



Neutral Citation Number: [2019] EWCA Civ 1558

Case No: C3/2018/1699

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**FAMILY DIVISION**

**Sir Ernest Ryder SPT (sitting as a judge of the High Court)**

**[2017] EWHC 2536 (Fam)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/10/2019

**Before :**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE SINGH**  
**and**  
**LORD JUSTICE BAKER**

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**Between :**

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

**Appellant**

**Respondent**

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**Hugh Tomlinson QC and Nick Armstrong (instructed by Irwin Mitchell LLP) for the Appellant**

**Sam Grodzinski QC and Joanne Clement (instructed by the Government Legal Department) for the Respondent**

Hearing dates: 30-31 July 2019  
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**Approved Judgment**

**Sir Terence Etherton MR, Lord Justice Singh and Lord Justice Baker:**

Introduction

1. This is an appeal against the order dated 12 October 2017 of Sir Ernest Ryder SPT (sitting as a judge of the High Court) (“the SPT”), by which he dismissed the Appellant’s claim for a declaration that an order made by Mostyn J (“Mostyn J’s order”) authorising his removal to, and detention in, a hospital was an unlawful violation of his rights under Article 5 of the European Convention on Human Rights (“ECHR”), which is one of the “Convention rights” set out in Sch. 1 to the Human Rights Act 1998 (“HRA”). Mostyn J made the order under the inherent jurisdiction of the High Court.
2. The main question which arises in this appeal is: does the HRA permit a person to bring a claim in the High Court for a declaration that an earlier order of that Court was an unlawful violation of his Convention rights, or is the claimant’s only remedy an appeal against that order?
3. At the hearing before us oral submissions were made on behalf of the Appellant by Mr Hugh Tomlinson QC (who appeared with Mr Nick Armstrong) and on behalf of the Respondent by Mr Sam Grodzinski QC (who appeared with Ms Joanne Clement). We also had the advantage of reading written submissions (in the case of the Appellant, they were by Mr Pushpinder Saini QC, who acted for the claimant in the High Court, and Mr Armstrong). We are grateful to all counsel for their submissions.

Factual background

4. The Appellant, Mr Aamir Mazhar, was the claimant in the proceedings below. In the High Court the parties agreed a detailed summary of the facts, which was set out in an Annex to the SPT’s judgment. The facts were also set out at paras. 16-22 of his judgment. We can therefore be relatively brief here.
5. Mr Mazhar suffers from severe physical disabilities for which he requires 24-hour care, including ventilation. He has mental capacity in all material respects, including in respect of decisions about his care. At the material time his care was provided by carers at his home.
6. On 22 April 2016, Birmingham Community Healthcare NHS Foundation Trust (“the NHS Trust”) made an urgent out-of-hours application, by telephone, for an order authorising the use of reasonable and proportionate force to remove Mr Mazhar from his home to Queen Elizabeth Hospital in Birmingham (paras. 1-3 of Mostyn J’s order), and to detain him in hospital for medical care (para. 4 of that order) on the basis that no carers were available to attend his home at the weekend, and no agreement had been reached between the NHS Trust and his family that would have met his care needs. Para. 5 of Mostyn J’s order required that the matter be listed for an urgent hearing as soon as possible on or after 25 April 2016.

7. Neither party made an application for a hearing on notice until 9 May 2016. This was heard by Holman J on 23 May 2016. At that hearing Mr Mazhar consented to remain in hospital and para. 4 of Mostyn J's order was consequently discharged.
8. Mr Mazhar maintains that the order was based on misrepresentations made to Mostyn J by the NHS Trust. He also contends that, even on the evidence that was before Mostyn J, the order could not and should not have been made because there was no evidence that he was a person "of unsound mind", to use the phrase in Article 5(1)(e) of the ECHR. He initiated proceedings against both the NHS Trust and the Lord Chancellor, seeking a declaration that both had violated his Article 5, 6 and/or 8 rights under the ECHR. He also sought damages. He settled his claim against the NHS trust by accepting a Part 36 offer, and then sought a declaration only against the Lord Chancellor.
9. Mostyn J's order has not been appealed, varied or set aside. Although para. 4 of that order was discharged, other parts of the order were not. Furthermore, in principle an appeal could have been brought even as against para. 4 of the order on the ground that it was an order that the High Court had made unlawfully and without jurisdiction from its inception; whereas the fact that it was discharged only meant that it had no effect from the time that it was discharged. An appeal is now well out of time but in principle it could still be brought if this Court grants an extension of time. Mr Mazhar points out that he did not seek to bring an appeal because the Lord Chancellor had, until at least January 2017, positively stated that he would not seek to rely on judicial immunity as a defence. It was initially common ground that a claim could be made for a declaration against the Lord Chancellor in the High Court.

#### Mostyn J's order

10. The out of hours emergency application was made under the inherent jurisdiction of the High Court to Mostyn J at 23.10 on 22 April 2016 (there was a drafting error in the order made by the Court, as it referred to the Court of Protection). The application was made by telephone. The order recorded in recitals that the application was made by counsel instructed by the NHS Trust and that the judge had read the witness statement of Liza Walsh made (on behalf of the Trust) on the same date. The recitals also recorded that the Court had been informed in that witness statement among other things that:

“(v) ... Mrs Mazhar 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.”
11. The operative parts of Mostyn J's order contained the following paragraphs:

“1. It is lawful for the police and any medical professionals, as are required, to enter 83 Kingswood Road,

Moseley, Birmingham B13 9AW (the property) and to 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 for him to be transferred to an alternative specialist respiratory unit.”

12. After the hearing on 23 May 2016, at which counsel appeared for the Trust and also for Mr Mazhar, it was ordered, among other things, at para. 4:

“Paragraph 4 of the order of Mr Justice Mostyn dated 22 April 2016 is discharged.”

#### The present proceedings

13. The present claim was brought against both the NHS Trust and the Lord Chancellor.

14. In the Particulars of Claim, it was averred, at para. 12, that:

“The application was determined by Mr Justice Mostyn late in the evening of 22 April 2016. The Second Defendant [the Lord Chancellor] is vicariously liable for the actions or omissions of Mr Justice Mostyn.”

15. It was common ground before us that that was erroneous. It is now common ground that there can be no question of the Lord Chancellor having vicarious liability for the judicial acts of a judge.

16. At para. 39 of the Particulars of Claim it was said that the First and Second Defendants were “jointly and severally liable for the breaches of the claimant’s rights”, including his rights under Article 5 of the ECHR. That was further particularised at paras. 37-38. At para. 37 it was alleged that the deprivation of the Appellant’s liberty violated Article 5(1) because, among other reasons, there was no

(or no adequate) evidence that he was “of unsound mind” within the meaning of Article 5(1)(e).

17. At para. 38 it was said that the First Defendant was liable for breach of Article 5(1) because it was the detaining authority and/or had procured the deprivation of liberty. The Second Defendant was said to be liable for that breach of Article 5(1) “because Mr Justice Mostyn authorised the deprivation of liberty.”
18. In the original form of the Defence for the Lord Chancellor, at para. 7, para. 12 of the Particulars of Claim was admitted. Again it was common ground before us that that was in error.
19. In a letter dated 14 December 2016, the solicitors for the Appellant informed the Court that:

“In light of the settlement with the First Defendant, the Claimant no longer seeks a payment of damages against the Second Defendant. However, the Claimant still seeks a declaration from the Second Defendant ...”

20. Subsequently, in the Second Defendant’s Amended Defence, after referring to that letter of 14 December 2016, it was averred that the claim for a declaration as against the Lord Chancellor could not succeed for the reasons set out in particular at para. 4. It was submitted that the claim was barred by the principle of judicial immunity and/or by section 9(1) and (2) of the HRA in circumstances where the Claimant was no longer pursuing a damages claim under section 9(3) and (4). It was now averred that the Second Defendant was not vicariously liable for judicial acts. It was also averred that the Court had no jurisdiction to make the declaration sought; and/or that the claim was an abuse of process.
21. At para. 5 of the Amended Defence it was submitted that, if the Claimant contended that the order made by Mostyn J on 22 April 2016 was unlawful, he should have sought permission to appeal against that order.

### Human Rights Act 1998

22. The relevant provisions of the Act are as follows:

#### **“6 Acts of public authorities**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

...

(3) In this section ‘public authority’ includes—

(a) a court or tribunal ...

## **7 Proceedings**

(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**

(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**

(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.

(5) In this section—

‘appropriate person’ means the Minister responsible for the court concerned, or a person or government department nominated by him; ...”

### Civil Procedure Rules

23. The Civil Procedure Rules (“CPR”) rule 7, so far as material, provides:

#### **“Human Rights**

7.11

(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.”

24. CPR rule 19.4A, so far as material, deals with section 9 of the HRA in the following terms:

“(3) Where a claim is made under that Act for damages in respect of a judicial act—

(a) that claim must be set out in the statement of case or the appeal notice; and

(b) 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.”

### The SPT’s judgment in outline

25. The SPT declined to determine Mr Mazhar’s claim on its merits for three reasons. First, he held that the claim was barred by the common law principle of judicial immunity, which had not been abrogated by the HRA; secondly, that the Lord Chancellor was in any case not vicariously liable for the acts of the judiciary; and thirdly, that the claim would constitute an abuse of process. He held that Mr Mazhar’s only remedy was a claim for damages for breach of Article 5, which could not be pursued in a court of co-ordinate jurisdiction and thus could only be considered by the Court of Appeal. We will refer later to the SPT’s judgment in more detail.

### Grounds of appeal

26. Five grounds of appeal are advanced as follows:

- (1) The Judge was wrong to hold that the Appellant’s claims were barred by the principle of judicial immunity.
- (2) The Judge was wrong not to deal with the Appellant’s Article 5 claim on the basis that it remained a claim for damages.
- (3) The Judge was wrong to hold that the Appellant’s claims could only be advanced on appeal to the Court of Appeal (rather than in the High Court as being “such other forum as may be prescribed by rules” for the purposes of section 9(1)(c) of the HRA); and/or he was wrong to hold that advancing the Appellant’s claims in the High Court amounted to an abuse of process.
- (4) Alternatively, the Judge was wrong not to grant the Appellant permission to appeal out of time against Mostyn J’s order.
- (5) The Judge was wrong to find that the Lord Chancellor was not the correct defendant.



Submissions of the parties

*Grounds 1 and 2*

27. The Appellant argues, first, that the principle of judicial immunity would not be infringed by the High Court granting a declaration, because:
- a) That principle protects judges from personal liability to pay damages. There is no question in this case of the judge being personally liable to pay damages for breach of Article 5. At the hearing before us Mr Tomlinson was prepared to accept that the principle of judicial immunity also applies to a claim for a declaration against a judge personally but he submitted that that is not what the Appellant seeks in this case, since his claim is brought against the Lord Chancellor and not Mostyn J.
  - b) There is no difference in principle between (i) a declaration by the High Court that the order was incompatible with the ECHR; and (ii) a superior court holding on appeal that a judge was wrong to make an order. Since appeals, obviously, do not offend against judicial immunity, nor can a mere declaration.
28. Further, even if judicial immunity was somehow engaged, it has been abrogated by the power of the court to award damages for breach of Article 5. That power entails a power to make a declaration that the order which caused the breach of Article 5 was unlawful, because it is a precondition to awarding damages that the court determine that the order made was unlawful. This is made obvious by the fact that, if the SPT were correct, Mr Mazhar could simply obtain the declaration sought by making a claim for a nominal sum (which he does as an alternative to Ground 1 under Ground 2). Judicial immunity is therefore at least abrogated to the extent required for Mr Mazhar to make his claim.
29. In response the Lord Chancellor argues that the principle of judicial immunity is engaged, and has not been abrogated by section 9 of the HRA.
30. The Lord Chancellor also submits that Mr Mazhar cannot now renew a nominal claim in damages for breach of Article 5 because, since he has settled his claim against the NHS, to do so would be to seek double recovery.

*Grounds 3 and 4*

31. The Appellant argues that section 9 neither mandates that an appeal is the only mechanism for bringing his claim, nor would it be an abuse of process for him to do so, because:
- a) Section 9(3) does not require a declaration to be sought by way of an appeal because there is no hierarchy among the three ways of bringing a claim under section 9(1)(a)-(c). If more than one route is available to the claimant he may elect between them. Nothing in the wording of the section suggests otherwise.

- b) The fact that in Scotland<sup>1</sup> a declaration by way of section 9(1)(c) is available only as a last resort does not militate against this conclusion as there is no equivalent rule in England and Wales.
- c) Were it the case that an appeal was required, this would both require the Court of Appeal to act as a trial court in cases where what is appealed is an order made on a without notice application; and disadvantage the claimant both by requiring him to bring his appeal within 21 days (rather than a year, which is the normal time limit under section 7 of the HRA).
32. If the Appellant is wrong on Ground 3, he seeks permission to bring his appeal out of time (Ground 4), and submits that this is the only fair outcome given that all the parties took an approach to the proceedings which has, on this hypothesis, turned out to be wrong.
33. In response the Lord Chancellor argues that the legislative purpose of section 9(1)(c), as revealed by the Parliamentary statements quoted by the SPT in his judgment, is to provide a subsidiary route to a remedy that could not be determined on appeal or judicial review.
34. In addition, the procedural disadvantages alleged by the Appellant would not have been suffered had the correct procedure been followed in this case; that is, if the parties had returned swiftly for a hearing on notice at which evidence could have been heard and a determination about the earlier order could have been made. Had Mr Mazhar disagreed with the outcome, an appeal on the basis of the facts found could then have been made to the Court of Appeal.
35. As to the request for permission to appeal (Ground 4), the Lord Chancellor submits that the SPT was correct to decline to deal with this for the reasons he gave at para. 81 of his judgment, in particular because it would prejudice the NHS Trust, which had settled the claim against it.

#### *Ground 5*

36. The Appellant accepts that the Lord Chancellor would not be vicariously liable for the actions of a judge but submits that English law should adopt the approach taken in *Maharaj v Attorney General of Trinidad and Tobago (No. 2)* [1979] AC 385 and treat such claims as being claims against the state, in which case the Lord Chancellor would again be the appropriate defendant.
37. In response the Lord Chancellor submits that this ground must fail for the reasons given by the SPT. It is accepted that section 9(4) creates a statutory cause of action against the Crown for judicial acts for which vicarious liability is not necessary but it is submitted that the cause of action is limited to claims for damages, not declarations.

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<sup>1</sup> Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000 (SI 2000/301), rule 4(1).

The correct interpretation of the HRA

38. We do not accept the submissions of either party before us in full. The central question which falls to be determined in this appeal is one which must be answered according to the correct interpretation of the HRA.
39. The starting point is the duty which is imposed on all public authorities to act in a way which is compatible with the Convention rights. Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. For this purpose “public authority” includes a court or tribunal: see subsection (3)(a).
40. The next relevant provision in the HRA is section 7(1), which provides that 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 the Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, provided that he is (or would be) a victim of the unlawful act. In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules.
41. Such rules have been enacted. CPR rule 7.11(1) provides that a claim under section 7(1)(a) of the HRA in respect of a judicial act may be brought only in the High Court. Any other claim under that provision may be brought in any court: see para. (2).
42. Section 8 of the HRA provides that, 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: see subsection (1). Subsection (2) provides that damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings. The rest of section 8 makes more specific provision in relation to the circumstances in which an award of damages may be made. We would note, in particular, that it is only to be made if the court is satisfied that an award of damages is necessary to afford “just satisfaction” to the person in whose favour it is made: see subsection (3). That phrase “just satisfaction” mirrors the power of the European Court of Human Rights to award a remedy: see Article 41 of the ECHR. Very often the European Court simply states that finding of a violation constitutes just satisfaction and makes no monetary award at all.
43. If matters had stopped there, the scheme of the HRA would be clear. An act (including a judicial act) made unlawful by section 6(1) would lead to the right to bring a claim under section 7(1)(a) and obtain appropriate remedies (by no means confined to an award of damages) in section 8. In essence that is how Mr Tomlinson invites us to interpret the HRA. But matters do not stop there. The HRA must be read as a whole.
44. In relation to *judicial* acts, section 9 goes on to make more specific provision. Subsection (1) provides that proceedings under section 7(1)(a) in respect of a judicial act may be brought only (a) by exercising a right of appeal; (b) on an application for judicial review; or (c) in such other forum as may be prescribed by rules. As we shall see, the original version of the Human Rights Bill did not include para. (c) in subsection (1). If the original version of the Bill had been enacted, it would have been

clear that the only two ways in which proceedings could be brought under the HRA in respect of a judicial act would have been by way of an appeal or by way of judicial review.

45. Section 9(1)(b) does not affect any rule of law which prevents a court from being the subject of judicial review: see subsection (2). In our view, what that particular provision does is to preserve existing rules of law which govern the circumstances in which a court may be the subject of judicial review. For example, the Crown Court is not amenable to judicial review in matters relating to a trial on indictment: see section 29(3) of the Senior Courts Act 1981. It does not seem to us that subsection (2) goes any further than that. The phrase “judicial review” is clearly used in the context of section 9 to mean “judicial review” in the strict legal sense and not in any wider sense of review by a court.
46. Bennion on Statutory Interpretation (7<sup>th</sup> ed., 2017), at para. 24.13, says:

“Where an amendment is made to a Bill during its passage through Parliament, or an amendment is moved but not made, this may throw light on the meaning of the resulting Act.”

In the commentary to that passage the authors state:

“Where a Bill is amended during its passage through Parliament the amendments themselves and surrounding debates can sometimes shed light on the intended meaning or at least help to explain why the text has ended up in an unsatisfactory state ... The vast majority of amendments made to Bills are tabled by the Government having been drafted by Parliamentary Counsel. It is usual for the drafter who prepares a Bill to draft any amendments to it. The amendments are drafted so that they can be stitched into the existing fabric leaving the Bill as a coherent whole. The resulting Act should be a seamless web so that, unless something has gone wrong, limited assistance is likely to be derived from ascertaining which provisions were in the original Bill and which were added by amendment.”

47. We respectfully agree with the tenor of that passage. Nevertheless, as the authors themselves state, the legislative history, in particular the way in which a Bill was amended during its passage through Parliament, may throw light on the meaning of the resulting Act. It would be undesirable to be too prescriptive about the circumstances in which it will be appropriate to refer to the legislative history of a statutory provision because much will depend on the particular provision and its context. In the present case, in our view, the legislative history does helpfully shed light on the true construction of section 9 as finally enacted.
48. In a slightly different context, concerned with the situation where there has been a draft Bill before a final version of the Bill is introduced into Parliament, Bean J said in *Cooke v MGN Ltd* [2014] EWHC 2831; [2015] 2 All ER 622, at para. 35:

“I also consider that the Parliamentary history, and in particular any respect in which the Act differs from the original draft Bill, may be highly illuminating.”

We would respectfully agree and consider that, by way of analogy, the same point can be made in relation to a change to the original version of a Bill as introduced in Parliament which is made by way of amendment.

49. When the Human Rights Bill was introduced (in the House of Lords) on 23 October 1997 (at the same time as the White Paper ‘Rights Brought Home’), clause 9(3) provided that there should be no remedy in damages in respect of a judicial act at all. During the passage of the Bill through Parliament it became clear that that would place the UK in breach of its international obligations under Article 5(5) of the ECHR. It was for that reason that the Government itself introduced an amendment which became the final version of section 9(3) as enacted. As will be apparent that provision makes it clear that, in proceedings under the 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. Further, subsection (4) provides that an award of damages permitted by subsection (3) is to be made against the Crown, in other words not against the individual judge concerned. No award may be made unless the appropriate person, if not already a party to the proceedings, is joined. Subsection (5) then provides that the “appropriate person” means the Minister responsible for the court concerned, or a person or government department nominated by him. It is for that reason that the Lord Chancellor is properly made a party to a claim for damages in respect of a judicial act done in good faith. There is no question of the relevant Minister being “vicariously” liable for the judicial acts concerned.
50. The original version of clause 9 of the Bill, which had the sidenote “Acts of Courts and Tribunals”, provided as follows:
- “9. (1) Proceedings under section 7(1)(a) in respect of any act of a court may be brought only by way of an appeal against the decision, or on an application (in Scotland a petition) for judicial review.
- (2) That does not affect any rule of law which prevents a court from being the subject of judicial review.
- (3) Damages may not be awarded in proceedings under this Act in respect of any act of a court.
- (4) Nothing in this Act makes a person personally liable in relation to—
- (a) the exercise (or purported exercise) of the jurisdiction of a court, or
- (b) the administration of a court.
- (5) In this section—
- ‘act’ includes a failure to act; and

‘court’ includes a tribunal a justice of the peace, a  
justice’s clerk and (in Northern Ireland) a clerk  
of petty session.”

51. When the Bill was at Committee stage in the House of Lords, on 27 November 1997, it was pointed out by Lord Meston that clause 9(3) as drafted would provide a general immunity for acts of courts even in circumstances where Article 5(5) of the ECHR gives an enforceable right to compensation to those who have been victims of arrest or detention in contravention of the provisions of Article 5: see Official Report, Vol. 583, col. 856. In response Lord Irvine of Lairg (the Lord Chancellor) said that the Government were alive to the need to make appropriate provision for the Article 5(5) requirement and were considering how best to give effect to that obligation in relation to courts and tribunals.
52. Subsequently, by the time the Bill reached its Report stage in the House of Lords on 29 January 1998, the Lord Chancellor moved two relevant amendments, no. 35 and no. 36. Amendment no. 35 amended clause 9(1) in the terms which were subsequently enacted by Parliament. Amendment no. 36 replaced clause 9(3) and following with an entirely new set of provisions, which were enacted as section 9(3), (4) and (5).
53. Lord Meston had also moved his own amendment no. 37 but withdrew that amendment in the light of what the Lord Chancellor said about the Government’s amendments: see Official Report, 29 January 1998, Vol. 585, col. 389.
54. In our view, when the final version of section 9 is read in the light of its legislative history, it is clear that the way in which a judicial act is usually to be the subject of proceedings under the HRA is by way of an appeal or (where it is otherwise available) by way of judicial review. The only circumstances in which a claim is permissible under section 9(1)(c) is where that is necessary to enable a claim to be brought for damages for unlawful detention in breach of Article 5, in accordance with section 9(3).
55. This also explains what might otherwise be obscure, namely why the only reference to the relevant Minister with responsibility for a court being made a party to the proceedings is in the context of a claim for damages for breach of Article 5: see section 9(4) and (5).
56. Mr Tomlinson submitted to us that it was a necessary implication of those provisions that the Lord Chancellor can also be made a party to a claim for a declaration, as the Appellant has sought to do in the present case. We disagree. In our view, there is no such necessary implication. 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.
57. Mr Tomlinson also submitted before us that a restrictive interpretation of section 9(1)(c) would lead to an undesirable gap emerging where some judicial acts could not be challenged under the HRA at all, because no appeal or application for judicial

review is available and there would be no right to bring a claim by way of originating process.

58. We do not accept that submission. In our view, any exercise of judicial powers is an order that is in principle appealable or (where judicial review is available, as in the case of inferior courts) may be a decision which can be the subject of judicial review. The question is one of substance, not form. Even judicial acts done in excess of jurisdiction are orders. This is the rationale for section 9(2), which preserves the rule that courts of unlimited jurisdiction are not amenable to judicial review, because it is assumed that an appeal is available. Mr Tomlinson was unable to give us any realistic examples of a judicial act that would not be amenable either to appeal or judicial review.
59. Mr Tomlinson did suggest during the hearing before us that an example can be found on the facts of *Sirros v Moore* [1975] QB 118, in which a judge asked security staff to stop a person who was in court and who was subsequently detained by them. Mr Tomlinson submitted that there was no formal order in that case, none presumably having been drawn up by the court, and so there would have been nothing which could have been appealed. We do not accept that submission. In our view, an instruction by a judge which leads to a person being detained would be an order which could be appealed. It would not matter if no formal order was ever drawn up. What matters is the substance of the matter, not the form.
60. In a case like the present, which frequently arises at first instance in all of the Divisions of the High Court, particularly when urgent applications have to be made out of hours, the question of whether a judge had jurisdiction to make an order is a question to be determined on appeal, not on a return date hearing. Leaving aside procedural issues arising specifically under section 9 of the HRA, as a matter of general principle whether a decision of a judge of the High Court can, on the one hand, be set aside by the same judge or a different judge of the same standing or, on the other hand, ought to be appealed to the Court of Appeal, will depend on all the circumstances. In the case of an order made after a without notice application, such as that made by Mostyn J in the present case, if the attack on the order is on the ground of failure to give full and frank disclosure of relevant facts, the same or another judge of the same standing can set it aside. If, however, the attack on the order is, as in the present case (see Ground 2 of the proposed Grounds of Appeal which have now been filed in respect of Mostyn J's order), based entirely on a submission of an error of law, the appropriate course is to appeal the order to the Court of Appeal and ask for it to be set aside.
61. As it happens, that course was not followed in the present case because the initial position of both the NHS Trust and the Lord Chancellor was to accept that the claim for infringement of Article 5 could be pursued at first instance by converting the claim into a Part 7 claim. It was not until February 2017 that the Lord Chancellor served his amended Defence in which it was asserted that there was no jurisdiction to make the declaration sought. The position, therefore, is that, irrespective of any bar which may exist under section 9 of the HRA to a claim for a declaration against the Lord Chancellor by originating process, any such claim ought to have been made by way of an appeal for an order setting aside Mostyn J's order on the ground of an error of law.

62. On the other hand, we also 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 HRA 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 may be an abuse of process to make a claim against the Lord Chancellor under section 9(3) by way of originating process in respect of an order which, as a matter of proper process, can be and ought to have been appealed.
64. We disagree with Mr Grodzinski's submissions (and the judgment of the SPT) 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 (and usually would be) brought by way of an originating process in the High Court itself pursuant to section 9(1)(c) and CPR rule 7.11(1).
65. First, there is nothing in the express language of section 9 to limit a claim brought under subsection (1)(c) to one which is brought in respect of the judicial acts of inferior courts and tribunals. The language is general. It simply refers to the forum which is prescribed by rules made under the HRA. Those rules do not distinguish between the acts of inferior courts and tribunals on the one hand and the High Court on the other. CPR rule 7.11 simply states that any claim in respect of a judicial act can only be brought in the High Court, whereas a claim in respect of the acts of other public authorities may be brought in any court. We also note that CPR rule 19.4A(3) expressly provides that, where an action for damages is brought, it should be set out in either the statement of case or in the appellant's notice: that provision does not contemplate that such a claim can only be brought by way of an appeal if it concerns the judicial acts of the High Court as distinct from inferior courts or tribunals.
66. Secondly, we accept Mr Tomlinson's submission that to require a person to bring a claim for damages in respect of a judicial act by the High Court only by way of appeal would have surprising and undesirable consequences. It would mean that a very short time limit would have to be complied with (21 days) compared to the normal time limit under section 7(5) of the HRA (one year). It would also mean that the claim could not be brought as of right but only with permission to appeal. Further, it would lead to procedures, such as disclosure of documents and the need to make findings of fact, which are better suited to a court of first instance than to an appellate court.
67. We therefore conclude on the central question of statutory interpretation which arises in this appeal that: (1) section 9(1)(c) must be read with section 9(3) and only permits a claim for damages for breach of Article 5 and does not go further; but (2) the SPT was wrong to hold that a claim for damages under section 9(1)(c) can only be brought by way of appeal if it concerns a judicial act of the High Court.
68. Finally, we should observe that, although we have found what we have described as the legislative history of section 9 helpful in order to arrive at its correct interpretation,



we have, unlike the SPT, not found it necessary or appropriate to refer to Ministerial statements in Parliament, in accordance with the principles set out by the House of Lords in *Pepper v Hart* [1993] AC 593. We were taken to those statements but nothing in them is, in our view, inconsistent with the correct interpretation as we have set it out above.

69. Having set out what we regard as the correct interpretation of the HRA above, we will now turn to consider the main authorities to which the parties referred at the hearing in order to see whether they are consistent with that interpretation or require a different one.

#### Relevant decisions of the Court of Appeal

70. Mr Grodzinski placed particular reliance on the decision of the Court of Appeal in *Forrester Ketley v Brent and Another* [2012] EWCA Civ 324. That was a decision of a two member constitution of this Court. Nevertheless, it is established that a decision of a two member Court is binding on this Court, subject to the usual principles in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718: see *Langley v North West Water Authority* [1991] 1 WLR 697 at p. 710 in the judgment of Lord Donaldson MR, with which Woolf and Mann LJ agreed. After considering earlier decisions, including *Boys v Chaplin* [1968] 2 QB and *Williams v Fawcett* [1986] QB 604, at pp. 615-617, Lord Donaldson said:

“The authority of a two-judge court should be today regarded as being the same as that of a three judge court.”

71. The particular passage upon which Mr Grodzinski relies is to be found at para. 19 in the judgment of Lewison LJ, with which Longmore LJ agreed at para. 33 in giving his concurring judgment. At para. 19, having referred earlier to the principle of judicial immunity, Lewison LJ said:

“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). [It was common ground before this Court that that must have been a typographical error and should have referred to section 9(3) of the HRA] 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.”

72. The difference between the parties before us was that, while Mr Grodzinski contends that that passage forms part of the *ratio* of the decision in *Forrester Ketley*, Mr Tomlinson QC submits that it is *obiter*. In order to resolve that issue it is necessary to consider the judgment of Lewison LJ in some detail.
73. The lengthy factual background to that case is summarised in the judgment of Lewison LJ at paras. 1-12. In brief, Forrester Ketley were a firm of patent agents who had provided services for Mr Brent. In 1993 they sued for their fees and expenses but were met by a defence and counterclaim. In the spring of 2005 the Court of Appeal made an extended civil restraint order against Mr Brent in the underlying proceedings. Various orders were made against him requiring him to pay money. When he did not comply with those orders Forrester Ketley applied for a charging order over a residential property. In 2007 Forrester Ketley began proceedings under part 8 of the CPR seeking an order for sale of the property under the charging order. On 17 November 2009 Vos J gave judgment against Mr Brent and made an order for sale of the property. Mr Brent did not give possession of the property by the due date, so the matter came back before Vos J on 6 December 2010. Among the orders made on that occasion was a mandatory injunction requiring Mr Brent to vacate the property by 20 January 2011. Mr Brent's application for permission to appeal against that order was refused both by the High Court and by Lloyd LJ in the Court of Appeal. The consequence was that the order of Vos J had now become incapable of challenge.
74. In the meantime, on 5 September 2007, Waller LJ had made a further extended civil restraint order against Mr Brent. On 31 July 2009 Morgan J extended the civil restraint order until 5 September 2011.
75. Since Mr Brent had failed to comply with the order of Vos J requiring him to vacate the property, on 25 January 2011 Forrester Ketley applied for a committal order. The matter eventually came before Morgan J on 10 March 2011. Neither Mr Brent nor his solicitors, who had been instructed pursuant to emergency legal aid funding, were present. Morgan J refused an application that he should recuse himself and also refused an application for an adjournment. He went on to find that the contempt of court had been proved and proceeded to sentence. It is important to observe that, at para. 10 in the judgment of Lewison LJ, it was said that:

“The only order under appeal in this appeal is the order of Morgan J dated 10 March 2011. By his order of that date Morgan J found that Mr Brent was in breach of the order requiring him to give possession of the property and also in breach of an injunction to the same effect. He was therefore in contempt of court. He made an order committing Mr Brent to prison for 8 weeks but suspended the order so that it would not come into effect if Mr Brent vacated the property by 28 March 2011.”

That period of suspension was subsequently extended to 4 April 2011. Nevertheless Mr Brent did not vacate the property by the deadline set although he had done so by the time of the judgment of the Court of Appeal. He did not in fact serve any part of the prison sentence imposed upon him.

76. Mr Brent now appealed against the committal order made by Morgan J on 10 March 2011. Nevertheless, as Lewison LJ noted at para. 13 of his judgment, a theme which ran throughout Mr Brent’s lengthy written submissions in support of his appeal was that decisions had been made in the underlying proceedings which infringed his human rights. He wished to bring proceedings to vindicate those rights by means of proceedings under section 7 of the HRA. Mr Brent invoked CPR rule 7.11, which we have cited earlier. At para. 16 Lewison LJ observed that Mr Brent argued that this gave him a freestanding right to bring proceedings “against judges for breaches of his human rights.” Lewison LJ rejected that proposition for several reasons. The first was that Mr Brent had been subject to an extended civil restraint order at the time and therefore needed permission to bring the claim. The claim was made on 16 February 2009 at a time when the extended civil restraint order made by Waller LJ was still in force. The claim was therefore liable to be struck out for that reason alone. Lewison LJ went on to state:

“I might also add that, under section 7(5) of the Human Rights Act, proceedings should normally be brought no later than one year after the act complained of. Many of Mr Brent’s complaints are on the face of it well out of time. Some of them also seem to relate to events that took place before the Human Rights Act came into force, and the Act does not have retrospective effect.” [That last proposition is not entirely accurate – see section 22(4) of the HRA – but that is not material for present purposes]

77. At para. 17 of his judgment Lewison LJ said that the second “and in my judgment insuperable problem is that High Court judges are immune from suit when acting judicially.” He went on to cite *Sirros v Moore* [1975] QB 118, from the judgments of both Lord Denning MR and Buckley LJ. Having done so, he made the observations which we have already quoted from para. 19 of his judgment.

78. At para. 20 Lewison LJ said that the fourth and final problem was that unless and until the orders about which of Mr Brent complained had actually been set aside he was required to obey them. That reflected the well-known principle in *Isaacs v Robertson* [1985] AC 97, approving (at pp. 101-102) the decision of the Court of Appeal in *Hadkinson v Hadkinson* [1952] P 285.

79. This all led to the conclusion at the end of para. 21 in the judgment of Lewison LJ:

“Accordingly, for the reasons I have given, the orders leading up to the committal orders were orders that Mr Brent was required to obey and, if he did not, he was liable to be committed for contempt.”

80. It was from para. 22 of his judgment that Lewison LJ turned to the only order which was actually under appeal in that case, namely the committal order made by Morgan J. Lewison LJ observed that it was illegitimate for Mr Brent to attempt to use an appeal against the committal order as a means of sidestepping the refusal of permission to appeal in relation to all the other orders of the Court with which he was dissatisfied.

He further noted that the first 39 pages of Mr Brent's written submissions were largely devoted to orders other than the committal order, "which as I have said is the only order under appeal." Lewison LJ then proceeded to consider the grounds of appeal which actually related to the only order under appeal before the Court, namely the committal order, and not to the matters in para 19 of Lewison LJ's judgment. He dismissed the appeal, with the concurrence of Longmore LJ.

81. In our view, when the judgment of Lewison LJ is read as a whole, it is clear that the passage upon which Mr Grodzinski relies from para. 19 does not constitute part of the *ratio* of the decision of this Court in *Forrester Ketley*. It is only *obiter*. Furthermore, we would observe that, as Mr Tomlinson has been at pains to stress before this Court, the present case is not about the principle of judicial immunity since there is no question of anyone seeking to bring an action against Mostyn J personally.
82. We would also note that, without any disrespect to the members of the Court who sat in *Forrester Ketley*, Mr Brent was a litigant in person and the respondents were not represented, so the Court did not have the benefit of full argument nor was it necessary for it to do so.
83. Mr Grodzinski also relied on the decision in *O'Reilly v Mackman* [1982] 2 AC 237 while it was in the Court of Appeal. As is well known, that case proceeded to the House of Lords, which decided it on the basis of procedural exclusivity, in other words that generally speaking "public law" proceedings against a public authority must be brought by way of judicial review rather than an ordinary action, for example for a declaration. Mr Grodzinski relied on the judgment of Lord Denning MR in the Court of Appeal for a different purpose. He relied in particular on the passages at pp. 251-253. He also noted that O'Connor LJ agreed with Lord Denning MR: see p. 266. At p. 253 Lord Denning MR said that he could see no difference between an action for damages and an action for declaration against a judge or similar body such as the Parole Board in that case.
84. Before this Court, at least by the time of the hearing, it was common ground that the principle of judicial immunity applies not only to an action for damages against a judge personally but also to an action for declaration. Nevertheless, Mr Tomlinson's fundamental submission, with which we agree, was that the principle of judicial immunity has nothing to do with the present case since no one is trying to bring an action against Mostyn J for anything.
85. In *Webster v Lord Chancellor* [2015] EWCA Civ 742; [2016] QB 676 the claimant was convicted of serious sex offences and sentenced to nine years' imprisonment. Nearly two years later the Court of Appeal (Criminal Division) allowed his appeal against conviction. The claimant then brought a claim against the Lord Chancellor under section 7(1) of the HRA seeking damages for breach of his rights to liberty and to a fair trial. The judge struck out the claim. The claimant's appeal to the Court of Appeal was dismissed. The main judgment was given by Sir Brian Leveson P, with whom Lord Dyson MR and Tomlinson LJ agreed.
86. At para. 21 of his judgment Sir Brian Leveson said:

"A claim under section 7(1)(a) of the 1998 Act in respect of a judicial act may only be brought in the High Court (see CPR r

7.11(1)) prescribing that court as a the forum in which proceedings may be brought pursuant to section 9(1)(c) of the 1998 Act against an appropriate person (in this case the Lord Chancellor: see CPR r 19.4A(3)(b)(4)). It is thus common ground that the effect of these provisions is that an award of damages may be made against the Lord Chancellor in respect of judicial acts in one of two circumstances, namely: (i) if the relevant act or acts were not done in good faith, in respect of a breach of *any* Convention right; or (ii) if the relevant act or acts were done in good faith, only in respect of a breach of article 5 of the Convention, even if the act or acts are or were incompatible with other Convention rights.” (Emphasis in original)

87. In the present case Mr Grodzinski withdrew the concession which was made on behalf of the Lord Chancellor in *Webster*. In particular he submitted (as he successfully did before the SPT) that a claim even for damages under section 9(1)(c) of the HRA may not be brought in the High Court if it is brought in respect of an earlier order of the High Court. He submitted that even an action for damages for breach of Article 5 must be brought by way of appeal, in other words in this Court.
88. We do not accept that submission. We consider that the concession which was made in *Webster* was rightly made and that the law was correctly set out by Sir Brian Levenson at para. 21 of his judgment in *Webster*.
89. In the course of his judgment in the present case the SPT declined to follow the decision of this Court in *LL v Lord Chancellor* [2017] EWCA Civ 237; [2017] 4 WLR 162. He did so on the basis that there had not been argument in that case along the lines which he had heard in the present case.
90. *LL* was a case which started in the Family Division of the High Court, in which a judge had made successive orders, each endorsed with a penal notice, requiring the claimant to return his son from Singapore to the UK. The claimant stated that his parents refused to comply with his requests for them to bring the child back. His wife applied for an order that he be committed to prison for contempt of court. The judge found the contempt proven and sentenced the claimant to 18 months’ imprisonment. The Court of Appeal quashed the finding of contempt and the sentence, holding that the judge had been guilty of numerous procedural errors, and the claimant was released after spending nine weeks in prison. He then brought a claim against the Lord Chancellor under section 7 of the HRA seeking damages under section 9(3) for breach of his right to liberty in Article 5. The High Court dismissed the claim on the ground that the conduct of the Family Division judge had not amounted to a “gross and obvious irregularity” in the court’s procedure for the purposes of the jurisprudence of the European Court of Human Rights and therefore did not amount to a breach of Article 5.
91. On the claimant’s appeal this Court allowed the appeal. The main judgment was given by Jackson LJ. King LJ and Longmore LJ gave concurring judgments, in which they agreed with Jackson LJ. For present purposes the case is cited not for what it

holds but for what it does not say. As Mr Tomlinson observed, no one in the case, including counsel for the Lord Chancellor, Foskett J (the trial judge) or the Court of Appeal, considered that there was anything surprising or wrong about the fact that an action for damages had been brought by way of originating process in the High Court rather than on appeal.

92. The procedural history of the case for material purposes is described at paras. 51-55 of the judgment of Jackson LJ. The relevant application was made under the Family Procedure Rules (“the FPR”), part 19, and claimed damages against, first, the High Court which was named as a defendant, and, secondly, against the Lord Chancellor as second defendant. LL subsequently withdrew his claim against the High Court and continued it against the Lord Chancellor as sole defendant. The Lord Chancellor served a defence, denying liability. No jurisdictional point was taken in that case as it has been in the present case.
93. Mr Grodzinski submitted that *LL* was wrongly decided in so far as it appears to countenance that a claim for damages in respect of an order of the High Court may be brought in the High Court. We do not accept that submission.
94. We have come to the conclusion that the procedure which was adopted in *LL* was perfectly consistent with what is proper and in accordance with the scheme created by section 9 of the HRA, in particular subsection (1)(c). The only thing that was inappropriate was the initial attempt to bring a claim against the High Court itself. As is plain from the terms of section 9(3)-(5) of the HRA, the action for damages for breach of Article 5 must be brought against the relevant Minister, namely for present purposes the Lord Chancellor. In that way there is no contravention of the principle of judicial immunity.

#### Decisions of the House of Lords and Privy Council

95. As is well known, the distinction between errors of law within the jurisdiction and jurisdictional errors was largely rendered obsolete by the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, at least in the case of inferior courts and tribunals. Where therefore no appeal is possible, it may nevertheless be possible to seek judicial review of such an inferior body in order to correct an error of law. As Lord Diplock put it in *In re Racal Communications Ltd* [1981] 374, at p. 383:

“The break-through made by *Anisminic* ... was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of an administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.”

96. All that, however, was regarded by Lord Diplock as being irrelevant to the position of the High Court, which is not a court of limited jurisdiction. At p. 384 he said:

“There is in my view, however, also an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or a judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. 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 appeal to an appellate court; and if, as in the instant case, the statute provides that the judge’s decision shall not be appealable, they cannot be corrected at all.”

97. Mr Grodzinski relies upon that passage, as he successfully did before the SPT. In our view, however, there is nothing in that passage which is inconsistent with the correct analysis as we see it. The legal position remains that, subject to an appeal, the High Court is not amenable to judicial review. That is preserved by the words of section 9(2) of the HRA. That does not, however, lead to the conclusion that there can never be an action by way of originating process in the High Court under section 9(1)(c) in respect of an earlier order of the High Court. In our view, there can be, as is consistent with the wording of both the primary Act and rule 7.11 of the CPR. Indeed, as that rule makes clear, in respect of judicial acts, the High Court is the only correct forum.
98. We respectfully therefore disagree with the conclusion reached by the SPT, that even an action for damages against the Lord Chancellor in respect of a judicial act where the HRA permits such an action must be brought on an appeal in this Court. That, however, does not determine the central question which arises in the present appeal, namely whether an action for a remedy other than damages (for example a declaration as is sought in the present case) can be brought by way of an originating process under section 9(1)(c). As we have explained above, in our view, such an action cannot be brought: in those circumstances a judicial act must be either appealed or (where it is available) can be the subject of judicial review.
99. The SPT referred in his judgment to the decision of the Privy Council in *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385, although we were informed that the parties had not addressed that case in their submissions before him.

In that case the appellant was a barrister engaged in a case in the High Court and was committed to prison for 7 days for contempt on the order of the judge. He immediately applied *ex parte* by notice to the High Court under section 6 of the Constitution, naming the Attorney General as respondent and claiming redress for contravention of his right, protected by section 1(a) of the Constitution, not to be deprived of his liberty save by due process of law. The motion was dismissed. After serving his term of imprisonment the appellant appealed to the Court of Appeal. While that appeal was pending he obtained leave to appeal to the Privy Council against the committal order. The Privy Council quashed that order on the ground that there had been a fundamental failure of natural justice in that, before making the order, the judge had not told the appellant plainly enough what he had done to enable him to explain or excuse his conduct. Subsequently, the Court of Appeal by a majority dismissed the appellant's appeal on the ground that the failure of the judge to specify the nature of the contempt did not contravene a right protected by section 1 of the Constitution. The Privy Council, by a majority, allowed the appeal. In giving the opinion for the majority of the Board, Lord Diplock said, at p. 399:

“... No change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. 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.”

100. Mr Grodzinski submitted that no direct analogy can be drawn with the decision in *Maharaj*. Although the wording which we have to construe in the present appeal is different from that in the Constitution which was under consideration in that case, we nevertheless see the force in Mr Tomlinson's submission that some analogy can be drawn with the analysis by Lord Diplock in that passage. A claim under section 9(1)(c) of the HRA can be regarded as a claim against the Crown in respect of a judicial act and not as a claim against a judge.
101. This is also consistent with the fundamental purpose of the HRA, which was to “bring rights home”, in other words to enable a person to bring proceedings in domestic courts where previously they had to bring them in the European Court of Human Rights. In Strasbourg an application is brought against the state, not against a particular branch of it. It follows that there can be cases in which the application relates to a judicial act, which places the state in breach of its international treaty obligations. An example of such a case is provided by *Hammerton v United Kingdom* (2016) 63 EHRR 23, in which the European Court of Human Rights held that the law of this country is in violation of Article 13 of the ECHR (the right to an effective remedy) because there is no possibility of obtaining damages for a breach of Article 6 (the right to a fair trial): see paras. 150-152 of the judgment.
102. We will now address the SPT's judgment in more detail. What follows is not intended to be a comprehensive analysis of his judgment. It is confined to a limited number of



points, on which we consider it would be helpful to comment, principally to show where our approach differs from his in a material way.

### The judgment of the SPT

103. The main reason why the SPT rejected the claim before him turned on the correct construction of the HRA and of the CPR and the FPR: see paras. 35-41 of his judgment.

104. At para. 38 the SPT placed particular emphasis on the constitutional principles of the separation of powers and the independence of the judiciary (and its corollary, judicial immunity from suit). He considered that, by way of analogy to the principle of legality in such well known decisions of the House of Lords as *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, at p. 131 in the speech of Lord Hoffmann, it could be said that the common law recognises certain “principles of constitutionality”; and that Parliament is not to be taken to encroach upon those principles by the use of general words.

105. At para. 39 he said:

“There are no express words in the Human Rights Act 1998 which do other than create a limited jurisdiction in the court to award damages for a breach of article 5.5 of the Convention. 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.”

We would interpose that, so far, that passage appears to be uncontentious and, in any event, in our view, is correct.

106. The SPT continued, at para. 39:

“Section 8 of the 1998 Act 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. ...”

He then considered the concept of necessary implication, which was strict, by reference to the speech of Lord Hobhouse of Woodborough in *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para. 45. The SPT then concluded para. 39 as follows:

“In my judgment there is nothing sufficient in the language of the 1998 Act that permits such an implication nor is the statutory purpose frustrated by not implying the power.”

107. With respect to the SPT, we consider that section 8(1) is wide enough on its express terms to include the grant of a declaration but that the critical issue in the present case is whether, as we hold, section 9 precludes any originating jurisdiction for a declaration in relation to a judicial act and limits such an originating jurisdiction to judicial review (in the case of an inferior court or tribunal) and to compensation for a breach of Article 5(5).
108. The SPT devoted a large part of his judgment, at paras. 42-64, to consideration of the principle of judicial immunity. In our view, that principle is not directly affected in the present context at all. This is because there is no question of anyone trying to bring a claim against Mostyn J personally, whether for damages or for a declaration. As the SPT himself noted, at para. 48 of his judgment, the parties did not dispute the principle of judicial immunity. That was certainly made clear in the appeal before this Court by Mr Tomlinson.
109. In our view, the proper analysis is that the central issue in this appeal depends on the correct construction of the HRA. There was no question of the HRA abrogating or encroaching upon the principle of judicial immunity. The Appellant's submission is that it does not need to do so. We respectfully agree.
110. Where we part company with the SPT is in particular where he said, at para. 59, that the only forum in which a claim for damages for a breach of Article 5 can be brought is on an appeal in the Court of Appeal. He accepted that, for inferior courts and tribunals, the claim could be brought in the High Court, in accordance with CPR rule 7.11 or the FPR. We take the view that the same applies to the High Court also. There is no difference in the wording of the CPR in this respect nor in the wording of the HRA.
111. In the next part of his judgment, at paras. 65-66, the SPT referred to the principle of vicarious liability. He noted that the general principle at common law is that Ministers of the Crown are not vicariously liable for judicial acts. He also noted that there is a general principle in the law of tort that the Crown is not vicariously liable for the acts of the judiciary and referred in that context to the terms of section 2(5) of the Crown Proceedings Act 1947. Again, in our respectful view, this was something of a "red herring". In the present case there is no dispute, and certainly was none as the case was presented before this Court, that the Crown is not vicariously liable for the acts of Mostyn J. What Mr Tomlinson does submit is that, on its correct construction, the HRA has created a statutory cause of action which is available in respect of a judicial act and that this includes the ability to obtain a declaration and not only damages against the Lord Chancellor. As we have explained above, we accept his submission so far as it relates to a claim for damages for breach of Article 5 but would not go further than that.
112. In his conclusion, at paras. 78-79, the SPT said the following:
- "78. The consequence is that I have come to the conclusion that there is nothing in the Human Rights Act 1998 (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 1998 Act 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. ...”

113. As we have indicated above, we agree with the SPT’s conclusion that the appropriate remedy is for Mr Mazhar to seek to appeal Mostyn J’s order although we do not agree with all of the SPT’s reasoning.
114. The SPT then turned to a different issue, whether he should grant permission to appeal against Mostyn J’s order. He continued, at paras. 79-81:

“That brings me to the submissions made about next steps that form no part of the pleaded case. Mr Saini [then leading counsel for Mr Mazhar] 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 reinstate 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.”

115. We therefore turn to the application for permission to appeal Mostyn J’s order.

#### Permission to appeal

116. At the hearing before us, it was suggested by the Court that, as a precautionary measure, an out of time application for permission to appeal against Mostyn J’s order should be lodged. This was done at the start of the second day of the hearing before us.

117. Before us no objection to the grant of permission to appeal was taken by the Lord Chancellor on either grounds of delay or that an appeal would have no real prospect of success. On the issue of delay in issuing a formal notice of appeal from Mostyn J’s order, the facts are exceptional.

118. The delay is explained by the following chronology. Upon issue and service of the proceedings and the particulars of claim for, among other things, a declaration against the Lord Chancellor that the Appellant’s rights under Articles 5, 6 and/or 8 ECHR had been breached, no issue was taken by the Lord Chancellor that the proceedings were procedurally flawed. That objection was only raised by the Lord Chancellor in January 2017 and was only formally advanced in the Lord Chancellor’s amended Defence served in February 2017. That change of position occurred after the Appellant’s solicitors had written on 14 December 2016 to say that they would not pursue the claim for damages against the Lord Chancellor in the light of the settlement which had been reached with the NHS Trust. Following a series of adjournments, the hearing before the SPT took place on 24 and 25 May 2017. His judgment was handed down on 12 October 2017. The Appellant’s notice of appeal was filed on 2 November 2017, leading to the present appeal. It is only now, with this Court’s decision on the appeal against the SPT’s order as to the correct interpretation of section 9 of the HRA,

that it has become clear that the Appellant has no right to the claim for a declaration and his proper course was to appeal Mostyn J's order. Accordingly, the procedural point on section 9 has been a live one at all material times since the Lord Chancellor's change of position in early 2017.

119. Furthermore, the Appellant attempted, as a "fallback" position, to appeal against Mostyn J's order at the hearing before the SPT. He declined to grant the application for permission to appeal (in his capacity as a single judge of the Court of Appeal) but did so with some reluctance and left the application to the full court.
120. In all those circumstances, it would be contrary to the interests of justice if an appeal that has a real prospect of success were to founder now only on the ground that the wrong procedure was used.
121. Mr Grodzinski's substantive retort to the application for permission to appeal Mostyn J's order and have it set aside is that the Lord Chancellor would not be a necessary or even appropriate person to be joined to that appeal as the Lord Chancellor will not have been a party to the proceedings at the time of the offending judicial order. That may well be correct generally speaking but in the present case there remains a formal claim for damages against the Lord Chancellor in the particulars of claim. There has been no settlement with the Lord Chancellor, only a unilateral notification by Mr Mazhar's solicitors of there being no intention to continue the damages claim against the Lord Chancellor following the Part 36 settlement with the NHS Trust and at a time when the Lord Chancellor had not changed his position on the jurisdiction of the High Court. There is no reason why, in view of the Lord Chancellor's change of position, the damages claim should not be continued against him, in whose favour there has not been any order for a stay. In those circumstances, the Lord Chancellor is a person interested in the outcome of any appeal against Mostyn J's order and a proper person to be joined to it.
122. As to the merits of the application for permission to appeal we consider that the appeal would have a real prospect of success. In essence Mr Tomlinson submits that, as a matter of law, Mostyn J's order should never have been made because there was no evidence before him that Mr Mazhar was a person "of unsound mind" (the phrase used in Article 5(1)(e) of the ECHR).
123. The appeal will have to be against the NHS Trust and not only the Lord Chancellor. Since the NHS Trust did not appear at the hearing before us, our order will give it permission to apply for a stay of our order, or to be discharged as a party. The order will also require that it (and this judgment) should be served on the Trust.

### Conclusion

124. For the reasons given above, we dismiss the appeal against the order made by the SPT but for different reasons from those that he gave. We also grant permission to appeal out of time against Mostyn J's order of 22 April 2016.