Neutral Citation Number: [2024] EWCA Civ 94

Case No: CA-2022-002417

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**MR DAVID LOCK KC**
**[2022] EWHC 3583 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2024

**Before:**

**LORD JUSTICE BAKER**
**LORD JUSTICE PHILLIPS**
and
**LORD JUSTICE STUART-SMITH**

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**Between:**

**THE KING**
**(on the Application of REZQ ALLAH KORO)**
**Claimant/Appellant**

**-and-**

**COUNTY COURT AT CENTRAL LONDON**
**Defendant/Respondent**

**-and-**

**THE CROWN PROSECUTION SERVICE**
**Interested Party**

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**Dr Abdul-Haq Al-Ani** for the **Appellant**
**Scarlett Milligan** (instructed by **Government Legal Department**) for the **Respondent**
**Kate Longson** on a Noting Brief (instructed by **Government Legal Department**) for the **Interested Party**

Hearing date: 1 February 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 8 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Lord Justice Stuart-Smith:**

## Introduction

1. This is the judgment of the Court after a rolled-up hearing. The issue is whether to grant permission to appeal the decision of Mr David Lock KC sitting as a Deputy High Court Judge ["the Deputy Judge"] on 14 December 2022 on a renewed application for permission to bring judicial review proceedings and, if permission is granted, to deal with the substantive appeal against his decision. By those judicial review proceedings the Appellant wishes to challenge the lawfulness of a decision by HHJ Baucher in the Central London County Court ["the CLCC"] on 27 May 2022 refusing the Appellant permission to appeal an earlier decision of that Court. The Deputy Judge refused the Appellant's renewed application for permission to bring the judicial review proceedings and certified that the renewed application was totally without merit.

2. This brief introduction hints at the possibility that the most recent decisions are merely the tip of an iceberg. Closer investigation of the factual and procedural background shows this to be true. In order to understand what the Deputy Judge thought he was doing on 14 December 2022 and, which is materially different, what the position actually was, it is necessary to go back to the beginning. We should say at once, however, that we are in no doubt that permission to bring the present appeal against the order of the Deputy Judge should be granted and that the appeal should be allowed. What else should be done to try to unravel what has happened is rather more complicated.

3. The Appellant has been represented throughout the history of the civil litigation to which we refer below by Dr Al-Ani on a direct access basis. Dr Al-Ani has shown remarkable professional persistence and commitment to the interests of his client, as we shall make clear. As is usual where the actions of a Court are brought into question, the Defendant initially indicated that it intended to take no part in the proceedings and that it adopted a neutral stance. When directing that this rolled-up hearing should happen, Stuart-Smith LJ directed that the Defendant should participate. As a result, Ms Milligan was instructed to appear for the Defendant. Her written and oral submissions were of the highest quality and extremely helpful, while maintaining a rigorously neutral stance. Stuart-Smith LJ also directed that the Interested Party ["the CPS"] should have the opportunity to make representations if it so wished. In the event, the CPS decided not to make representations but instructed Ms Longson to appear on a noting brief but without any authority otherwise to represent or bind the CPS. As we set out later, Ms Longson had represented the CPS at the hearing before HHJ Baucher. Despite the limitations on her instructions before us she provided helpful information about how that hearing had developed, for which we are grateful.

## The procedural and factual background

4. The Appellant is an Iraqi refugee who has been in present in the United Kingdom since March 2015. Before he arrived in this country he had business dealings with a Mr Zakaria, which ended in litigation. The Appellant says that, in the course of that litigation, he discovered that Mr Zakaria had committed criminal offences. For reasons that are not disclosed, he decided to bring a private prosecution against Mr Zakaria and, to that end, he applied to the Ealing Magistrates Court to issue a summons against Mr Zakaria alleging an offence of theft and an offence of fraud. In due course, summonses

were issued and Mr Zakaria elected to be tried in the Crown Court. The Appellant then asked the CPS to take over the prosecution because, he says, he could not afford to instruct counsel to appear to prosecute the case. The CPS took over the conduct of the case but then decided to discontinue the prosecution. Despite protest from the Appellant, on 16 August 2019 the CPS upheld its decision to terminate the criminal prosecution. Accordingly the CPS offered no evidence in accordance with section 17 of the Criminal Justice Act 1967.

5. The Appellant's first response was to issue judicial review proceedings on 4 November 2019 ["the 2019 JR proceedings"] seeking to challenge the decision of the CPS to discontinue. In addition, the Appellant sought declarations that the CPS had breached his rights guaranteed under Directive 2012/29/EU and under Article 6(1) ECHR. Permission to bring the 2019 JR proceedings was refused by Cheema-Grubb J on 18 March 2020 after an oral hearing.

6. The Appellant's next response is what set in motion the course of events that led ultimately to Mr Lock's decision in December 2022. On 26 July 2020, Dr Al-Ani sent the papers for a Part 7 claim for damages from the CPS to the CLCC for the court to process and issue the proceedings. From the outset the claim's progress was dogged by what may most politely be called administrative mishaps. Despite the fact that the CLCC acknowledged receipt of the papers by signing for them on 28 July 2020, nothing happened until Dr Al-Ani had chased twice, first on 22 September and then on 19 October 2020. In response to the second chase, the CLCC said that it could find no record of receipt of the papers. It requested further copies, which Dr Al-Ani sent the same day. At a later date, the CLCC sent a standard form Notice of Issue to Dr Al-Ani stating that the claim had been issued on 21 October 2020. It said that the claim had been sent to the Defendant CPS by first class post on 2 November, that it would be deemed served on 4 November and that the CPS would have until 18 November to reply. The bottom half of the Notice of Issue was a tear-off section enabling the Claimant to request that judgment be entered in default if the CPS had not replied during the time for doing so i.e. by 18 November 2020.

7. Three things may be noted at this stage:

   i) When finally issued by the CLCC, the proceedings were designated as action GO2CL625. We shall refer to them as "the 2020 Part 7 Proceedings";

   ii) The Claim Form's Brief Details of Claim and the accompanying Particulars of Claim provided by the Appellant repeated the history of the CPS taking over and then discontinuing the prosecution of Mr Zakaria and claimed damages in the sum of £386,112 "caused by the offences committed by the Accused" (i.e. Mr Zakaria). The Particulars of Claim referred to the refusal of the High Court to permit the 2019 JR proceedings to be brought. They asserted, first, a duty arising under Articles 6 and 13 of the ECHR to have the prosecution (described by the Appellant as "his action") against Mr Zakaria heard by a court, to give him an effective remedy and to allow him at least one oral hearing. Second, they asserted that the decision to offer no evidence breached his rights under Article 8 and Article 1 of Protocol 1 of the Convention. Third, they asserted that the Appellant "is a victim under section 7 of the Human Rights Act 1998 and believes that the breach of his constitutional right ought to be heard in court".

iii) The Defendant's name and address for service including postcode was given in the relevant box on the Claim Form as "The Crown Prosecution Service, 102 Petty France, London, SW1H 9EA". That was indeed the correct name for the Defendant and the Defendant's postal address. What the Claim Form did not do was to include reference to the Government Legal Department in the box. As we will explain later, this omission has had malign consequences.

8. On 20 November 2020 the Appellant applied for judgment in default against the CPS.

9. The only response from the CPS came on 2 December 2020 when the Government Legal Department ["GLD"] wrote to Dr Al-Ani. The letter asserted that any claim was statute barred. More importantly for present purposes, it commenced by saying:

> "We are instructed by the CPS in this matter.
>
> We have been sent copies of the Court papers that you have attempted to serve directly upon our client.
>
> Your attempt to serve directly upon our client is defective. Until the papers are served upon us in accordance with CPR 6.10(b), time limits for an Acknowledgement of Service or for a Defence do not begin to run, and there is no requirement for our clients or ourselves to respond in such manner."

10. The reference to CPR 6.10(b) was to the provision that "In proceedings against the Crown … service on a government department must be effected on the solicitor acting for that department." It is now apparent that the GLD did not copy its letter of 2 December 2020 to the Court; nor did it say or do anything more about the failure to serve on the GLD until the hearing before HHJ Baucher, to which we will return. The Appellant did nothing in response to the letter by way of applying to amend the entry in the Claim Form either then or later. It will, of course, immediately be noted that the GLD's address is also 102 Petty France; and the 2 December 2020 letter shows that, despite the fact that the Claim Form did not mention the GLD, copies of the papers (i.e. the issued claim form and other papers submitted to the CLCC) for the 2020 Part 7 Proceedings) had been passed by the CPS to the GLD so that both the CPS and their instructed lawyers, the GLD, had them. This, of course, assumes that the papers went to the GLD via the CPS rather than being delivered directly to the GLD on arrival at 102 Petty France, as to which there is no information available to the Court.

11. On 10 December 2020 the CLCC wrote to Dr Al-Ani informing him that the Appellant's request for judgment had been "referred to the Judge for directions, comments on your request or an order/hearing notice will be despatched in due course." What then happened was that on 1 February 2021, as recorded in an order dated 25 February 2021, DJ Avent refused the claimant's application for judgment and, of his own motion, struck out the claim. The reason given was that the Appellant should have sought Judicial Review of the decision to terminate the prosecution. The order correctly stated that the claimant could apply within 7 days to set aside or vary the order (see CPR 3.3(5), although the order made incorrect reference to CPR 23.10). We shall refer to this decision and order as "Avent 1". Although it was specifically referred to in the Particulars of Claim that should have been before the District Judge when he made his

order, there is no sign in the order that he was conscious of the fact of the 2019 JR proceedings or Cheema-Grubb J's refusal of permission.

12. Avent 1 was received by the Appellant on 2 March 2021. The Appellant duly applied the following day, 3 March 2021, to set aside Avent 1, with a witness statement from Dr Al-Ani in support. The application notice referred to the fact that Avent 1 had been made in the absence of the Appellant and stated that no evidence from the CPS had been served. Dr Al-Ani's witness statement drew a distinction between the 2019 JR Proceedings, which he said was "to argue that it was a wrong decision by the [CPS] to discontinue the criminal proceedings" and the 2020 Part 7 Proceedings which he said were seeking to enforce "his right for a remedy if the action of the Defendant resulted in a breach of his rights under the Convention." He assumed, wrongly, that the CPS had made an application to strike out the claim and had submitted evidence. In fact the CPS had done neither of these things. So far as the CLCC was concerned, the CPS had done nothing and the order was made of the court's own motion.

13. On 22 March 2021 the court acknowledged receipt of the Appellant's application to set aside Avent 1 and stated that it had been referred to the Judge for directions. Subsequently, on 29 April 2021 the CLCC informed the Appellant that his 3 March 2021 application to set aside Avent 1 would be heard on 28 July 2021.

14. It is at this point that matters went seriously awry. For some reason that has not been fully explained, on 19 April 2021 (i.e. 10 days before the CLCC informed the Appellant that his 3 March 2021 application would be heard on 28 July 2021) DJ Avent made another decision, which was formally recorded in an order of the Court on 1 May 2021 (i.e. 2 days after the notice of hearing dated 29 April 2021). We shall refer to this decision and order as "Avent 2". Avent 2 ordered that "the claim is struck out." It stated that it was made upon the Court's own motion. The reasons given for making the order included that the decision of the CPS to offer no evidence did not give rise to a private law remedy under the Human Rights Act 1998; that the Appellant's redress was to pursue a Judicial Review which the High Court refused on 18 March 2020; and that the Appellant could not now bring a collateral attack against the High Court decision in the current proceedings.

15. Quite how Avent 2 came about is not entirely clear. What appears from the CLCC's Case History of the Original Case File is that on 16 February 2021 a duplicate file was referred to DJ Avent with a request for judgment. This was after DJ Avent had made his decision on 1 February 2021 but before that decision was formally issued as Avent 1 on 25 February 2021. There is no apparent explanation for the decision to send a duplicate file to DJ Avent on 16 February.

16. It would be untenable to suggest that Avent 2 was intended to deal with the Appellant's application to set aside Avent 1. For a start, the words "the claim is struck out" is the form of words used when the order of the court is effective and intended to strike out an existing claim. Furthermore, the reasons given for Avent 2 are obviously intended to be reasons supporting a decision to strike out the claim on this occasion. The order does not refer to Avent 1 either expressly or by implication. There is therefore no reason to think that Avent 2 was in any sense reiterating or restating what had already been decided.

17. Before us there was some discussion about whether Avent 2 should be described as a nullity. For reasons that we explain later, we would not so describe it: see [79] below. However, what is abundantly clear is that Avent 2 was ineffective since it purported to strike out a claim that could not be struck out because it had already been struck out by Avent 1. It follows that all the tortuous proceedings that subsequently arose out of Avent 2, which we detail below, should not have happened, since they were premised upon the fundamentally mistaken assumption or belief that Avent 2 was legally effective.

18. There are three inferences which are, in our judgment, inescapable. First, DJ Avent did not have Avent 1 in mind when he decided Avent 2. Second, that when sending out the listing direction on 29 April, the court did not appreciate that DJ Avent had made the decision that led to the issuing of the formal Avent 2 order two days later. And, third, that when drawing up and sending out Avent 2, the court did not appreciate that it had 2 days previously sent out the listing direction on 29 April 2021. Even allowing for the heavy load of paperwork in a busy County Court and the difficulties created by working from home during the pandemic, it is infinitely regrettable that the court's control of its case file did not lead to an appreciation that Avent 2 was entirely inappropriate.

19. The Avent 2 order, as Avent 1 had done before, stated that the order had been made without a hearing and that the Appellant could apply within 7 days of service of the order to set it aside or to vary it. On 7 May 2021 Dr Al-Ani promptly sent an application to set it aside, with an accompanying witness statement. His witness statement set out the relevant procedural background, starting with his application on 3 March 2021 to set aside Avent 1, his receipt of the listing directions dated 29 April 2021 and his subsequent receipt of Avent 2. He took the point that the Appellant had not yet had an oral hearing "despite having filed a proper Claim and a proper Application Notice to set aside the order of the District Judge", that being a reference to his 3 March 2021 application to set aside Avent 1. He referred to relevant authority in support of his contention that the Appellant was entitled to an in-person hearing and concluded by reiterating that the Appellant was entitled to an oral hearing for his Application Notice and the Claim. He did not expressly take the additional point, which he could have taken, that Avent 2 was legally ineffective - or at least that it was an order that required an explanation.

20. On 11 May 2021 Dr Al-Ani wrote to the CLCC asking for the copy of any application made by the CPS that led to Avent 2. On 28 May 2021 he was told that there had been no application and that the court had made its order of its own motion.

21. On 1 June 2021 Mr Story of the GLD gave notice that the GLD was now acting on behalf of the CPS and asked Dr Al-Ani to ensure that he was copied in to any further correspondence. The GLD took no action on behalf of the CPS either by filing an Acknowledgment of Service or an application in respect of the addressee of the original Claim Form or otherwise.

22. On 16 June 2021 the next inappropriate step was taken by the CLCC. In a letter to Dr Al-Ani it wrote:

> "The Judge has viewed the application and direct the court office not to issue the application at this stage. The has [sic] enquired to the [Appellant] – should this application not more correctly be

> framed as an appeal against the decisions of DJ Avent, rather than an application to set it aside."

23. The letter did not specify what application was being addressed. The reference to "decisions" might suggest that the letter was intended to address both of the Appellant's outstanding applications (3 March and 7 May 2021). However, a document on the file reveals what caused the letter to be sent. The document is described as a referral sheet dated 28 May 2021 and is the document used within the CLCC to refer a question or application to a District (or other) Judge for directions or, if appropriate, decision on the papers. Under the heading "Hearings Listed" there was a reference to "Renewal App 28th July 2021", which is evidently a reference to the renewed application in respect of Avent 1. The document then says: "Please see attached application … from the [Appellant] … dated 7/5/21" and "You are being asked to set aside order dated 1/5/21." The Referral Sheet is therefore a referral of the Appellant's application to set aside Avent 2. According to the Referral Sheet, it was referred to a Deputy District Judge on 10 June 2021, who wrote "Please do not issue the applications but return it to the [Appellant] asking [the question that found its way into the letter of 16 June 2021]".

24. This involved a fundamental misunderstanding of the proper position, which was that the Appellant was entitled to an in-person hearing of his application to set aside Avent 2, just as he was entitled to an in-person hearing of his application to set aside Avent 1. The error was compounded by the fact that the letter of 16 June 2021 did not specify that it was referring to the 7 May 2021 application to set aside Avent 2 and not to the 3 March 2021 application to set aside Avent 1. It is, however, clear from the information on the Referral Sheet that it was referring to the 7 May 2021 application to set aside Avent 2. There is no indication that the Deputy District Judge was conscious of Avent 1 or the potential significance of the reference to the renewal application being listed on 28 July 2021. There is also no indication that the Deputy District Judge was alerted by Dr Al-Ani's reference in his witness statement to the March 2021 application to the possibility that Avent 2 was legally ineffective or that anything unusual was going on.

25. Dr Al-Ani's response to the 16 June 2021 letter was to send the CLCC yet another application on 25 June 2021. This time the form of the application was an appeal against the "Order of the District Judge refusing to issue the Claimant's Application Notice to set aside the District Judge's order striking out the Claim without a hearing." The Grounds of Appeal made it clear that Dr Al-Ani was (correctly) treating the letter of 16 June 2021 as relating to Avent 2. The grounds rehearsed the background going back to Avent 1; the Appellant's filing of his 3 March 2021 application to set aside Avent 1 with an oral hearing; the listing direction on 29 April 2021; and the receipt of Avent 2 two days after the receipt of the listing direction. It was submitted that "there is no authority supporting the conduct of DJ Avent in making [Avent 2]." The Grounds went on to refer to the 7 May 2021 application to set aside Avent 2 with an oral hearing; and to the letter of 16 June 2021 (which was wrongly attributed to DJ Avent) ordering that the 7 May 2021 Application Notice should not be sealed. Dr Al-Ani's witness statement laid out the same background and annexed the relevant documents. With a measure of understatement that shows considerable restraint, his witness statement also said:

> "32. The [Appellant] finds it difficult to comprehend the action of the Court when deciding on 29/04/2021 to fix a date for

> hearing the Application Notice dated 03/03/2021 only to decide TWO days later to strike out the Claim without any explanation.
>
> 33. The claimant finds the Court's action to be very casual when the date at which the order of 01/05/2021 was made is given at the bottom of that order to be 19/04/2021. There seems to be some confusion as [to] what was decided when. If the order to strike out was made on 19/04/2021 and only signed on 01/05/2021 then how did the Court issue the Notice of Hearing of Application on 29/04/2021.
>
> 34. The Claimant believes that the Court has denied him justice by denying him ONE single ORAL hearing to enable him to argue his entitlement to damages in accordance with HRA 1998 resulting from the Defendant's failure."

26. Technically, Dr Al-Ani could have applied to set aside the refusal since it was made without a hearing; or, possibly, he could have issued another set of judicial review proceedings to challenge the refusal to grant the Appellant a hearing. It might also be said that he could have contacted the Court and replied to the letter of 16 June 2021 by saying that he did not accept that an appeal was the appropriate course and that he wanted the promised in person hearing to be granted. But, in our judgment, he was justified in his decision to adopt the course he did. He was already subject to baffling conduct on the part of the Court in purporting to strike out the claim twice, listing the application in respect of Avent 1 to be heard on 28 July 2021 and then sending the letter of 16 June 2021 with its unjustifiable refusal to list his application, with the added complication that the letter referred to the Court's "decisions" without specifying which decision (Avent 1 or 2) was being talked about. His two previous attempts to set aside orders made without a hearing had got nowhere and, as he pointed out in submissions, judicial review should be treated as a remedy of last resort.

27. The confusion was compounded on 1 July 2021 when the CLCC's listing team sent Dr Al-Ani a letter that was expressed to be about the hearing date of 28 July 2021. Having stated that the hearing would be held remotely unless the parties agreed otherwise, the letter asked eight questions ranging from "Have all outstanding directions been complied with?" through "Can you please confirm the time estimate for the hearing?" to "Do you wish this hearing to take place face to face at court …?"

28. Before replying to the CLCC, Dr Al-Ani wrote to the GLD on 7 July 2021 asking them for their time estimate for the hearing. Mr Story of the GLD replied "I presume this relates to the Koro matter? If so, I would estimate two hours." Dr Al-Ani then replied to the CLCC on 8 July 2021 including a time estimate of 2-3 hours, that two parties were expected to attend, and that he had no objection to a remote hearing.

29. On 12 July 2021 an administrative officer of the CLCC responded to Dr Al-Ani's submission of his appellant's notice on 25 June 2021 saying:

> "we are unable to process your Appeal as it is appealing a direction rather than a sealed court order. The Judge asked us to enquire whether the Application should instead be an Appeal

> against DJ Avent's Order of 19th April 2021 (i.e. Avent 2), which was the purpose of the court's letter of 16th June 2021"

The assertion that there could be no appeal against a direction rather than a sealed court order was yet another calamitous error: see [77] below.

30. Dr Al-Ani replied to the administrative officer on the same day with a submission that he asked should be put before the Judge. Correctly, the first point he made was that the Appellant had followed the directions of the judge and the Court at every step. He submitted, also correctly, that the Appellant was entitled under the CPR to have a hearing of his application for judgment in default and his application of the 3 March 2021 ought to have been heard. He concluded by saying that he left it to the judge to decide which route the Appellant should follow "in order for him to exercise the rights guaranteed under the law and the CPR".

31. Having had no reply, Dr Al-Ani wrote again on 26 July 2021 to the administrative officer urging him to put his submission of 12 July 2021 before the Judge. We have seen no evidence that anything effective was done in relation to Dr Al-Ani's submission or the chasing letter. In particular, we have seen no evidence that the submission was put before a Judge. If it was put before a judge, there is no record of the judge having considered or responded to it.

32. In the event the hearing listed for 28 July 2021 did not happen. The reason for this appears from an entry on the Case History of the Original Case File dated 27 July 2021, which records "28.0721 Vacated – Case S/O". If, as the entry suggests, the hearing was vacated because the case had been struck out, two observations may be made. First, the whole point of the hearing was to enable the Appellant to apply to set aside Avent 1, which is what had struck out the claim. Second, an alternative possibility is that the reference to the claim being struck out was a reference to Avent 2, in which case it would be doubly inappropriate as (a) Avent 2 was ineffective and (b) the application listed to be heard on 28 July 2021 was to set aside Avent 1, not Avent 2. Whatever the reason, the opportunity for the Appellant to have the day in Court to which he was entitled was lost. That must be added to the growing list of serious errors in the administration of the Appellant's litigation.

33. On 1 September 2021 Dr Al-Ani wrote to the CLCC what was intended to be a pre-action letter before an application for judicial review of the failure to grant the Appellant access to justice by failing to list his applications for oral hearings. In setting out the issue, Dr Al-Ani again set out the procedural background, which we have summarised above. Under the heading "The details of the action that the Defendant [i.e. the Court] is expected to take", the letter said simply: "Grant the [Appellant] a hearing."

34. On 9 September 2021 the same administrative officer as before wrote to thank Dr Al-Ani for his emails. He continued:

> "I'm afraid I must refer you back to my email of 12th July 2021. If you wish to lodge an appeal with our Court in a civil matter, it must be against a sealed order of the Court along with the appropriate fee or fee remission form. Without a valid

> application or appeal, the Court is unable to take further action as the claim has been struck out."

35. In the light of this, the Appellant decided not to pursue his proposed judicial review against the CLCC. Instead, on 13 September 2021 Dr Al-Ani issued an Appellant's Notice seeking to appeal Avent 2. It is an irresistible inference that this was a reaction to the Court's continued failure to list for a hearing the Appellant's 7 May 2021 application to set aside or vary Avent 2 and the contents of the court's letter of 9 September 2021. Once again, Dr Al-Ani set out the procedural background in the Grounds and in a further witness statement. Once again, it should have been clear to anyone who read the grounds and witness statement that things had gone awry both in relation to the making of Avent 2 and in the Court's failure to list the Appellant's applications to set the two Avent orders aside, which Dr Al-Ani rightly described in his witness statement as "a total denial of justice".

36. Nearly two months later, on 5 November 2021, the CLCC wrote to Dr Al-Ani to inform him that his appeal had been served on the respondent and that they had 14 days in which to reply with a respondent's notice if they so wished. The Respondent was the CPS. The CPS did not respond.

37. On 12 November 2021, as recorded in an order made on 15 November 2021, HHJ Lethem considered the Appellant's Notice dated 13 September 2021, which he noted had been filed out of time, given that the order being appealed was made on 1 May 2021 (Avent 2). The order stated that the Judge had considered the application and the file of papers. He stated that no good reason had been given for the Appellant's Notice being filed out of time and ordered that (a) the application to extend time was refused and (b) the application for permission to appeal was refused. Once again, because the order was made without a hearing, it drew attention to the Appellant's right to request a reconsideration at an oral hearing.

38. HHJ Lethem amplified his reasons, including the following:

> "I. The Appellant maintains that the court wrongly refused to issue an application filed on or about 7th May 2021. If this is correct then his remedy was judicial review of the refusal to issue the application. The balance of section 11 makes no sense. There is a suggestion that DJ Avent refused the Appellant's Notice. That could not be right as the Appellant's Notice is case managed by a Circuit Judge and would not be open to DJ Avent to grant of refuse permission. The Appellant's Notice is woefully out of time and there is no coherent explanation with any merit.
>
> II. In any event, the proposed appeal has no real prospect of success and there are no other compelling reasons for permission to be granted. There are no particulars given that would indicate that the court below took into account irrelevant matters or failed to take into account relevant matters when reaching its factual conclusions nor exercised its discretion outside the generous ambit afforded to a judge at first instance."

39. It is apparent from these reasons that HHJ Lethem did not understand or have in mind Dr Al-Ani's explanation of why and how he came to issue the 13 September 2021 Appellant's Notice when he did. Specifically, he cannot have had in mind the sequence of events set out by Dr Al-Ani which explained that his applications for in-person hearings had been ignored or rejected, that the Appellant was entitled to an in-person hearing, and that the reason why the 13 September 2021 Appellant's Notice was out of time was because the court had wrongfully refused to list his applications for an in-person hearing.

40. Dr Al-Ani applied for an oral hearing on 19 November 2021. It was this application which ultimately came before HHJ Baucher on 27 May 2022. With his application Dr Al-Ani filed another witness statement which, as before, set out the background and exhibited the relevant documents. His evidence included that he had applied to vary or set aside Avent 2 within a week of receiving it. He also explained that the issuing of the Appellant's Notice followed the Court's letter of 9 September 2021, which he took to be a direction from the Court to proceed by way of an appeal. He exhibited that letter.

41. Dr Al-Ani attempted to serve the application documents upon Mr Story at the GLD, but the email system initially failed to deliver them. He therefore corresponded with Mr Story about alternative means of delivery, finally sending the documents by email in three tranches on 25 November. Mr Story acknowledged receipt, merely noting that "the documents were served on me out of time, and I reserve the right to bring this to the court's attention at the appropriate time.".

42. On 20 January 2022 the Court issued a notice of Oral Hearing stating that the oral hearing would take place on 21 February 2022, with a time estimate of 30 minutes before a Circuit Judge: that was referring to the oral hearing of the Appellant's application for reconsideration of the 15 November 2021 order of HHJ Lethem. That direction was superseded by a further order, made by HHJ Lethem on 3 February 2022, that the application for permission to appeal should be listed on the first open date after two months before HHJ Lethem with a time estimate of one hour. The order said that the Respondent need not attend.

43. In response to another listing questionnaire, Dr Al-Ani exchanged emails with Mr Story of the GLD on 4 February 2022. On being asked for his comments on the listing questionnaire, Mr Story said that the Court had already sent it to him and that he would reply to them and copy in Dr Al-Ani. He duly did so later that day, suggesting that a remote hearing would be most appropriate and stating that the only attendee for the CPS would be Ms McAteer of Counsel.

44. On 22 March 2022 the CLCC sent directions for the hearing to be heard on 27 May 2022; and so it was that the hearing came before HHJ Baucher on that day.

45. In accordance with directions that had been given by the Court, Dr Al-Ani prepared and filed a Skeleton Argument, which cross-referred to the witness statement he had filed with the current application. In addition to the contents of the witness statement, which had set out the relevant background, the Skeleton Argument set out the procedural background, identifying accurately the confusion and errors that appeared on even a cursory review of his witness statement and the latest skeleton. On a fair reading of his (uncontradicted) witness statement and skeleton it was obvious that the sequence of

events leading to the hearing on 27 May 2022 flowed directly from the issuing of Avent 2, the confusion that order had generated, and the court's confused and frankly wrong directions that had followed. In particular, they showed why HHJ Lethem's conclusion that there was no good reason for the delay in issuing the Appellant's Notice on 13 September 2021 was unfounded.

46. We have read the full transcript of the hearing before HHJ Baucher. It does not make for happy reading. The first thing to note is that Ms Longson of Counsel was instructed to appear on behalf of the CPS. Her submissions make plain that she appreciated the need for an exercise of judicial discretion in the CPS's favour if she was to make substantive submissions because (a) the CPS had not served an acknowledgement of service; (b) the CPS had not made an application under CPR Part 11 as it should have done if it was to take a point challenging the jurisdiction of the court because of defective service: see [65] below; and (c) neither the CPS nor Ms Longson had submitted a skeleton argument or any other material indicating what their position would be.

47. It is to be remembered that the hearing was, or should have been, the hearing of the Appellant's application for an oral hearing to set aside or vary the decision on the papers that HHJ Lethem had made by his order of 13 November 2021. In the light of this and the precarious basis upon which Ms Longson was attending, it is surprising and unfortunate that the judge started by addressing Ms Longson about the issues and how they might be resolved. Far from being given the opportunity to present his application to the Court, Dr Al-Ani was asked to sit down while the judge continued her discussion with Ms Longson. That said, the Judge's initially expressed provisional view was that there should have been an oral hearing for the Appellant to have the opportunity of addressing the District Judge. Ms Longson appeared to accept that proposition but then submitted that there was "a slight difficulty because these proceedings were never served." While accepting that it was "slightly irregular" that she was appearing at all and that another tribunal might not have allowed her to do so, she took the judge to the GLD's letter of 2 December 2020. The judge immediately identified that the burden of the point that Ms Longson wished to make was that it would be a "waste of time" to grant permission and send the case back to the District Judge "because they had not issued proceedings." Ms Longson developed her submission by saying that "the case does not exist".

48. It is apparent from the transcript that at this point Dr Al-Ani attempted to intervene. He was, in my judgment, right to do so because his application had been hijacked in two respects. First, the judge had given him no opportunity to present his application but had allowed Ms Longson to make all the running. Second, he had no notice in advance of the hearing that the point was to be taken, save that we accept that Ms Longson informed him outside court while waiting to be called on. Regrettably, the judge did not allow Dr Al-Ani to intervene, saying that he "would have his opportunity". Ms Longson was allowed to continue her submission that, if remitted for an oral hearing, the District Judge would have to consider "whether to declare that the claim does not exist, having never properly be served" which she submitted was the correct course to take. She went so far as to submit that "at some way along the line, the court would have to acknowledge that the claim no longer exists, that it does not have jurisdiction to hear the claim, because it does not. It has never been served correctly, and we are way out of time now from the issue of the claim form."

49. At this point the judge finally turned to Dr Al-Ani. Dr Al-Ani tried to develop a submission that responsibility for the correct serving of the proceedings rested with the Court. The judge formed the view (which she was entitled to form) that this was a bad submission; but she rejected, in language that became increasingly intemperate and with frequent interruptions, all attempts by Dr Al-Ani to make his submissions. She then returned to Ms Longson for assistance in how to frame her order. Ms Longson suggested that the judge should allow the application for permission to be made out of time and then refuse the application, which is what the judge did.

50. In her ex tempore judgment, the judge declared herself satisfied that the time limit for issuing the Appellant's Notice had been breached and that it was a serious breach. She did not refer to any of the background but held that the real reason for the delay and breach was confusion on the part of the Appellant, which she did not regard as a good reason. Her only reference to the procedural background and the role of the court in generating confusion was to say that the reason for the breach was confusion "not assisted greatly by the court office." However, she said that "the proper course of action in fairness to the Appellant, taking into account the need to comply with orders, but for there to be justice between the parties, is to grant permission to appeal out of time." She then went on to address what she described as "an underlying issue in relation to this matter, namely that the proceedings themselves have not been properly served." She held that the proceedings had not been served on the GLD as they should have been in compliance with CPR 6.10 because the Appellant did not provide the correct address to the court. Having discussed the terms of CPR 6.6(2) she concluded that "the reality is that there were no proceedings in the sense that whilst they had been issued, they had not been served on the correct party." On that basis she concluded that:

> "there would be no purpose in my permitting the appeal for that irregularity and remitting the proceedings back to the District Judge because all the District Judge could say at any subsequent hearing was, "I have no jurisdiction to hear this matter because the proceedings have not been served on the correct party." It would be an inappropriate use of the court's resources."

The judge therefore refused permission.

51. The order reflecting the judge's decision stated:

> "**Preamble**
>
> 1. The appellant has not complied with CPR 6.10, CPR 6.6(2) and PD 66
>
> 2. These proceedings have never been served
>
> **It is ordered that**
>
> 1. Permission to appeal out of time granted.
>
> 2. Permission to appeal refused. There is no right of appeal against this decision – Access to Justice Act 1999 s. 54(4)

> The Appellant to pay the Respondent's costs to be subject to detailed assessment if not agreed."

52. It is unfortunate that the Judge was deflected from her initially expressed provisional view by the submission that the proceedings did not exist because they had not been served on the GLD. It is doubly unfortunate that, perhaps because she considered that Dr Al-Ani's initial submission about the responsibility of the court for effecting service correctly to be thoroughly bad, she did not consider the alternative courses and case management orders that would be open to a District Judge if the GLD were to raise the question of defective service (either originally or at this late stage), or the fact that the point was now being raised without complying with the provisions of CPR Part 11 or giving any advance notice of their intention to raise the point. It is triply unfortunate that the end result was reached after a hearing where Dr Al-Ani's well-founded and fully explained application was peremptorily dismissed after what can only be described as an unacceptable litigation ambush that should not have been tolerated.

53. With all other possible routes barred, the Appellant issued these judicial review proceedings on 19 July 2022 naming the CLCC as Defendant and the CPS as Interested Party. The Statement of Facts and Grounds set out the background, annexing relevant documents. Dr Al-Ani concentrated in his submissions and grounds on (a) the procedural irregularity of allowing the CPS to raise the point about non-service without having complied with the provisions of CPR 11; (b) what he described as the CPS misleading the judge by failing to disclose the full history of the CPS's conduct (or lack of conduct) in relation to the claim, which, he submits, could only be construed as having accepted service; and (c) the denial of the Appellant's right to an oral hearing by successive decisions of the CLCC culminating in the decision of 27 May 2022. In support of his grounds, he referred to *R (Sivasubramaniam) v Wandsworth County Court* [2004] 1 WLR 475, [2002] EWCA Civ 1738 including [56] where the Court said:

> "[56] The possibility remains that there may be very rare cases where a litigant challenges the jurisdiction of a circuit judge giving or refusing permission to appeal on the ground of jurisdictional error in the narrow, pre-Anisminic sense, or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing. If such grounds are made out we consider that a proper case for judicial review will have been established."

54. The application for permission on the papers was refused on 1 November 2011 by Ms Margaret Obi sitting as a Deputy High Court Judge. Ms Obi was not persuaded that the Statement of Grounds arguably demonstrated a procedural irregularity which constituted a substantial denial of the right to a fair hearing.

55. Dr Al-Ani filed an application for renewal of the claim for permission to apply on 3 November 2022. His renewed application came before the Deputy Judge on 14 December 2022. The Deputy Judge had the order made by HHJ Baucher but did not have a transcript of the hearing before her or of her judgment. He did, however, have a skeleton argument from Dr Al-Ani which referred back to the summary of the background in the Grounds and Statement of Facts. Dr Al-Ani described as the essence of the background that:

> "(i) Although the Claimant had filed his Claim on 26/07/2020, he has not yet had a single hearing on the substance or merits of his Claim;"
>
> (ii) Service of the Claim on the Defendant had either been affected by the Court or that the Defendant had waived its right to service by its action;
>
> (iii) The Defendant misled the County Court on 27/05/2022 when it submitted that the proceedings had never been served on it;
>
> (iv) The Circuit Judge erred in law she allowed the Defendant to address her on the lack of jurisdiction contrary to Part 11 of the CPR."

56. The Deputy Judge gave an ex tempore judgment and, by his order of the same date dismissed the application and certified it as being totally without merit. His judgment needs to be considered in a little detail. Early on, the Deputy Judge expressed "very substantial doubt" about whether the underlying claim demonstrated any breach of the Appellant's human rights without making a finding that the underlying claim had no merit. He also suggested that any challenge to the CPS decision to discontinue the proceedings ought to have been made by judicial review proceedings "but is very unlikely to give rise to a private law action" though, once again, he did not make a finding that it did not do so.

57. The Judge then said:

> "3. Nonetheless, he started these proceedings against the Crown Prosecution Service and sent the proceedings for service to the County Court. The County Court did not serve the proceedings in accordance with CPR 6.10 and the Government Legal Service on behalf of the County Court took the point they had never been properly served. There was then a series of procedural hearings when the claim was struck out by the District Judge and the claimant applied to set aside or vary that. Eventually, when that application was refused, it came on by way of an appeal against the decision of the District Judge."

58. In our judgment this summary is so concise that it suggests the Deputy Judge had not appreciated anything of the protracted history, so carefully laid out by Dr Al-Ani in his documents for the Court, or the confusion generated by the Court's actions.

59. Nor, it must be said, is there any indication in the judgment that the Deputy Judge appreciated that there were real issues about the CPS's conduct in relation to the failure to serve the proceedings on the GLD either initially or later. In particular there is no sign of an appreciation that, if the CPS wished to challenge the jurisdiction of the court on the basis of defective service, they should (as Dr Al-Ani had pointed out) have complied with the provisions of CPR Part 11: see [64] below.

60. However, what is both extraordinary and inexplicable about the judgment of the Deputy Judge is that he decided the application on the basis that HHJ Baucher had *refused* to extend time for bringing the appeal that was before her. That this is so is clear beyond argument from the following passages:

> "4. … *[HHJ Baucher] refused an application for permission to appeal out of time* and observed in her preamble that the proceedings had never been served. It seems to me that the question as to whether the previous proceedings had never been served is undoubtedly correct; they were never served. Mr Koro's case, presented ably this morning by Mr Al-Any, his barrister, is that even though proceedings have never been served, service had been waived. It does not appear to me that the judge accepted that argument and in my judgment she was fully entitled to say that this argument had no merit. *Further, the judge had a discretion to decide whether to extend time to allow the claimant to appeal, and, as a case management decision, she refused to extend time. In my judgment, that is a case management decision that the judge was entitled to make, and a decision which, on the facts of this case that was not clearly wrong.* Indeed, it is a decision that, if the matter had come before me, almost inevitably I would have made."
>
> The Deputy Judge referred to *Sivasubramaniam* and the need to show very exceptional circumstances if permission is to be given and continued:
>
> 6. Cutting through all of the arguments that have been made this morning, it seems to me this case does not raise any exceptional circumstances. *The appeal failed because it was out of time and there was a lawful case management decision by the judge not to extend time. The Judge had a discretion to exercise and she decided not to extend time, as she was perfectly entitled to do. That does not seem to me to come anywhere near the sort of exceptional circumstances envisaged in Sivasubramaniam*. Therefore, whilst I acknowledge that the issues about whether the defendant had been served (which it plainly had not properly) and whether service had been waived (which does not appear to have been the case) might be thought to be complicated issues, *this application cannot make any progress unless the claimant can overcome the judge' decision not to extend time.* The judge's decision is one that she was entitled to reach and in those circumstances I cannot see there is any error of law in her decision to dismiss the appeal. Further, even if there was an arguable error (which there is not) the facts of this case do not appear to me to raise any exceptional circumstances and therefore, even if there was an arguable case, I would have refused permission to proceed by way of judicial review."

61. We describe this as extraordinary because it was entirely clear from HHJ Baucher's order that she had in fact extended time. It is inexplicable because there is nothing in

the papers that we have seen to explain how the Deputy Judge could have made such a fundamental error having read the papers and heard from Dr Al-Ani.

## The present appeal

62. Dr Al-Ani's grounds of appeal for permission to appeal to this court from the decision of the Deputy Judge include that:

    i) He failed to appreciate that HHJ Baucher had granted an extension of time and decided the application before him on the mistaken basis that she had refused to do so;

    ii) He failed to appreciate that, if the CPS wished to challenge jurisdiction on the basis of defective service, it should have made an application under CPR Part 11 but failed to do so;

    iii) He should have held that HHJ Baucher was misled as to the effect of the failure to serve the proceedings originally on the GLD;

    iv) He failed to appreciate the fundamental failure of the CLCC to afford the Appellant the in-person hearings to which he was entitled.

63. In our judgment the appeal raises a more general question, namely the effectiveness or otherwise of Avent 2 and any decisions that flowed from it, up to and including the decision of HHJ Baucher.

## Relevant principles

*Defective service and its consequences*

64. It was wrong of Ms Longson to submit and wrong of HHJ Baucher to accept that defective service means that proceedings do not exist. Proceedings that have been properly issued and are properly constituted exist whether or not they have been properly served. They do not cease to exist either because they are not served in time or have been served defectively. We consider this to be axiomatic.

65. The procedure for disputing the Court's jurisdiction is laid down by CPR Part 11. For present purposes, the most relevant provisions of CPR Part 11 are CPR 11 (1)-(4) which should be well known:

> "(1) A defendant who wishes to –
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must –
>
> (a) be made within 14 days after filing an acknowledgment of service; and
>
> (b) be supported by evidence.
>
> (5) If the defendant –
>
> (a) files an acknowledgment of service; and
>
> (b) does not make such an application within the period specified in paragraph (4),
>
> he is to be treated as having accepted that the court has jurisdiction to try the claim."

66. In *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203 at [23], the Court of Appeal held that the word "jurisdiction" in CPR Part 11 does not denote territorial jurisdiction but is a reference to the court's power or authority to try a claim:

> "But in CPR r 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR r 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim: CPR r 11(1)(b). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR r 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR r 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim. "

67. In *Caine v Advertiser and Times Ltd and Ors* [2019] EWHC 39 (QB) Dingemans J held that *Hoddinott* was binding authority for the proposition that an application that the court should not exercise its jurisdiction to try a claim must be made by CPR Part 11. Subsequently, Nugee LJ sitting in the Intellectual Property List of the Patents Court expressed a degree of uncertainty about the breadth of the *Hoddinott* principle in a case

where a defendant had not served an acknowledgement of service and, as Nugee LJ found, there was a separate route provided by CPR r.7.7(3).

68. Given the breadth of the terms of CPR Part 11 and the absence of any alternative route elsewhere in the CPR which the CPS could have adopted or did adopt, we would hold that CPR Part 11 provides *the* procedure for disputing the Court's jurisdiction in a case such as this. Accordingly, if the CPS wanted to assert defective service, it should have followed that procedure, served an Acknowledgment of Service and made an application pursuant to CPR Part 11 within 14 days thereafter.

69. Even if we were to be wrong and there were to be some other route by which the CPS could have or could now raise the assertion of defective service, it would not be safe to speculate about what the outcome of such an application would be. It is not to be assumed (and could not be assumed by HHJ Baucher or the Deputy Judge when considering whether to give permission in these proceedings) that the end result would be that the Court would decline to exercise jurisdiction. Many different considerations might arise of which three of the most obvious are the nature of the defect in service (as to which see [7.iii)] above), the promptness (or otherwise) with which the point was taken by the CPS, and whether the CPS had waived the defective service. As Ms Milligan fairly and correctly pointed out, on any such application (whenever and however made) the Court would have a range of case management options from which to select the most appropriate, including (a) retrospectively dispensing with service, (b) extending time for service of an amended Claim Form to cure the defect or (c) making a retrospective or prospective order under CPR 6.15. This is not intended to be an exhaustive catalogue of the Court's available powers in an appropriate case.

70. In our judgment, Ms Longson was right to be reticent about the basis upon which she was attending for the CPS given the absence of (a) an Acknowledgement of Service, (b) an application either under CPR Part 11 or otherwise, and (c) a skeleton argument. It was not sufficient for Mr Story simply to have told Dr Al-Ani that counsel would be attending. In the absence of proper advance notice of what counsel was going to say, what happened was an unacceptable and unfair ambush which the Judge should not have tolerated. We make clear that we do not know where responsibility lies for this course of action. In particular, we recognise that the original intention had been for Ms McAteer to attend and we do not know at what stage Ms Longson was instructed or in what terms. Accordingly we do not criticise any particular person; but, whoever should bear the responsibility, it should not have happened.

S*etting aside orders made without notice or a hearing*

71. Avent 1 and Avent 2 both referred to the Appellant's right to apply to set aside the orders. The ability to challenge an order that has been made without a hearing is fundamental to the fairness of a system that requires many decisions to be made on the papers, at least in the first instance.

72. Without notice orders may be made either (a) of the court's own motion or (b) on the application of another party. In both instances, the CPR provides that the party who does not have notice of such an order may apply to vary that order or set it aside. CPR 23.9 and 23.10 read together provide for such an opportunity in respect of applications made by another party (whether in writing or orally); and CPR 3.3 provides for the opportunity where an order has been made of the court's own motion.

73. The fundamental nature of this ability to apply to set aside orders made without notice or hearing is well established in ECHR and domestic authority. It is broadly accepted that the need to provide such an opportunity to be heard engages a claimant's fundamental rights, both at common law and pursuant to ECHR Article 6. The latter is engaged where the court is determining a claimant's civil rights and obligations, and requires, inter alia, "a fair and public hearing" in which "[j]udgment shall be pronounced publicly". In courts of first instance, this right requires citizens to have an entitlement to an oral hearing, absent exceptional reasons: see *Göç v Turkey* (Grand Chamber unreported decision of 11 July 2002 Application No. 36590/97). The fact of an appeal against that decision cannot be remedied unless the appellate court has full jurisdiction: see *Ramos Nunes de Carvalho e Sa v Portugal* - Grand Chamber unreported decision of 6 November 2018, Application Nos. 55391/13, 57728/13, and 74041/13).

74. Domestic authority is equally clear. The balance between the need for suitable judicial robustness and the right of a party to be heard was set out in *Labrouche v Frey and Ors* [2012] 1 WLR 3160, [2012] EWCA Civ 881 by Lord Neuberger MR (with whom the other members of the Court agreed):

> "[22] It is a fundamental feature of the English civil justice system, and indeed any civilised modern justice system, that a party should be allowed to bring his application to court, and make his case out to a judge. Of course, this principle is subject to some exceptions and limitations, which exist to ensure the proper administration of justice. Thus, the court may refuse to entertain argument from a party who is in contempt of court, a civil restraint order can fetter the right of access in the case of a person who has used the court process to harass others, and time limits are routinely imposed for hearings. However, even where a party is in contempt or is subject to a civil restraint order, the court will ensure that he is not prevented from making an application or submissions where it would be unjust to shut him out; and time limits are imposed simply to ensure that a party is not allowed an extravagant amount of time to the detriment of other court users.
>
> …
>
> [24] But what a judge cannot properly do, however much he believes that he has fully read and fully understood all the documents and arguments before coming into court, is to dismiss the application without giving the Applicant a fair opportunity to make out his case orally. It is vital that justice is seen to be done, but that is by no means the only, or even the main, reason for this. It is also because it is vital that justice is done. Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument.

> …
>
> [43] However, even assuming that the decision in this case was a case management or procedural decision, it was simply unsustainable. It is fundamentally wrong for a judge to refuse to hear oral argument on behalf of a party whom the judge has decided to find against on reading the papers."

75. As if to demonstrate the breadth of application of this principle, the majority of the Supreme Court in the family case *Pontanina v Pontanin* [2024] UKSC 3 commenced their judgment as follows:

> "Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is - if you make the order sought - to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made."

76. Not the least troubling aspect of this case is that the CLCC has still not listed the application of 3 March 2021 to set aside Avent 1. We have traced how that state of affairs has come about earlier in this judgment. It amounts to an unconscionable denial of fair procedure over a protracted period, prolonged by the inexplicable and unjustifiable refusal of the CLCC by its letters dated 16 June 2021 and 12 July 2021 to issue the applications that had been properly submitted by Dr Al-Ani.

*Challenging orders and directions*

77. The CLCC's letter of 12 July 2021 asserted that "we are unable to process your appeal as it is appealing a direction rather than a sealed court order." There was no basis for this assertion and it was plumb wrong. The position has recently been authoritatively restated by the decision of the Court of Appeal in *Anwer v Central Bridging Loans Ltd* [2022] 1 WLR 4917, [2022] EWCA Civ 202. In *Anwer* the Circuit Judge had refused the claimant's application for a transcript to be made available at public expense. There was no sealed order recording the Judge's refusal. The Court of Appeal's decision is accurately summarised in the headnote:

> "Held, granting permission and allowing the appeal, (1) that a court's refusal to make a direction under CPR r52.14 that transcripts be obtained at public expense for the purposes of an appeal was a "determination" within the meaning of section 77(1) of the County Courts Act 1984 with the consequence that the party who sought the direction would have a right of appeal under that section against such a refusal; that, furthermore, although CPR PD 52C, para 3(3)(a) required copies of the sealed order being appealed to be provided where a sealed order existed, which was likely to be in the vast majority of cases, that

> provision did not preclude an appeal from proceeding where there was no sealed order, it being well established that a formal order was not a condition precedent to any appeal; …"

78. At [16]-[17] Coulson LJ (with whom Birss LJ and Zacaroli J agreed) said:

> "16. … Save in an exceptional case, there can be no practical difference between any of the possible formulations (namely "determination", "judgment", "order", or "direction"). If I was forced at gunpoint to say, I would venture the suggestion that "determination" is possibly the widest of them all.
>
> 17. What is much more important is that, however it may be labelled, an appeal can only lie against something which has been decided: a result, a conclusion, an outcome. It does not lie against any observation or comment by the judge along the way to that result. In this way, the winner cannot appeal against a finding or a reason for the judge's decision. A defendant whose defence is upheld by the judge cannot seek to appeal against a finding that he or she did not always tell the truth: see by analogy *Lake v Lake* [1955] P 336, where the wife who had obtained an order entirely in her favour was not allowed to appeal the judge's finding that she had committed adultery. It is only the result that matters for the purposes of an appeal. That is why, although it is technically inaccurate (as this case demonstrates), judges are so fond of saying that "an appeal lies against an order, not a judgment"."

*The status of Avent 2 and what followed*

79. *R (Majera) v SSHD* [2022] AC 461, [2021] UKSC 46 addressed directly the question: are unlawful acts or decisions incapable of having legal effects? At [27]-[29] Lord Reed PSC (with whom the other justices agreed) said:

> "27. The Court of Appeal's approach to the present case, based on the characterisation of invalid administrative acts and decisions as null and void, was as I shall explain inapposite to the order of a court or tribunal such as the First-tier Tribunal. But it is also worth explaining why, even in relation to administrative acts and subordinate legislation, Haddon-Cave LJ's statement that "when an act or regulation has been pronounced by the court to be unlawful, it is then recognised as having had no legal effect at all" is, with great respect, an over-simplification of the position. Although judges have commonly used expressions such as "null" and "void" to describe unlawful administrative acts and decisions, it has nevertheless been recognised that the notion that such acts and decisions are utterly destitute of legal effect, as if they had never existed at all, is subject to important qualifications.

> 28. Although Haddon-Cave LJ's dictum was confined to the situation where there has been a judicial pronouncement—which I take to mean an order, since it is orders, not the reasons given for them in judgments, which have legal effects—determining that an act or regulation is unlawful, it is illuminating to consider first the position before such a pronouncement is made. A significant point was made by Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC 736, 769-770, where he considered an argument that an ouster clause preventing a compulsory purchase order from being challenged after the expiry of a time limit must be construed as applying only to orders made in good faith, since an order made in bad faith was a nullity and therefore had no legal existence. Describing the argument as "in reality a play on the meaning of the word nullity", Lord Radcliffe observed:
>
> > "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."
>
> 29. Accordingly, if an unlawful administrative act or decision is not challenged before a court of competent jurisdiction, or if permission to bring an application for judicial review is refused, the act or decision will remain in effect. Equally, even if an unlawful act or decision is challenged before a court of competent jurisdiction, the court may decline to grant relief in the exercise of its discretion, or for a reason unrelated to the validity of the act or decision, such as a lack of standing … or an ouster clause … . In that event, the act or decision will again remain in effect. An unlawful act or decision cannot therefore be described as void independently of, or prior to, the court's intervention."

80. One consequence of these principles is that there is a legal duty to obey a court order which has not been set aside: see *Majera* at [46]-[49]. At [49] Lord Reed explained the basis of the legal duty:

> "49. That is consistent with the rationale of the rule. As explained in para 45 above, it is based on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as to those made by courts possessing unlimited jurisdiction. In the present case, the First-tier Tribunal was in any event a court of competent jurisdiction: it possessed jurisdiction under paragraph 22 of Schedule 2 to the [Immigration Act 1971] to hear and determine applications for bail."

81. At [50] Lord Reed illustrated the scope of the principle by reference to the decision of the Court of Appeal in *R v Central London County Court, Ex p London* [1999] QB 1260, a case of compulsory detention of a patient in hospital under mental health legislation where Stuart-Smith LJ had explained at [30] that "if the orders were made by the county court without jurisdiction, then the applicant was entitled to have them quashed, but he was not entitled to a declaration that the decision to admit him was unlawful: that decision could only be quashed if it was ultra vires the hospital managers at the time when it was made, and it was not."

82. In the present case the position is factually slightly different. In the normal course of events the CLCC would have jurisdiction to make an order such as Avent 2. The problem in the present case is that Avent 2 was legally ineffective because one cannot strike out a claim that has already be struck out. Theoretical arguments about whether Avent 2 would have had any legal effect if Avent 1 had been set aside are, in our judgment, nothing to the point: the question does not arise. However, the principles explained in *Majera* lead to the conclusion that Avent 2 should not be described as a "nullity". Instead, unless and until Avent 2 is set aside, it (and everything that flowed from it) should be described as being legally ineffective.

*The applicability of Sivasubramaniam*

83. We have set out the critical passage from *Sivasubramaniam* at [52] above. It is uncontroversial that it acknowledges the possibility of a claim for judicial review in exceptional circumstances where the challenge is founded on either (a) pre-*Anisminic* jurisdictional error or (b) a procedural irregularity of the kind that would constitute a denial of the applicant's right to a fair hearing. An applicant for permission under sub-category (b) must therefore show it to be arguable they have a real prospect of showing a denial of their right to a fair hearing.

84. The Deputy Judge said that, in his judgment the present case did not raise any exceptional circumstances. We are unable to agree with that assessment. In our judgment it is not merely arguable that the Appellant has been denied a fair hearing: it is incontrovertible for the reasons we have given. Even if that were not our assessment, the catalogue of serious errors in this case suggests the existence of widespread problems that provide a compelling reason for an appeal to be heard. We therefore grant the Appellant permission to appeal and will quash the decision of the Deputy Judge. That said and done, we return to the wider issues raised by the history that we have set out.

**Further discussion and resolution**

85. For the reasons we have set out at length above, the conclusions to be drawn from the rolled-up hearing are:

    i) There has been a sustained failure by the CLCC to provide a hearing for the Appellant's application of 3 March 2021; and

    ii) Avent 2 and all that flowed from it were legally ineffective.

86. What should happen therefore seems clear:

i) Permission should be given to the Appellant to appeal against the decision of the Deputy Judge;

ii) On the substantive appeal against the decision of the Deputy Judge, the Judge's decision should be set aside and permission given to the Appellant to bring his JR proceedings;

iii) The Appellant's application of 3 March 2021 should be listed for hearing; and

iv) Avent 2 and all the steps that flow from it, up to and including the hearing before and judgment of HHJ Baucher, should be set aside as legally ineffective.

87. What is less clear is how this result should be achieved. The starting position is that we are only seized with the question whether to set aside the decision of the Deputy Judge. That is the only *lis* between the Appellant and the CLCC. There can be no doubt that we are entitled to and should resolve that *lis* by granting permission and allowing the Appellant's appeal; and, as indicated above, we shall do so. The conclusions that Avent 2 and all that flows from it are legally ineffective and that they should be set aside, while forming a necessary part of our reasoning in this judgment, are not at present formally before the Court of Appeal for separate decision. Furthermore, despite any defects in service and the absence of an Acknowledgement of Service, the CPS was a party to the proceedings in which Avent 2 purported to be made, whereas it is merely an Interested Party in the present judicial review proceedings.

88. In response to a request for help from the Court, Ms Milligan has provided a thorough and helpful note on the powers of the Court of Appeal in the present position. That said, in our view, far and away the cleanest route would be if the CPS and the CLCC would agree that Avent 2 and the steps that flowed from it, including the judgment and order of HHJ Baucher, should be set aside. That would leave the way open for the CLCC to list the 3 March 2021 Avent 1 application for hearing. At such a hearing it would be open to the Appellant and the CPS to advance such arguments as it may be advised and the CLCC permits. Those arguments can, if the parties are so advised, cover the question of service of the proceedings. We must emphasise that nothing we say should be taken as expressing any view on how that issue (if raised) should be determined; nor, more fundamentally, do we express any view about the merits of the Appellant's underlying claim. What this judgment is concerned with and what is important is that the Appellant must have his day in court and that his position on that hearing should not be prejudiced by the delay that has occurred through no fault of his. He may then win or he may lose; but that is not the concern of the present hearing.

89. Ms Milligan had authority to confirm that the CLCC would agree to such a course being taken. Ms Longson did not have instructions that enabled her to give equivalent confirmation on behalf of the CPS.

90. Having resolved that we should and will grant permission and allow the appeal, we will therefore adjourn this hearing for the CPS to consider the terms of this judgment and Ms Milligan's note on the powers of the Court of Appeal in the present situation and to indicate whether it would agree to the course we have proposed to dispose of Avent 2 and what flowed from it. If the parties so agree, the Court can proceed without the need for a post-script to the present judgment; if they do not, a post-script will be necessary. Any resolution will have to make appropriate provision in relation to costs.

91. We therefore direct the parties to liaise with a view to agreeing the way forward by 4pm on 23 February 2024. If agreement cannot be reached, the Court will give directions for any further steps that may be necessary to ensure that all parties have had a proper opportunity to make appropriate submissions on the way forward.

**Lord Justice Phillips**

92. I agree.

**Lord Justice Baker**

93. I also agree.