Case No: QB-2020-004497

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
Neutral Citation Number: [2021] EWHC 1231 (QB)

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 25 February 2021

BEFORE:

MRS JUSTICE EADY

BETWEEN:

ZUHAYR JAMIL MENJOU

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

DR ABDUL-HAQ AL-ANI (instructed via Public Access Scheme) appeared on behalf of the Claimant
MR M ARMITAGE (instructed by the Government Legal Department) appeared on behalf of the Defendant

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JUDGMENT
(Approved)

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MRS JUSTICE EADY:

Introduction

1. This matter comes before me by application dated 14 January 2021, whereby the defendant seeks:

   (1) An order that the claim is struck out pursuant to Civil Procedure Rule ("CPR") Part 3.4(2)(a) or (b); alternatively,
   (2) An order granting summary judgment in the defendant's favour pursuant to CPR Part 24.2; and,
   (3) To the extent necessary, an order extending the time to file the defendant's acknowledgment of service in respect of the claim.

   The application is resisted by the claimant.

2. Both parties filed skeleton arguments which I was able to consider – along with the documents and authorities to which they referred - in advance of the hearing. I also had the benefit of hearing oral submissions from Mr Armitage, counsel for the defendant, and from Dr Al-Ani, counsel for the claimant. In the course of my pre-reading, I considered a witness statement from Dr Al-Ani for the claimant, dated 19 January 2021 and the attachments thereto, namely a document said to be the claimant's statement of facts and grounds in earlier judicial review proceedings (under case number CO/2798/20) and what I understood to be his skeleton argument for an oral renewal hearing in those proceedings. As it was unclear whether those documents had been seen by counsel for the defendant, I arranged for these to be forwarded to him on the morning of the hearing, albeit that meant that he had only about an hour to digest their contents. I also asked my clerk to see if the administrative court office could forward any orders relating to those judicial review proceedings and, at the outset of the hearing, she was able to forward the order of Mr Justice Julian Knowles of 2 October 2020, refusing permission on the papers, and that of Mr Justice Morris, refusing permission at an oral renewal hearing on 19 November 2020. I again ensured that these documents were circulated to the parties for the hearing before me.

3. Given the on-going need to reduce transmission of Covid-19, and with the agreement of the parties, and it being an effective means of ensuring justice in this matter, the hearing took place remotely by Microsoft Teams. These remained, however, public proceedings, and the hearing and details for access were published in the cause list, thus ensuring the principle of open justice.

The Background

4. By a CPR Part 8 claim, filed on 14 December 2020 (sealed by the court on 17 December 2020), the claimant seeks the following relief against the defendant:
   (1) a declaration that the defendant has failed to "*adopt the laws, regulations and administrative provisions necessary for the full transposition into national law of Directive 2012/29/EU*" (that is, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012) establishing minimum standards on the rights, support and protection of victims of crime ("the Directive");
   (2) a declaration that section 18(1) of the Senior Courts Act 1981 ("SCA") is incompatible with Article 10 of the Directive for a victim of crime participating as a private prosecutor in criminal proceedings and should be disapplied;
   (3) a declaration under section 4, Human Rights Act 1998 ("the HRA") that section 18(1) of the SCA is incompatible with Article 6 of the European Convention of Human Rights ("the ECHR" or "the Convention") for a victim of crime participating as a private prosecutor in criminal proceedings;
   (4) a declaration that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") is incompatible with Articles 13 and 14 of the Directive for a victim of crime participating as a private prosecutor in criminal proceedings and should be disapplied;
   (5) a declaration under section 4 of the HRA that LASPO is incompatible with Article 6 of the Convention for a victim of crime participating as a private prosecutor in criminal proceedings;
   (6) a declaration that the judgment in *R v Jones & Ors* and *Ayliffe & Ors v Director of Public Prosecutions* [2006] 2 All ER 741 ("*Jones*") is incompatible with Article 2 of the Directive for a victim of crime participating as a private prosecutor in criminal proceedings and should be disapplied;

(7) a declaration under the HRA that the judgment in *Jones* is incompatible with Article 76 of the ECHR for a victim of crime participating as a private prosecutor in criminal proceedings; and

(8) an order that the defendant pay the claimant his entitlement for legal aid and reimbursement of expenses under Articles 13 and 15 of the Directive, which he incurred in his private prosecution in CO/2798/2020.

5. The claim form itself does not set out the particulars of claim but was accompanied by a witness statement from the claimant in which he stated that he was the victim of crimes committed in the invasion and occupation of Iraq and wished to bring a private prosecution in that context. To this end, the claimant says that, on 30 January 2020, he laid an information before Ealing Magistrates' Court for the issue of a summons against Tony Blair and others "*to come to court and answer for the international crime of aggression*". He further explains that, following the decision of the Magistrates' Court not to issue the requested summons, he thereafter sought permission to apply for judicial review (that is, in CO/2798/2020), but says that his application for permission was refused by Morris J on 19 November 2020 in reliance on the binding authority of the House of Lords in *Jones* (that was at the oral renewal hearing of the application for permission; I have already observed that the application was refused on the papers by Julian Knowles J on 2 October 2020).

6. I should say that I have not seen the full pleadings in the judicial review proceedings thus referred to and I have not seen a transcript of the reasoning provided in refusing permission at the oral hearing. What I have seen is the undated document said to be the claimant's statement of facts and grounds (which I have presumed was attached to the claim form) and a skeleton argument apparently relied on at the oral hearing, and the orders to which I have already referred.

7. It further seems, although again I have to say I have not seen all the relevant documentation, that the claimant then sought to appeal against the decision of Morris J but was refused permission by the Court of Appeal. It is said (and I am taking this from the witness statement of Dr Al-Ani in the current proceedings) that first the Court of Appeal Master refused to seal the appellant's notice, stating that no appeal lay to the Court of Appeal from any judgment of the High Court in any criminal cause or matter

pursuant to section 18(1) of the SCA, and that thereafter, when the claimant applied for a review of the Master's decision, Phillips LJ dismissed that application stating that:

> "I uphold the Master's decision that the court lacks jurisdiction to entertain the appellant's notice. There is no doubt that the proposed appeal is in a criminal cause or matter. The applicant cannot avoid that consequence by referring to any other ancillary argument sought to be raised improperly in my judgment."

8. Returning to the claimant's witness statement, he states that he was "*made impecunious*" by the invasion and occupation of Iraq and objects that, under LASPO, he was not then entitled to legal aid for the purposes of pursuing a private prosecution. I understand it to be the claimant's contention that he is thereby prevented from participating in the criminal proceedings as a victim acting as a private prosecutor.

9. On 8 January 2021, the defendant's solicitor advised the court that the claim had not been properly served on the defendant, only reaching the solicitor on 30 December 2020; in those circumstances it was said that the defendant would consider service to have been effected on 31 December 2020. On 9 January 2021 the claimant responded to the defendant's letter refuting that account. By application notice filed on 14 January 2021, the defendant applied for an extension of time for filing the acknowledgement of service, and served an acknowledgement of service, but at the same time applied for the court to strike out the claim as having no reasonable grounds, alternatively as an abuse of process or further or alternatively seeking reverse summary judgment. That application was accompanied by a witness statement from the defendant's solicitor accepting that the claim had in fact been properly served and therefore also applying for relief from sanctions for an out of time acknowledgement of service.

10. On 27 January 2021, the claimant filed an application, without notice, seeking a court order to strike out the defendant's acknowledgement of service as out of time. That was initially rejected for absence of certification on fee assistance but was re-submitted, with the appropriate certification, on 4 February 2021.

11. In any event, on 8 February 2021, the court placed the hearing of the defendant's application notice into the warned list for week commencing 22 February 2021 and subsequently listed this hearing for today.

Extension of time/relief from sanctions: my approach

12. The defendant now accepts that the acknowledgement of service in this matter was served out of time, but seeks relief from the sanction that would otherwise apply under CPR Part 8. It is common ground that I have power to grant relief from sanction and to extend time for the service of the acknowledgement of service even if the time limit has already expired: see CPR Part 3.1(2)(a) and CPR Part 3.9. The approach I am to take is as laid down in *Denton v TH White Limited* [2014] EWCA Civ 906: I should consider the seriousness and significance of the default, and whether an explanation has been given for that default, and then evaluate all the circumstances of the case so as to deal with the matter justly.

Strike out/summary judgment: my approach

13. The defendant's application that the claim be struck out is made under CPR Part 3.4 which (relevantly) provides:

> "(2) The court may strike out a statement of case if it appears to the court -
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings …"

14. It is common ground that a claim should not be struck out unless the court can be certain that it would be bound to fail. The power to strike out does not offend against the rule to a fair trial under Article 6.1 of the ECHR, as that applies only to genuine and serious disputes about civil rights: although a claim must be presumed to be genuine and serious unless there are indications to the contrary, if the legal position is clear and an investigation of the facts would provide no assistance, the court should be

prepared to dismiss a claim that has no real prospect of success, such as to mean that its continued pursuance would effectively amount to an abuse of process (I note here that there is often no exact dividing line between the grounds on which a claim might be struck out or summary judgment entered). That said, if defects in the pleading of a case might be remedied by permitting an amendment, that is the course that should be adopted rather than taking the more draconian step of striking out a claim that has been poorly pleaded.

15. In this case, it is further contended that the claim amounts to an abuse of process, either because it is an attempt to pursue a public law challenge by way of a private law claim and/or because it is an attempt to re-litigate matters that have already been decided against the claimant.

16. As for the application for summary judgment, by CPR Part 24.2 it is provided that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if -
>
> (a) it considers that -
>
> (i) that claimant has no real prosect of succeeding on the claim or issue:
>
> …
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

17. Guidance as to the approach I am to adopt on such an application has been provided by (for example) Lewison J in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] (approved by the Court of Appeal in *AC Ward & Sons Limited v Catlin 5 Limited* [2009] EWCA Civ 1098, see paragraph [24]). Relevantly, for current purposes, the court needs to ask whether the claim has a realistic rather than a fanciful prospect of success; "realistic", in this context, meaning carrying some degree of conviction, something more than merely arguable. Where the point in issue gives rise to a short point of law or construction and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that

the parties have had an adequate opportunity to address it in argument, then it is said the court should indeed grasp the nettle and decide the point; if the case is bad in law, then it will have no real prospect of success.

The parties' submissions

The defendant’s position

18. In support of the applications for the defendant, it is said that there are myriad reasons why the claim should be summarily dismissed, whether by way of strike out or summary judgment. The claim form on its face disclosed no reasonable grounds of bringing the claim and there was no good reason for permitting that defect to be remedied in circumstances where the claimant had been represented throughout by experienced counsel. Even if the manifest deficiencies in the pleading were rectified, however, the defendant contends that the claim has no real prospect of success and there is no compelling reason why it should be permitted to proceed to trial. Alternatively, it was an abuse of process in that it was an attempt to pursue a public law challenge by way of private law claim; alternatively was an attempt to relitigate matters already decided against the claimant.

19. Underpinning the claimant's claim was his contention that he was a victim of crime and should be entitled to legal aid to bring a private prosecution. The crime identified was the crime of aggression; the unanimous decision of the House of Lords in *Jones* had, however, established that, while recognised in international law, the crime of aggression was not a crime or offence in domestic law: see per Lord Bingham at paragraph 36, and Lord Hoffmann at paragraphs 60 to 69. An attempt to overturn that decision had, furthermore, been rejected by the Divisional Court in *Al Rabbat v City of Westminster Magistrates' Court* [2017] EWHC 1969 (Admin). Descending into the particular provisions of the Directive relied on by the claimant, it was apparent that, in any event, the claim could have no realistic prospect of success; alternatively, that it should be struck out as an abuse of process, either as brought under the wrong procedure or as an attempt to re-litigate settled issues.

The claimant’s position

20. For the claimant, a preliminary point was taken whereby it was said that it was not open to the defendant to make an application to strike out, or for summary judgment, because he had not filed an acknowledgement of service in time and would need first to be granted relief in that regard.

21. If the defendant was entitled to pursue such an application, the claimant says that, in any event, it would be quite wrong for the claim to be struck out in this case. This was a claim that concerned the construction of an EU Directive and domestic law and should be the subject of full consideration at a substantive hearing. The court would have to be convinced that the claim would be bound to fail before acceding to an application to strike out. The claimant says that the UK Government has failed to fully transpose the Directive and, where there has been a failure to fully transpose an EU Directive, an individual who has sustained damage as a result, is entitled to pursue a claim for compensation against the Government: see *R (on the application of Miller & Anr) v Secretary of State for Exiting the EU* [2017] UKSC 5.

22. The claimant further argued that it was wrong to object to the pursuit of this claim under CPR Part 8 rather than by way of judicial review under Part 54. This was not a case where the claimant was trying to overturn a decision of a public body but where, as a private individual, he was seeking to invoke his right to legal aid and declarations of incompatibility and, as the case law made clear, the court should not be diverted into arid discussions as to the correct procedural gateway in this regard. As for the argument that the claimant could not establish that he was a victim, whether or not he was a victim, the claimant had a right to pursue a claim under the HRA and, as such, he sought to establish that he was a victim of a crime of aggression. If the claimant was correct, and succeeded in overturning the judgment in *Jones*, he would have standing as a victim for the purposes of the Directive. It was not open to the defendant to prevent the claimant's exercise of his rights under the HRA. He was, moreover, entitled to rely on decisions of the Grand Chamber of the European Court of Human Rights which had interpreted the concept of international law for the purposes of Article 7 of the ECHR. As for the construction of the Directive, a Member State was required to transpose the entirety of the Directive; it could not pick and choose and then raise questions of interpretation in respect of those parts that it had failed to transpose. As from 16 November 2015, the UK had been required to implement the provisions of the

Directive; it did not simply have the power to do so (see per Green J (as he then was) at paragraph 87 of *R v HMRC* [2014] EWHC 1475). It was only after the UK had fully transposed the Directive that it could be asked whether the claimant was a victim so as to rely on its provisions.

23. The claimant did not, in any event, accept that the references to criminal offences under the Directive were limited to criminal offences under domestic law. As the CJEU had held in *Case 806/18*, Article 49(1) of the EU Charter applied to both criminal offences under national and international law. It was the claimant's case that the Directive should be interpreted in the same way, there being no limitation within the Directive to criminal offences under domestic law or to the criminal offences of the Member State; it merely referred to criminal offences occurring within the European Union.

24. This was, moreover, not an attempt to re-litigate matters addressed in the judicial review proceedings. The refusal of permission, either on the papers or at a short oral renewal hearing, did not give rise to binding authority and the principle of *res judicata* did not apply. This could not, moreover, be said to be an abuse of process. For there to be an abuse, there had to be some harassment of a party: see per Lord Bingham in *Johnson v Gore Wood* [2000] UKHL 1 at page 31. That could not be said to be this case.

25. More generally, the claimant contends the defendant should not be permitted to avoid explaining his failure to uphold EU law by allowing this application to strike out; the court should permit this matter to proceed to a full hearing.

Discussion and Conclusions

Can the defendant pursue the application to strike out/for summary judgment and/or should he be granted relief from sanction/an extension of time?

26. It is convenient for me to address this point at the outset because the claimant contends it is not open to the defendant to pursue the application to strike out or for summary judgment given that he has failed to file his acknowledgement of service in time and has not been granted relief from sanction or an extension of time in this regard.

27. It is right that, by CPR Part 8.4, where a defendant has failed to file an acknowledgement of service in respect of a Part 8 claim, and the time period for doing so has expired, it is provided that "*the defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission*". CPR Part 8.4 does not state, however, that a defendant in a Part 8 claim who has not filed an acknowledgement of service cannot make any applications in the proceedings and/or be heard on such applications; it is specific to the hearing of the claim. I do not read CPR Part 8.4 as preventing a defendant from exercising an entitlement to make an application as otherwise permitted under either CPR Part 3 or Part 24.

28. In so far as it might be necessary to do so, I would, in any event, grant the defendant relief from sanction and permission to serve the acknowledgement of service out of time, granting the extension of time necessary. I note that the delay in this case was for a relatively short period of time (just about a week) and I cannot see that it gives rise to any prejudice to the claimant. Whilst the explanation for the default may not cover the defendant in glory - and the claimant can reasonably complain that this particular defendant should exercise greater care - when I stand back and consider the circumstances of this case in general - so as to do justice in this matter as between the parties - it is clear to me that relief should be granted and the necessary short extension of time permitted. If there is any merit in any of the arguments raised by the claimant's claim, then justice to those arguments would require that the defendant be heard. If the claimant is right in what he says, then the matters raised do not pertain simply to his rights as a private citizen, but to the wider laws of this State and it must be right that the case of the defendant be considered.

29. I therefore hold: (1) the defendant has the right to make these applications and to be heard at this stage; but, in any event, (2), the defendant should be granted relief from sanction and an extension of time granted for the late filing of the acknowledgement of service.

The application for strike out/summary judgment

30. Turning to the defendant's application for strike out/summary judgment. In order to determine the questions raised by this application, it is necessary to return to the claims

made by the claimant in these proceedings. Doing so, it is immediately apparent that, as the defendant has observed, the claim form is deficient on its face: it merely lists the relief sought without particularising the basis on which that relief is sought. That is contrary to CPR Part 8.2(b)(ii), which requires the claimant to specify the legal basis for the remedy claimed. That said, it is right that I should consider whether that deficiency might be rectified: whether, considering the arguments made by the claimant more widely, permitting the defective pleading to be remedied by amendment might show a claim that was more than fanciful, that had a realistic prospect of success.

31. Referring to the declarations sought by the numbering adopted above (see paragraph 4) – which, in turn, reflects that used in the claim itself - it is helpful to start by considering what the claimant would have to establish to entitle him to the relief claimed. To put it another way, what are the premises or arguments upon which the different declarations would need to be based?

32. If granted, declaration (1) would state that the defendant has failed to adopt the laws, regulations and administrative provisions necessary for the full transposition into national law of the Directive. So the grant of relief is sought on the basis of the claimant's claim - which might be seen as being at the heart of these proceedings - that the defendant has unlawfully failed to transpose the Directive into national law.

33. Declarations (2) and (3) would provide that: (2) section 18(1) of the SCA is incompatible with Article 10 of the Directive; and (3) section 18(1) of the SCA is incompatible with Article 6 of the ECHR. In both cases, those declarations are sought by the claimant as (as he contends) a victim of a crime, participating as a private prosecutor in criminal proceedings. So, those claims are thus founded on the argument that section 18(1) of the SCA is incompatible with the Directive and with Article 6 of the ECHR.

34. Declarations (4) and (5) would state that: (4) LASPO is incompatible with Articles 13 and 14 of the Directive; and (5) LASPO is incompatible with Article 6 of the Convention. Again, these are sought by the claimant based on his contention that he is a victim of crime, participating as a private prosecutor in criminal proceedings. So again, those declarations would clearly be premised upon a claim that the claimant's

non-entitlement to legal aid for his intended private prosecution means that LASPO is incompatible with the Directive and with Article 6 of the Convention.

35. By declarations (6) and (7), it would be stated that: (6) the judgment in *Jones* is incompatible with Article 2 of the Directive; and (7) the judgment in *Jones* is incompatible with Article 7 of the ECHR. Again, the underlying premise is that the claimant is a victim of crime, participating as a private prosecutor in criminal proceedings. Those declarations would have to be founded upon the contention that the judgment in *Jones* was incompatible with the Directive and Article 7(1) ECHR.

36. Having thus particularised the claims that the claimant must be taken to make, so as to underpin the declarations sought, I turn to the application to strike out and/or for summary judgment in relation to each.

37. Starting with the claim that the defendant has unlawfully failed to transpose the Directive into national law, were the claim in this regard to be particularised, the first question would be whether the claimant was a victim of crime within the meaning of Article 2(1)(a) of the Directive, which (relevantly) provides:

> "'victim' means:
>
> (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
>
> (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death …"

38. The claimant contends that questions of construction in this regard cannot arise as the UK has failed to fully transpose the Directive. I do not agree. The problem for the claimant is that his argument - that there has been a failure of implementation on the part of the UK - depends upon his construction of the Directive, which the defendant says is simply not arguable. So, the first question I have to engage with must be whether there is any reasonably arguable case that the claimant is a "victim", such as would engage the provisions of the Directive; that is a question that gives rise to an issue of interpretation under the Directive. It is an issue, moreover, in respect of which –

however the case is put – the claimant meets the immediate stumbling block that the crime of which he says he is a victim - the crime of aggression - is not a crime recognised under domestic law in this jurisdiction. That was made clear by the unanimous ruling of the House of Lords in *Jones*, which involved various appeals which themselves were made in the context of the invasion of Iraq. That ruling is, of course, plainly binding on this court.

39. For the claimant it is said that the Directive should be taken to refer to crimes of both domestic and international law and he points to the lack of limitation within the Directive to references to criminal offences under domestic law, or to criminal offences within the Member State, and he relies on how the expression "criminal offences" has been taken to mean offences under both domestic and international law in other contexts.

40. I accept that the Directive does not specify what constitutes a crime, or a criminal offence; it is, rather, concerned with matters of procedure, being entirely silent as to the substance of the criminal law of the individual Member States. That is unsurprising because the basis for the Directive is Article 82(2) of the Treaty on the Functioning of the EU ("the TFEU"). That provides for the establishment of minimum rules applicable in Member States concerning, amongst other things, the rights of victims of crime and "*other aspects of criminal procedure*". There is nothing in the Directive that can assist the claimant in demonstrating a failure of transposition because of a failure to recognise the crime of aggression under domestic law. More than that, however, it is plain that the Directive itself does not create a crime of aggression. Had it done so, then, when this point was argued before the Divisional Court in *R (on the application of Al Rabbat) v Westminster Magistrates' Court* [2017] EWHC 1969 (Admin), that would have provided a basis for granting permission to bring proceedings for judicial review that were premised on a grant of permission to appeal to the Supreme Court (asking that it depart from the earlier decision in *Jones*). Instead, the Divisional Court refused permission, concluding that there was no prospect of the Supreme Court departing from the decision in *Jones*.

41. For completeness, I note the defendant's further observation that, for the claimant's case to have any prospect of success, he would also need to show that the Directive had

retrospective effect given that the crime he alleges occurred in the context of the invasion of Iraq, which was over 12 years before the deadline for the implementation of the Directive (16 November 2015). It is yet further pointed out that EU law specifically prohibits the retrospective application of criminal liability under Article 49(1) of the Charter. These are additional indications of the difficulties inherent in this claim. In my judgment, however, the complete answer is that it is plain that the Directive does not itself create a crime of aggression and there is nothing in its provisions that can assist the claimant in demonstrating a failure of transposition because of a failure to recognise the crime of aggression under domestic law.

42. I next turn to the contention that Article 18(1) of the SCA is incompatible with the Directive and Article 6 of the ECHR. In respect of the latter, although the relevant declaration (declaration 3) states that the incompatibility is with Article 6 of the ECHR, in his statement in support the claimant also references Article 47 of the EU Charter of Fundamental Rights and Article 13 of the ECHR. I have therefore considered the case on this wider basis for the purpose of the applications to strike out and/or for summary judgment.

43. First, however, I note that section 18(1) of the SCA places restrictions on appeals to the Court of Appeal, providing (relevantly):

> "(1) No appeal shall lie to the Court of Appeal -
>
> (a) except as provided by the Administration of Justice Act 1960, form any judgment of the High Court in any criminal cause or matter …"

44. So far as I understand the claim in this regard, the claimant says that the refusal of his appeal to the Court of Appeal - against the dismissal of his application to apply for judicial review against the decision of the Ealing Magistrates' Court - was contrary to Article 10 of the Directive and to his fundamental rights under the EU Charter and/or the Convention.

45. Article 10 of the Directive provides that Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Thus, the first point that arises is, again, that the claimant's ability to rely on this provision would depend

upon him establishing that he is a victim. That, in turn, would have to be based on the contention that the crime of aggression is itself mandated by the Directive, an argument for which I am unable to see any proper basis.

46. Even if I was wrong about that, however, Article 10(2) of the Directive makes clear that the procedural rules under which victims may be heard during criminal proceedings and may provide evidence, are to be "*determined by national law*". So, even if I assume that the claimant was arguably a victim for these purposes because he was a victim of a crime of aggression (notwithstanding the ruling in *Jones*), there is nothing within Article 10 that can assist him in terms of claiming a right to be heard as a private prosecutor, or as a victim acting as a private prosecutor, because such a right is to be determined by reference to national law.

47. Further, and for completeness, I make clear that I do not consider it arguable that the refusal by the Ealing Magistrates' Court to issue a summons can be said to demonstrate there has been a failure to permit the claimant to be heard. First, "being heard" may involve the consideration of a case on the papers. Second, and in any event, the claimant then had the right to be heard by way of his application for judicial review: that was the way in which he was able to challenge the decision and, in his application for permission to pursue a claim by way of judicial review, he was heard not only on the papers but also at an oral renewal hearing.

48. I am also satisfied that Article 6 of the ECHR cannot assist the claimant in this regard. First, although Article 6(1) of the ECHR provides a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, it says nothing about the content of domestic criminal law. The claimant is thus again met by the obstacle of *Jones*. In any event, as I have said, I am satisfied that the claimant's Article 6 ECHR rights have been fully met by his right to bring the judicial review proceedings in respect of the refusal by Ealing Magistrates' Court to issue the proposed summons, and I do not consider that this right was in any way violated by the fact that section 18(1) SCA may have precluded the claimant from then appealing to the Court of Appeal (and see *R (on the application of Kearney) v Chief Constable of Hampshire Police* [2019] EWCA Civ 1841).

49. Far from being denied a fair hearing, the claimant was clearly afforded that right by the oral renewal hearing in his judicial review proceedings. More than that, however, he has previously sought to take the same points in relation to a similar refusal to issue a summons, on the same bases, by the Guildford Magistrates' Court in *R (on the application of Defending Christian Arabs) v Guildford Magistrates' Court* [2020] EWHC 1850 (Admin), where the claimant submitted a witness statement as the director of the claimant charity. That application, which included claims under the Directive and arguments under Article 47 of the Charter and as to the incompatibility of section 18(1) of the SCA with the Convention, was refused by Cutts J in her reserved judgment handed down on 10 July 2020. The claimant is now seeking to re-argue the same points in the current claim brought in his own name. Far from being denied a right to be heard, the claimant has been afforded many opportunities to re-argue precisely the same points.

50. Although, as I have said, it forms no part of the relief sought in the claim form in relation to section 18(1) SCA, the claimant's witness statement also refers to Article 47 of the Charter and Article 13 of the Convention. Allowing that any defect in the pleading could thus be taken to be remedied by reference to the content of the witness statement, I therefore address these points at this stage.

51. Article 47 of the Charter provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

52. The applicability of Article 47 of the Charter is thus contingent on the existence of a violation of a right or freedom guaranteed under EU law. The claimant has pointed

to no such right or freedom and I am satisfied that it is not arguable that he has a right under EU law to bring a private prosecution in respect of the crime of aggression. The fact that section 18(1) SCA might have prevented the claimant from appealing to the Court of Appeal against Morris J's refusal of permission, in respect of the claimant's abortive attempt to commence such a prosecution, thus involves no arguable violation of any EU law, right or freedom.

53. As for Article 13 of the ECHR, this provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

54. The claimant has, however, not identified any Convention right that has been violated as a result of the non-existence of a domestic right to pursue a private law prosecution in respect of the crime of aggression. Again, the fact that section 18(1) SCA may have prevented him from appealing to the Court of Appeal, against Morris J's refusal of permission in the judicial review claim, does not involve any arguable violation of a Convention right. Further, for completeness, as the defendant observes, Article 13 ECHR is not incorporated into English law, having been omitted from Schedule 1 to the Human Rights Act.

55. I next turn to the contention that LASPO is incompatible with the Directive and/or with Article 6 of the ECHR.

56. In relation to the Directive, the claimant clarifies (and I am here referring to his witness statement, at paragraph 29) that LASPO is incompatible with Articles 13 and 14. Article 13 of the Directive provides that Member States "*shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings*." It further makes clear, however, that "*conditions or procedural rules under which victims have access to legal aid <u>shall be determined by national law</u>*." (emphasis added). Article 14 makes similar provision for the right to reimbursement of victims' expenses.

57. Article 13, and the Directive generally, does not enshrine any right to legal aid for the purposes of bringing a private prosecution, still less does it require the payment of legal

aid in relation to proceedings in respect of a crime that domestic law does not recognise. The same is true in respect of the right to reimbursement of expenses in Article 14. In both respects the Directive is limited to the conditions of procedural rules as determined by national law.

58. Similarly, I am satisfied that there is no arguable incompatibility between the provisions of LASPO and Article 6 ECHR. Article 6(3)(c) ECHR does refer to the right to the provision of free legal assistance where a person does not have sufficient means to pay for it, but this right is confined to persons charged with criminal offences. There is nothing that provides an arguable basis for a similar right to those who prosecute criminal proceedings, who are in an entirely different position.

59. I now turn to the contention that the judgment of the House of Lords in *Jones* is incompatible with the Directive and/or Article 7(1) of the ECHR.

60. The fundamental difficulty that the claimant faces in respect of this argument has already been stated: the Directive does not specify the content of the substantive criminal law of Member States, a point made clear in the guidance cited by the claimant in his skeleton argument, where the emphasis is firmly on the Directive's application to the *procedural rights* of victims. Thus, the fact that the House of Lords unanimously held that the crime of aggression forms no part of the English criminal law is entirely consistent with the Directive; there is no basis for contending that the decision in *Jones* is incompatible with it.

61. As for the claimant's reliance on Article 7(1) of the ECHR, that provides as follows:

> "(1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

62. That says nothing about the content of the criminal law of the contracting states. Again, it is plain that Article 7(1) can provide no arguable basis for the claimant's claim.

63. Thus engaging with the detail of the provisions on which the claimant relies, I am satisfied that this claim can have no reasonable prospect of success. Whether by way of strike out, or by way of grant of summary judgment, I am satisfied that the defendant's application should be allowed.

Abuse of process

64. In case I am wrong about that, I have, in any event, gone on to consider the question whether the claim should be struck out as an abuse of process under either of the alternative bases on which the application is put.

65. First, the defendant argues that the claim amounts to an abuse of process because the claimant is using the incorrect procedure. In this regard, the defendant argues that the claimant is seeking to pursue what is, in substance, a judicial review claim without utilising the specified procedure for such claims under CPR Part 54. The claimant has, instead, utilised the Part 8 procedure, which (the defendant objects) has the practical effect, for instance, that the claimant avoids the requirement to provide a detailed statement of his grounds and a statement of the facts relied on. More specifically, the defendant observes that CPR Part 54.2 provides that the judicial review procedure *must* be used in a claim for judicial review where the claimant is seeking, *inter alia*, a mandatory order. The claimant contends that the case law provides a more flexible approach and argues that he is seeking to pursue his claim as a private individual, asserting his rights under the HRA. He says that the defendant is taking an overly-technical objection that is inconsistent with the development of the civil law in this regard.

66. I acknowledge that the court should avoid adopting an overly-technical approach and agree that the case law has developed, to provide for what might be described as a more nuanced approach to the exclusivity principle arising from the speech of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 (HL). That said, it is plain that the present claim comprises a claim for judicial review as defined in CPR Part 54.1(2)(a). That is because it involves both a claim to review the lawfulness of an enactment (that is, both section 18(1) of the SCA and the provisions of LASPO) and a claim to review the lawfulness of what is said to be a failure to act in relation to the exercise of a public

function (the failure to take measures to implement the Directive). In *O'Reilly v Mackman* Lord Diplock stated (see page 285) that this would be:

> "… contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by that means to evade the provisions of [CPR Part 34]."

67. Although the claimant might ultimately derive a private benefit from the declarations he seeks, that does not establish that this is a claim where his private law rights are necessarily in issue. A private right arising from a point of construction does not preclude the question of the meaning and effect of a public decision - here what is said to be failure to transpose the Directive into domestic law - retaining its public law status: see, by analogy, the decision in *T&P Real Estate Limited v Mayor and Burgesses of the London Borough of Sutton* [2020] EWHC 879 (Ch) at paragraphs [37] to [40].

68. In the present case, the claimant has not identified any sufficient private law interest that would justify the use of the Part 8 procedure by way of exception from the general rule in *O'Reilly v Mackman* (i.e. that public law claims should be pursued by way of public law (that is judicial review) proceedings). Moreover, the claim form makes clear that the relief sought by the claimant includes a mandatory order that the defendant pays the claimant his entitlement for legal aid and reimbursement of expenses under the Directive. It is impermissible to use the Part 8 procedure for the purposes of seeking such mandatory relief. That would have to be a claim pursued under CPR Part 54.

69. For those reasons, I agree with the defendant that the pursuit of this claim by way of CPR Part 8 amounts to an abuse of process. That, however, would not be the end of the matter: the next stage would be for me to consider whether some relief should be granted to allow the claim to be pursued by the appropriate alternative means. In this case, however, I am satisfied that that is not a step that should be taken, or indeed could properly be taken. First, because of the view I have already formed on the application to strike out/for summary judgment. Second, because of the view that I have reached as to the second basis for the defendant's complaint of abuse of process; that is, that this is an attempt to re-litigate decided issues. I turn to that point next.

70. The defendant's second objection to the claim as an abuse of process is put on the basis that it is an attempt to re-litigate settled issues: issues that have either been decided against the claimant, alternatively issues that could, and should, have been raised by the claimant in his previous judicial review claim, where permission was refused by Morris J.

71. While the Secretary of State was not a party to the earlier proceedings - so that a question of *res judicata* does not arise - it is well established that it may be an abuse of process to seek to re-litigate a decided issue, or to raise an issue that could have been raised in earlier litigation, even where the subsequent case involves a different defendant: see *Johnson v Gore Wood* [2002] 2 AC 2 (HL). As Lord Bingham explained in *Johnson* (see page 31), in determining whether there has been an abuse of process, the court applies a broad, merits-based approach taking account of public and private interests and all the facts of the case, focusing attention on the central question: whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue that could have been raised before, or an issue which was raised before and decided against the claimant (and, for an example in the public law context, see *BA & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 944 at paragraph [26]).

72. In the present case, the claimant's statement of facts and grounds in his earlier judicial review claim make plain the arguments he seeks to pursue in the present proceedings have already been adjudicated upon, against him. In particular, his argument that the domestic law of England and Wales should recognise the crime of aggression, and that the House of Lords' decision in *Jones* should be reconsidered (placing reliance on Article 7 of the ECHR and the Directive) is addressed at paragraphs 74 to 103 of the grounds in those earlier proceedings. His argument that LASPO is incompatible with the Directive, in particular Articles 13 and 14, is addressed at paragraphs 105 to 108, and his argument that section 18(1) of the SCA is incompatible with the Convention is dealt with at paragraphs 109 to 120.

73. Similar points might properly be made in respect of the claimant's earlier involvement as director for the claimant charity in *R (on the application of Defending Christian Arabs).*

74. Whether or not the same defendants are always named, the continued re-iteration of the same arguments is properly to be described as an abuse of the court's process. So, if I were not already satisfied, on my own judgement, that this claim has no reasonable prospects of success and should be struck out, I would, in the alternative, strike out the claim on the basis that it is seeking to pursue the same contentions and issues which have already been settled in the determinations against the claimant, (1) in the earlier judicial review proceedings, relating to the very same Magistrates' Court decision as in issue in this case, and/or (2) in the case involving the decision of the Guildford Magistrates' Court.

Disposal

75. For the reasons I have explained in this Judgment, I allow the defendant's applications: (1) for an extension of time for service of the acknowledgement of service until 14 January 2021; (2) for the summary dismissal of the claimant’s claim, pursuant to CPR Part 3.4(a) and/or Part 24.2.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge