the Supreme Court of the United States. There is also arguably persuasive authority from the Privy Council in the majority opinions of the Board in *Maharaj v A-G of Trinidad and Tobago (No 2)* [1979] AC.

62. In that case the claimant sought to obtain compensation as redress for a puisne judge's failure to inform him of the specific nature of the contempt of court with which he was charged. The failure was said to be a contravention of a constitutional right and to be without prejudice to the claimant's right of appeal. Although the claim and the remedy are fact sensitive and the context in which they were decided was Trinidad and Tobago's written constitution, which adds an important distinguishing feature to an argument that on any basis is one of constitutional principle, Lord Diplock identified in principle that the right to redress would be from the State which is distinct from any liability in the judge whether that would be barred by the principle of immunity or not.

63. Although no reliance was placed before this court on these comparative legal solutions or the decision in *Maharaj*, it would be right to acknowledge that the *ratio* in *Maharaj* is the logical end point of Mr Saini's submissions. It would be a free standing right to a remedy that has been created by the HRA and presumably there would be the same restrictions on its use described by Lord Diplock at 399F:

> "The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution. In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of

> the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6(1) with a further right of appeal to the Court of Appeal under section 6(4). The High Court, however, has ample powers, both inherent and under section 6(2), to prevent its process being misused in this way; for example, it could stay proceedings under section 6(1) until an appeal against the judgment or order complained of had been disposed of."

64. There is also the possibility of a coherent argument being accepted in due course based upon the development of domestic remedies to enforce EU rights. None of that, however, assists Mr Saini in avoiding the case law of this jurisdiction which has not yet developed as far as that described above, nor has it yet disapproved of the principles relatively recently re-described in *Forrester's Ketley* and *O'Reilly v Mackman.* Given that Mr Saini is able to submit that judicial immunity should not bar a claim of this kind because the mischief it protects against is the protection of judges from liability, it remains to be seen whether the Supreme Court will follow *Maharaj* and/or take a similar line to that taken by the House of Lords in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615.

Vicarious Liability:

65. Given the conclusions to which I have come, I can take this aspect of the case more shortly. The general principle at common law is that Ministers of the Crown are not vicariously liable for judicial acts. It would infringe the doctrine of the separation of powers and the principle of the independence of the judiciary which the Lord Chancellor has a statutory duty to uphold (see section 3(1) of the Constitutional Reform Act 2005). There is also a general principle in the law of tort that the Crown is not vicariously liable for the acts of the judiciary (see, for example: section 2(5) of the Crown Proceedings Act 1947). This can only be dislodged by clear words. Section 9(3) only satisfies this requirement in respect of a free standing damages claim for an article 5(5) breach. Even if the judge were to be personally liable for a judicial act, which he is not, the Lord Chancellor would not be vicariously liable for that act. A *Maharaj* claim would not be a species of vicarious liability, it would be a new public law tort.

66. The consequence is that a declaration cannot be obtained against the Lord Chancellor. He has neither acted unlawfully in the sense that he did not make the order nor is he vicariously liable for the judicial act of making the order. Section 9(4) makes provision for joinder of the relevant Minister only in respect of a damages claim for breach of article 5(5), not for any other purpose.

Abuse of Process:

67. Mr Grodzinski raises a third barrier to the claim for a declaration which is that it is an abuse of process to challenge an order of one judge sitting in the High Court before another judge sitting in the same or a co-ordinate jurisdiction. He submits that the process is 'unprecedented' and could never have been intended by Parliament. He prays in aid his submissions on statutory construction ie the plain wording of the HRA but also submits that

the purpose of section 9(1)(c) is to provide a subsidiary route to an award of damages by the civil courts where that could not be determined on an appeal or a claim for judicial review.

68. That approach is made express in the Scottish rules. It is arguably not a necessary implication of the English rules and I shall therefore deal with it.

69. Mr Grodzinski again seeks to obtain support from Hansard. The subsidiarity relied upon is, in my judgment, plain from the language of the legislation and from the rationale that can be derived from the authorities to which I have referred, but if I am wrong then it is appropriate to consider the Hansard record which confirms my view. In the same debate on the report stage in the House of Lords (see ante) on the same day at col 389, Lord Irvine said this:

> "Subsections (1) and (2) of the clause require that proceedings under section 7(1)(a) in respect of a judicial act may be brought in three ways: by exercising a right of appeal; on an application for judicial review (or in Scotland a petition for judicial review) or in such other forum as may be prescribed by rules.
>
> A finding that an inferior court has acted unlawfully will most commonly be reached in England and Wales by way of an appeal to the Court of Appeal or the Divisional Court, or by an application by way of judicial review to the High Court. The higher court will then be able to reach a decision of unlawfulness and make an award of damages. Clause 8(2) will enable the courts, which already have power to award damages, to do so in proceedings under this Bill. However, in criminal proceedings in Scotland, if the High Court on appeal finds that some act of an inferior court has contravened the complainant's rights under Article 5(5) it would have no power to award damages. It would therefore be necessary for the amount of damages to be determined by the civil courts. The clause therefore enables proceedings to be brought in such other forum as may be prescribed by rules. The Court of Appeal, in England, as a single entity, has the power to award damages. Rules will provide whether the Criminal or Civil Division should hear compensation claims…"

70. In *O'Reilly v Mackman*, supra, Lord Denning made clear that it would be an abuse of process for a claimant to avoid a procedure of the court: here an *inter partes* hearing in the Family Division and an appeal to the Court of Appeal, to avoid the safeguards of that process (at 254F-H). The same proposition is set out by Lord Nicholas of Birkenhead in *Autologic plc v IRC* [2006] 1 AC 118 at [13] to [15]. Given that Mr Mazhar had a clear and firm view that his Convention rights had been breached by the order he could have asked for an *inter partes* hearing on the facts, for the discharge of the without notice order and/or for permission to appeal. It would have been good practice to seek to discharge or set aside the without notice order in its entirety on the return date. Disputed issues of fact could then have been resolved given that the evidence relied upon by the NHS Trust had not been tested. If the application to discharge or set aside had been refused there could have been an appeal. The issue would then have been appropriately raised by him within the original proceedings and on appeal. All of that was contemplated by the provisions of the order made by Mostyn J.

71. It is no answer to the statutory construction point as regards section 9(1)(c) to say that there would never have been an appeal to the Court of Appeal on the facts of this case because good practice dictated first that a return date *inter partes* should be considered and second that the deprivation of liberty clause was discharged by consent. First, not all of the clauses that caused the Convention breaches were discharged and, second, and in any event, in

respect of all of the clauses, it is not the function of the High Court judge sitting on a return date to adjudicate on the lawfulness of what another High Court judge has ordered on a without notice hearing. The function is to make a determination on notice to both parties, if asked and in so far as it is necessary to do so. There is a recurrent theme in the authorities to which I have referred that one High Court judge cannot adjudicate upon the lawfulness of another's determination. That follows from the fact that the High Court's supervisory jurisdiction is only susceptible of appeal.

72. In any event, it is plain that the inability to obtain elsewhere a remedy prescribed by Parliament in respect of the judicial act of a judge of the High Court (i.e. For the alleged article 5(5) breach) must open the door to permission being granted to bring an appeal about that act to the Court of Appeal where the jurisdiction undoubtedly exists to provide the remedy (see, for example section 15(3) of the Senior Courts Act 1981). To use the language of CPR rule 52.6(1)(b): 'there is some other compelling reason for the appeal to be heard' if the remedy is only available in that court.

73. Mr Grodzinski submits that to use section 9(1)(c) in that context without having pursued an appeal, is an abuse of process. In the alternative, he submits that it is wrong to use section 9(1)(c) where the appellate route remains available ie there is a priority of process in the language of the legislation. He also submits that in any event in principle it is an abuse to pursue what is in effect a substitute for a personal claim against a judge which could have been brought by statutory appeal. I agree in all three respects.

74. Unsurprisingly, the parties drew the court's attention to the decision of the Court of Appeal in *LL v The Lord Chancellor* [2017] EWCA Civ 237. That was an appeal against a decision of Foskett J dismissing a claim for damages in the High Court in collateral proceedings arising out of an alleged article 5 breach occasioned by the judicial act of another High Court judge in separate proceedings in the Family Division of the High Court. It concerned a committal order that was overturned within the family proceedings by a different constitution of the Court of Appeal that was not asked to consider a damages claim. It is apparent that Foskett J dismissed the claim on the merits and that the Court of Appeal disagreed with him.

75. Neither the first instance judge nor the Court of Appeal had addressed to them the issues of statutory construction, judicial immunity and abuse of process which have been the substance of the submissions before this court. It is of course impossible to say what the Court of Appeal would have made of those submissions had they had the benefit of them. Logically, if applied to the circumstances of that case the principles I have described would have given Foskett J another quite distinct reason for dismissing the claim and would have fundamentally altered the Court of Appeal's conclusion given that they were considering an appeal in collateral proceedings brought before a High Court judge in respect of the judicial act of another High Court judge. I derive no assistance from the decision in *LL* in relation to the wider issues that I have had to consider.

76. It was not until 23 January 2017 that the Lord Chancellor sought to amend his Defence to plead to the jurisdiction of this court and to rely on judicial immunity thereby withdrawing the concessions made as long ago as 22 June 2016. The amendment to the pleadings is opposed but there can be no question that the parties have had time to prepare in full for the arguments that have been the consequence and have participated in full, if not with enthusiasm then certainly with alacrity and skill. There is no prejudice that cannot be provided for in costs or by the Court of Appeal extending time for an appeal at least from the date of the concession should permission to appeal be considered in due course. This is

not a case where there has been non-compliance such that a judgment has to be made on relief from sanctions. In order to meet part of the procedural objection to Mr Mazhar's claim, Mr Saini made the alternative submission that his claim for damages could be restored, if that step were necessary to give the court jurisdiction to entertain his claim that the court make a substantive determination of the issues, and relying on his pleading which had not been amended to exclude the same.

77. The Lord Chancellor submits that the issues have considerable constitutional importance and I agree. It is also agreed that concessions can be withdrawn. Having regard to the overriding objective, the lack of prejudice on the merits, the availability of costs to mark the fact that the withdrawal and the need for amendment has caused delay, the prospects of success on the issues that would have required amendment to the pleadings and the fact that the administration of justice has not been harmed, rather it has been served, I am persuaded to grant permission under CPR 17.1(2)(b) to amend the pleadings and to dispense with the need to serve any amendment given the comprehensive and detailed nature of the statements of case and the submissions in support that have been provided on behalf of the parties.

Conclusion:

78. The consequence is that I have come to the conclusion that there is nothing in the HRA (taken together with either the CPR or the FPR) that provides a power in a court or tribunal to make a declaration against the Crown in respect of a judicial act. Furthermore, the HRA has not modified the constitutional principle of judicial immunity. Likewise, the Crown is not to be held to vicariously liable for the acts of the judiciary with the consequence that the claim for a declaration is not justiciable in the Courts of England and Wales. A claim for damages against the Crown is available to Mr Mazhar for the limited purpose of compensating him for an article 5(5) breach but the forum for such a claim 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.

79. If Mr Mazhar wants to pursue his challenge to the order of Mostyn J he must do so on appeal. That brings me to the submissions made about next steps that form no part of the pleaded case. Mr Saini submits that in the event that I come to the conclusion that I have, I should either a) review the order made and set it aside because it was made unlawfully, and/or b) re-constitute this court with the consent of the parties to decide an oral application for permission to appeal out of time to the Court of Appeal so that the issue underlying these proceedings can be considered in an appropriate court, without prejudice to his primary submission on that point.

80. For the reasons given above, it is inappropriate for this court to venture an opinion on the merits of the order made. While it is undoubtedly possible to extend time and consider whether the balance of the order should be set aside, the practical effect of doing so on the materials available to this court would be to undertake the very exercise that I have decided is inappropriate. Furthermore, I would be doing so in the absence of one of the parties, the NHS Trust, and without the benefit of a trial on any of the disputed issues that remain. The hearing would not be a true *inter partes* hearing on the disputed issues. The interesting submissions made about the procedural legality of the process and the nature and extent of the jurisdiction exercised must be for the Court of Appeal.

81. As to the application in the face of the court for permission to appeal, I do not think it is right to circumvent the usual process which would have the effect of prejudicing the NHS Trust and pre-judging whether the Lord Chancellor should be joined as a party to the appeal. I have decided that there is no power to grant a declaration for a Convention breach that arises out of a judicial act and Mr Mazhar has decided not to pursue a damages claim for his article 5(5) breach against the Lord Chancellor, save in the alternative. On the case as presented to this court on the issues I have considered I do not believe there to be sufficient prospects of success to grant permission. Whether a modified case might fare better must be for the Court of Appeal should Mr Mazhar be advised to pursue the same. Even if Mr Mazhar were to re-instate his broader damages claim against the Lord Chancellor as part of an application for permission to appeal, he would face the argument that a remedy in damages would likely be academic given that he has settled his damages claim against the NHS Trust on the same facts. With some hesitation and reluctance I decline to exercise the jurisdiction of a single judge of the Court of Appeal and shall leave any application for permission to be made to that court.

82. I am acutely aware that I have not decided the important issues that are summarised earlier in this judgment. Although they are issues of the utmost importance, in particular to Mr Mazhar, their identification will come as no surprise to any judge of the Family Division. They are neither new nor novel and many would be surprised to think that the issues are not settled. The extent to which any of those issues needs to be re-considered by the Court of Appeal must itself be the subject of further argument.