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Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **27/01/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

Between:

PAUL MAGENNIS

-and-

NORTHERN IRELAND COURTS AND TRIBUNALS SERVICE

_____

Frank O'Donoghue QC and David Heraghty, of counsel (instructed by Trevor Smyth & Co) for the Plaintiff
Paul McLaughlin QC and Michael Neeson, of counsel (instructed by Departmental Solicitor's Office) for the Defendant

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SIMPSON J

I Introduction

[1] Although rare nowadays, many years ago in the Petty Sessions a resident magistrate could often be heard to say to a defendant: "Fined £10, with 7 days in default." Such a statement may well have meant little to those members of the public present in court, but its significance was that a failure to pay the fine (i.e. default) by the defendant would result in his being imprisoned for 7 days. It remains the position today that if a person is fined in the Magistrates' Court a failure to pay that fine can lead to a period of imprisonment.

[2] That is what happened to the plaintiff in this case, on two occasions.

[3] On 28 March 2011 at Belfast Magistrates' Court he pleaded guilty to an offence of criminal damage and was fined £200. The default period was 14 days. Despite warning letters sent to him, the plaintiff failed to pay. A warrant of commitment issued on 12 September 2011, PSNI executed the warrant on 17 November 2011, and he was taken to

Hydebank Wood Young Offenders' Centre. With appropriate remission he was released from custody on 23 November.

[4] On 24 June 2011 the plaintiff pleaded guilty to an offence of theft. He was fined £250 with 14 days in default of payment. Again, despite warning letters sent to him he failed to pay. A warrant of commitment was issued on 6 December 2011. On foot of the warrant he was detained on 18 August 2012. He was taken to Hydebank on 20 August 2012. He was released on 24 August.

[5] As far as the plaintiff was concerned, matters rested there.

II re McLarnon and others

[6] On 22 March 2013 the Divisional Court (Morgan LCJ, Girvan LJ, Treacy J) gave judgment in the case of *Re McLarnon, McKeown and Chakravarti's Applications for Judicial Review* [2014] NI 73 (hereafter "*McLarnon*" or "*McLarnon and others*"). Girvan LJ gave the judgment of the court. While the initial judicial review application was based on the delay between the date of issue of warrants of commitment and the date of execution of the warrants, the Court identified a prior question — namely, the lawfulness of the warrants of commitment issued by the Northern Ireland Courts and Tribunals Service (hereafter "Court Service") under the arrangements then in place.

[7] Those arrangements (which were the arrangements in place when the plaintiff was fined) were set out in detail in paragraph 8 of the Divisional Court's judgment.

> "(a) When imposing a fine or other sum adjudged to be paid on conviction of a defendant the District Judge pursuant to Article 91 of the Magistrates' Courts (Northern Ireland) Order 1981 ('the 1981 Order') considers whether to order the defendant to pay the sum forthwith, allow time for payment or order payment by instalments.
>
> (b) Generally District Judges do not make any oral declaration as to the period of imprisonment to be served in default of payment of the fine imposed. They may on occasion make reference to a period in default of payment (for example when the defendant appears in person). There may be a general reference to imprisonment as a consequence of non-payment. In the vast majority of cases no reference is made in open court to the imposition of specific periods of imprisonment in default of payment.
>
> (c) Schedule 3 of the 1981 Order specifies the maximum period of imprisonment which may be imposed for non-payment of a fine of the amount shown in the schedule. It is a maximum and thus the court will ultimately have to exercise a judicial discretion as to the actual period to be

imposed. Since the introduction in or about 2006 of the Court Service's integrated computer system (known as ICOS) when the order is drawn up by the clerk the system generates the default period based on the total fines imposed. The system automatically populates the order with the maximum applicable default period. The entry can be overwritten if it requires to be changed. Even before the introduction of ICOS clerks inserted the default period themselves by reference to the maximum applicable period.

(d) The District Judge signs the Order Book. The Order Book shows the fine, the date by which it must be paid and the default period of imprisonment.

(e) The defendant is notified of the monetary penalty by a Fine Notice. This notice specifies the amount of the fine, the date by which it is to be paid and advises that if payment is not made a warrant would be issued committing him to prison. It further states that the issue of a warrant would increase the sum owed by £5 per charge and that no payment could be accepted by the court office once a warrant is issued. (At that stage payment could only be made to the PSNI or Prison Governor). It explains the various methods by which the payment could be made and advises that the defendant may apply to the court for payment by instalments, for further time to pay or to vary any instalment order.

(f) Where no payment is made by the due date ICOS provides a 7 day opportunity for the defendant to make late payment. On the expiry of that time the involvement of the fine recovery team based in Laganside Courts is engaged. An enforcement block suppressing the issue of a warrant for 10 days is applied. A 10 day letter is sent to the defendant stating that payment should be made immediately and pointing out that if the defendant is having difficulty paying the fine he may apply to the court for payment by instalments or for further time to pay. The letter strongly encourages a defendant to either make payment or immediately contact the fine recovery section to avoid any further action being taken at this stage. Seven days later a 3 day notice is given to the defendant. This is expressed to be a final opportunity to pay the fine otherwise a warrant would issue in 3 days' time.

(g) On expiry of that time a computer generated warrant created message is issued and details are forwarded by the Court Service to PSNI and the PPS. The PSNI Case Management System (NICHE) automatically creates an

> occurrence file which links the defendant to the warrants. The NICHE Causeway Adapter allocates the warrants to the relevant PSNI Justice Support Unit (in police terminology known as the 'Owning Police Unit')."

[8] Following a detailed analysis of the legal position, Girvan LJ said as follows:

> "[29] The system, as currently operated and as applied in the instant cases, breached the law in a number of respects. There has been no hearing before a judicial officer before a warrant of commitment is currently issued. The automatic computer generated issue of warrants of commitment is not subject to judicial oversight. The decision to issue a warrant of commitment requires a judicial consideration of the circumstances to ascertain what the appropriate form of enforcement should be. Commitment is not inevitably or always the most appropriate form of enforcement, particularly bearing in mind that imprisonment should be a last resort. The particular circumstances of the individual case must be properly taken into account. The statutory maximum period of imprisonment, if commitment is considered to be appropriate, is not necessarily and inevitably the period that a District Judge may decide to impose. The fixing of the period requires the exercise of a judicial assessment of the circumstances. The current system does not make provision for a hearing at which the defendant may attend and/or make written and/or oral submissions either in person or by a lawyer. The system does not give the defendant an opportunity to make representations and therefore is not compatible with the requirements of natural justice nor is the process compatible with Article 6.
>
> [30] For these reasons we conclude that the warrants as issued were not lawful warrants of commitment."

III The pre-proceedings correspondence

[9] Since the content of the correspondence is relevant to the court's consideration of a later issue, it is appropriate at this juncture in the narrative to set out the material parts.

[10] It took some time from the promulgation of the judgment in *McLarnon* for persons who had been affected to hear about the matter and instruct solicitors. On some date prior to 24 September 2013 the plaintiff attended the offices of Trevor Smyth & Co., because on 24 September that firm wrote letters of claim on behalf of the plaintiff to PSNI, the NI Prison Service and Court Service. The material part of the letter to Court Service says:

> "We are now instructed to claim damages based on the decision [in *McLarnon*] and accordingly Legal proceedings were (*sic*)

> issued forthwith within the next 21 days unless we hear from you with your proposals for settlement."

[11] The letter did not identify any cause of action upon which the plaintiff would rely, save for the assertion in the first paragraph that the solicitors' instructions were to claim damages for "unlaw (*sic*) detention by way of money warrant …"

[12] Court Service's reply to that letter is dated 1 October 2013. The reply referred specifically to the "letter of claim." The reply stated, in part:

> "You assert that your client has a cause of action arising from his imprisonment on foot of a warrant of committal for non-payment of a fine warrant. I can advise that, notwithstanding the recent decision of the Divisional Court in *McLarnon and others* liability is denied on the basis of Crown immunity pursuant to section 2(5) of the Crown Proceedings Act 1947. I refer you to the judgment of the Court of Appeal in England and Wales in *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174. The issuing of warrants which gave rise to the imprisonment of your client was an act conducted in connection with the execution of the judicial process and cannot, therefore, found a claim in damages because of the immunity provided by the 1947 Act.
>
> The Divisional Court has directed that issues in respect of the lawfulness of the subsequent periods of detention in the *McLarnon and others* cases be addressed by converting the judicial review proceedings to writ actions to be heard before the Senior Queen's Bench judge. The Divisional Court has directed that the *McLarnon and others* cases proceed as test cases in order to determine whether the periods of imprisonment imposed on foot of warrants of committal for non-payment of fines can give rise to a compensatable tortious act.
>
> In the event that your client applies for public funding to bring proceedings we would request that you provide a copy of this correspondence to the Legal Services Commission along with any application for a legal aid certificate."

[13] I interpose here in the chronology of the correspondence to record that the actions of McLarnon (and the associated plaintiffs) were listed for hearing from 13 to 15December 2016. In fact, the cases were settled. The evidence of Mr Peter Luney (at the relevant time he was Head of Court Operations within the Court Service) was that £5,000 per case was paid in damages, less the amount of the outstanding fine. There was no evidence before me of the length of detention in any of those settled cases, but I consider that it is a reasonable inference that since the period related to the non-payment of a fine, it was a short period of imprisonment. The cases were settled only in relation to the Human

Rights Act aspect of the claims. Mr Luney also said that part of the Court Service's strategy devised around the time of the settlement was that only those cases would be settled in which the letter of claim had been received within 12 months of the date of the relevant plaintiff's imprisonment.

[14] Following the settlement in *McLarnon* Court Service wrote to the plaintiff's solicitors on 4 January 2017. Where material the letter stated:

> "You wrote to [Court Service] to notify us of your intent to instigate legal action arising from a period of unlawful detention on foot of an undischarged monetary penalty. We acknowledged receipt of your letter and requested that the progression of any legal action be withheld pending the outcome of ongoing proceedings in the Divisional Court in *McLarnon and others*.
>
> We can advise that these actions have reached a resolution and have provided a basis upon which to progress appropriate offers of settlement. You will appreciate there is a high volume of claims currently pending and it will take time to validate the merits of each of these. However, we will endeavour to do so efficiently and will issue offers of settlement where appropriate to do so in respect of your client(s) as quickly as possible. We would respectively ask you to consider not advancing claims any further until you have first considered the terms of any offer made."

[15] The plaintiff's solicitor wrote two letters to Court Service asking about progress. Finally, Court Service wrote to the plaintiff's solicitors by way of a letter of 18 May 2017 in the following (where material) terms:

> "You assert a cause of action arising from the decision of the Divisional Court in *McLarnon and others*. In that case the Court found that the detention in question was in breach of Article 5 ECHR. Pursuant to section 7(5) of the Human Rights Act 1998 proceedings alleging a breach of a Convention right must be brought within one year beginning with the date on which the act complained of took place.
> …
> As the detention occurred more than one year before the date of your correspondence, the limitation imposed by statute applies. The Department [of Justice] considers that there is no cause of action arising in these circumstances."

[16] Following an application for legal aid, the plaintiff's Writ of Summons was issued on 21 September 2017.

IV The Pleadings

[17] In his Amended Statement of Claim the plaintiff identifies as causes of action (1) wrongful arrest (2) false imprisonment and (3) assault, battery and trespass to the person. In addition the plaintiff asserts a claim for a breach of his rights under Article 5 and Article 6 of the European Convention on Human Rights ("the Convention").

[18] The plaintiff's replies to a notice for particulars make it clear that the claim for assault, battery and trespass to the person is based on the technical use of force at the time of arrest and detention on foot of the warrants.

[19] If the plaintiff has a viable claim in relation to any of the tortious claims, no issue of limitation arises. As noted above the two periods of detention were in November 2011 and August 2012. The Writ was issued in September 2017 before the expiry of the relevant 6-year limitation period which applies to the claims in tort.

[20] The defendant denies that it was responsible for any of the acts which may amount to one or other of the torts; that, in any event, the issue of both warrants was in the discharge or purported discharge of responsibilities in connection with a judicial process and, accordingly, protection from suit is provided by section 2(5) of the 1947 Act or by Articles 5, 6 and 7 of the Magistrates' Courts (Northern Ireland) Order 1981, or both. The defendant further denies that the arrest or detention were in breach of the plaintiff's rights under articles 5 or 6 of the Convention, and it also relies on section 7(5) of the Human Rights Act asserting that any claim for breach of human rights is statute barred.

V The plaintiff's claims in tort

[21] It is the plaintiff's case that by issuing the warrants of commitment without any determination by a judicial officer thereby directing the PSNI to arrest and detain the plaintiff the defendant was legally responsible for the plaintiff's wrongful arrest and detention. The issue is squarely joined by the defendant in its submission that neither the district judge who imposed the fines nor the Court Service were the detaining authority; therefore neither committed any act constituting an actionable false imprisonment, or any other tort relied on by the plaintiff.

[22] The defendant relies on *Zenati v Commissioner of Police of the Metropolis* [2015] QB 758 in support of its submission that courts have been careful to distinguish between the acts of detention which amount to imprisonment and the wrongful acts of third parties which may have led to the imprisonment. In that case the plaintiff sued the Commissioner of the Metropolitan Police and the Crown Prosecution Service following his arrest and charge with offences under the Identity Cards Act 2006, it being believed that his British passport was counterfeit. He was remanded in custody on 10 December 2010. The National Document Fraud Unit examined the passport and informed police on 19 January 2011 that it was genuine. Police did not inform the CPS. At a court hearing on 4 February 2011 the CPS informed the court that a statement was required from the immigration authorities to confirm that the passport was a forgery, so the judge adjourned the case for 14 days and refused bail. Eventually the appropriate information was made available to the CPS and the plaintiff was released on 9 February. The Court of Appeal dismissed the claimant's appeal in relation to false imprisonment.

[23] Court Service, in its skeleton argument, cites *Zenati* at paragraph 50 where the court said that the claimant was not detained either by the Commissioner or the CPS and that his detention was justified by the warrant of remand.

[24] I do not consider that the decision in *Zenati* provides assistance to the defendant in the particular factual circumstances of this case. In *Zenati* the plaintiff was detained on foot of a valid order of the court. The failures of the police and/or prosecution service did not affect in any way the validity of court's decisions to remand the claimant in custody. That is a far cry from the facts of this case.

[25] The defendant also relies on the reference by Lord Dyson in *Zenati* to the decision in *Austin v Dowling* (1870) LR 5 CP 534, 540:

> "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, the one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

[26] In my view this, too, is of no assistance to the defendant. In the present case I am not concerned with circumstances in which a judicial officer has interposed his opinion or judgment between a complainant and the detention. Here, the Court Service in the guise of the Clerk of Petty Sessions was at all times the body responsible for the actions which led, seamlessly — as the Court Service intended they would — to the arrest and detention of the plaintiff.

[27] I note that in the paragraph specifically cited by the defendant from *Zenati* (paragraph 50), Lord Dyson MR went on to say:

> "It is well established that, where an imprisonment is effected through judicial proceedings, liability for false imprisonment 'virtually disappears': [citing *Clayton & Tomlinson, Civil Actions Against the Police*]. The reason for the qualification of 'virtually' is that there are circumstances in which justices who have no jurisdiction to order imprisonment may be liable for false imprisonment…"

[28] An example of just such a case is *Houlden v Smith* (1850) 14 QB 841. The defendant was a county court judge in Lincolnshire. His jurisdiction was geographically limited, and did not include Cambridge. The plaintiff was initially sued in Lincolnshire in respect of a cause of action arising within the defendant judge's jurisdictional area. A judgment summons was issued against the plaintiff and when he failed to appear, the defendant "made a minute in the minute book of the Court, whereby it was ordered that the plaintiff should, for contempt, in not attending, be committed to Cambridge gaol for fourteen days." (page 851) A warrant was drawn up and the plaintiff was committed to prison for contempt. The court held that the defendant judge had no jurisdiction to make such an order. The plaintiff succeeded in his action for trespass and false imprisonment.

[29] It is an inference properly to be drawn that in *Houlden* it was not the defendant judge himself who physically detained the plaintiff; nevertheless since the plaintiff was detained on foot of the order which the defendant made, the defendant was held to be liable for false imprisonment. That is effectively a situation on all fours with the position of Court Service in the present case.

[30] In my view, therefore, the plaintiff succeeds in his allegations of false imprisonment.

[31] The plaintiff did not give evidence. Accordingly, there was no evidence before me that the plaintiff was touched against his will or searched, as was alleged in the Amended Statement of Claim, or the circumstances of any such alleged actions. Accordingly, I dismiss the plaintiff's claim for assault, battery and trespass to the person.

VI Judicial immunity

[32] The Divisional Court in *McLarnon* specifically ruled (paragraph 30) that warrants which were issued in the same circumstances as those in the present case "were not lawful warrants of commitment." Therefore their issue was not within the jurisdiction of the magistrates' court.

[33] The relevant provisions of the Crown Proceedings Act 1947 were extended to Northern Ireland by virtue of The Crown Proceedings (Northern Ireland) Order 1981, Article 1(4) of which provides:

> "For convenience of reference the Act, as it extends to Northern Ireland by virtue of this Order, is set out —
> …
> (b) in Schedule 3 as it applies to the Crown in right of Her Majesty's Government in Northern Ireland."

[34] Schedule 3, Part 1 "Substantive Law", provides:

> "2(1) Subject to the provisions of the Act, the [Crown in right of His Majesty's Government in Northern Ireland] shall be

subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:

(a) in respect of torts committed by its servants or agents…"

…

(5) No proceedings shall lie against the [Crown in right of His Majesty's Government in Northern Ireland] by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

[35] In addition to the 1947 Act the defendant also relies on immunity within the provisions of the Magistrates' Court (Northern Ireland) Order 1981. The relevant provisions are Article 5, 6 and 7.

"**Immunity of resident magistrates etc. for acts within jurisdiction**

5. No action shall lie against any resident magistrate, lay magistrate or clerk of petty sessions in respect of any act or omission of his—

(a) in the execution of his duty—

(i) as a resident magistrate or a lay magistrate or

(ii) as such a clerk exercising, by virtue of any statutory provision, any function of a magistrates' court; and

(b) with respect to any matter within his jurisdiction.

Immunity for certain acts beyond jurisdiction.

6. An action shall lie against any resident magistrate, lay magistrate or clerk of petty sessions in respect of any act or omission of his—

(a) in the purported exercise of his duty—

(i) As a resident magistrate or a lay magistrate; or

(ii) as such a clerk exercising, by virtue of any statutory provision, any function of a magistrates' court; but

(b) with respect to a matter which is not within his jurisdiction,

if, but only if, it is proved that he acted in bad faith.

Where warrant on conviction is issued by clerk or another justice

7. Where a conviction or order is made by a magistrates' court and a warrant to enforce it is signed by … a clerk of petty sessions, no action shall be brought against the … clerk who signed the warrant by reason of any lack of jurisdiction in the magistrates' court which made the conviction or order."

[36] For the plaintiff, the submissions of Mr O'Donoghue QC are to the effect that since no judicial process took place in relation to the issue of the warrants of commitment the defendant is unable to pray in aid any of the above provisions. He says that by issuing what was a computer generated warrant, the defendant bypassed entirely any judicial process and that parliament cannot be taken as intending to extend judicial immunity to such a factual situation. In his skeleton argument he makes the point that it would be "extraordinary if the Court Service could use these statutory protections, which are designed to protect from civil liability those who are involved in the adjudication or administration of judicial proceedings, to protect a Government Department from bypassing the very legal requirement to hold judicial proceedings."

[37] In the course of his detailed submissions for the defendant Mr McLaughlin QC included the succinct, but telling, point that there would be no need for protection to be given statutory form for lawful acts or for acts done within jurisdiction; protection is needed for wrongful acts or omissions.

[38] In *Quinland v Governor of Swaleside Prison and others* [2003] QB 306 the plaintiff was sentenced to a combination of concurrent and consecutive sentences producing a total of 2 years and 3 months. The Crown Court judge miscalculated the total period and told the plaintiff he would serve 2 years and 6 months. The error was not noticed by anyone in court, but the single judge of the Court of Appeal, considering an application for permission to appeal, referred the matter to the full court for the error to be corrected. The Criminal Appeal Office failed to put the matter before the full court in time to prevent the plaintiff serving a period appropriate to the full period of 2 years 6 months. In subsequent proceedings against two prison governors and the Lord Chancellor's Department for, *inter alia* false imprisonment, the defendants successfully relied on Crown immunity.

[39] In relation to the case against the Lord Chancellor's Department, part of the argument revolved around the shortcomings of the office of the registrar (of the Criminal Appeal Office). The plaintiff's counsel sought to argue that those shortcomings fell outside the ambit of the protection offered by section 2(5) of the 1947 Act because they were administrative rather than judicial. Clarke LJ encapsulated the question for the court as being whether "the failure on the part of the Criminal Appeal Office to put the papers

before the full court in due time was a failure to discharge its responsibilities 'in connection with the execution of judicial process.'" He said this:

> "33. I at one time thought that the word 'execution' should be construed as limited to execution in the sense of execution of judgments, on the basis that the purpose of the provision was to protect those who execute judgments, such as bailiffs. However, on reflection, I do not think that the words in the section can be so limited. For example, it seems to me to be clear that a person drawing up a court order made by a judge would be exercising responsibilities in connection with the execution of judicial process. Thus, the Crown Court clerk who drew up the order in this case on the basis that the appellant had been sentenced to two years six months was, I see it, doing an act in connection with the execution of judicial process. He was implementing what he thought the judge had ordered and, in my judgment, would be immune from suit under section 2(5).
>
> 34. Once it is appreciated that the word 'execution' means something more than the execution of judgments or orders, it must I think be used in the sense of implementation. Thus any act in connection with the implementation of judicial process is within the meaning of the sub-section. … The second part of the sub-section is to be contrasted with the first and is not concerned with those discharging or purporting to discharge responsibilities.
>
> …
>
> 36. It was pursuant to [the single judge's] statement that he regarded the sentence as one of two years three months but that 'that should be checked if necessary' that the decision by or on behalf of the registrar was made to refer the matter to the full court 'for the sentence to be corrected from two years six months to two years three months.' In these circumstances, it seems to me that that decision was made in the course of discharging or purporting to discharge the responsibilities of the registrar in connection with the execution of judicial process. As I see it, it follows that the failure of those in the Criminal Appeal Office thereafter to ensure that the matter was in fact referred to the full court in due time was something omitted to be done by or on behalf of the registrar in discharging or purporting to discharge his responsibilities in connection with the execution of the judicial process within the meaning of section 2(5)."

[40] I respectfully agree with those sentiments. I consider that the interpretation which Mr O'Donoghue QC would wish to place on the legislation is too restrictive, and fails to give appropriate weight to the decision of the Court of Appeal in *Quinland*. I consider that the actions of the Clerk of Petty Sessions — in signing the warrants and transmitting them to the PSNI for execution — were actions by which he was purporting to discharge responsibilities which he had in the execution (in the Clarke LJ sense of implementation) of the judicial process. Accordingly, I am satisfied that the provisions of section 2(5) of the 1947 Act, as extended to Northern Ireland, provide immunity from suit to the defendant in this case.

[41] Mr McLaughlin QC also relied on the provisions of the Magistrates' Courts (Northern Ireland) Order 1981 set out above.

[42] Articles 5, 6 and 7 provide a suite of protections to magistrates (now known as district judges) and clerks of petty sessions: article 5, for acts or omissions of either in the execution of duty and within jurisdiction; article 6, for acts or omissions of either in the purported exercise of duty but outwith jurisdiction, unless it is proved that either acted in bad faith; article 7, for the clerk signing a warrant of enforcement of a conviction or order, where there was lack of jurisdiction in the magistrates' court which made the conviction or order.

[43] Articles 5 and 6 replicate provisions contained in section 108 of the Courts and Legal Services Act 1990 and applicable in England & Wales. In *Lloyd and others v United Kingdom* [2005] All ER (D) 17 (Mar) the ECtHR noted that:

> "The position under section 108 … is now that an action lies against a magistrate only if it can be proved that he acted in bad faith and in excess of jurisdiction."

Clearly the same applies to a clerk of petty sessions.

[44] Mr O'Donoghue, in answer to these provisions, repeats his argument that there was no judicial process at the stage when the warrants of commitment were issued and that the relevant articles are designed to protect magistrates and officials, but only in what he terms the judicial process. I reject this argument also.

[45] It could hardly be gainsaid that the enforcement of its orders is a function of a magistrates' court. Were it not so, orders made in the magistrates' court would be rendered otiose. The Warrant of Commitment in each case specifically refers to Articles 91 (Payment of sums adjudged to be paid by a conviction) and 92 (Enforcing payment of a sum adjudged to be paid by a conviction) of the 1981 Order, as well as various relevant rules of court made under the Order. I am satisfied that the Clerk of Petty Sessions, in signing and transmitting the warrants, was purporting to exercise, by virtue of the statutory provisions identified on the face of the warrants, a function of a magistrates' court, namely the enforcement of the court's order.

[46] There being no evidence of or assertion of bad faith in this case, the defendant is entitled to rely on the immunity provided by Article 6 of the 1981 Order in relation to the actions of the Clerk of Petty Sessions in signing and transmitting the warrants for execution. I consider that those actions are also protected from suit by the provisions of Article 7 of the Order.

[47] In the circumstances of this case I am satisfied that the defendant is entitled to rely on both the immunity provided for in the 1947 Act and by virtue of Articles 6 and 7 of the 1981 Order.

[48] Accordingly, I dismiss the claims against the defendant brought in tort.

VII The plaintiff's human rights claims

[49] Under the rubric "Right to liberty and security" article 5 of the Convention provides, where material:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
> …
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

[50] Arising from the decision in *McLarnon* enunciated above I am bound to conclude that the periods of imprisonment served by the plaintiff cannot be said to be in accordance with procedure prescribed by law and as the result of a lawful order of the magistrates' court as contemplated by article 5(1)(b) of the Convention.

[51] Accordingly, I hold that there has been a violation by the defendant of the plaintiff's rights under article 5(1).

[52] Article 6 of the Convention provides, again where material:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order

> or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> …
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require…"

[53] In *Benham v United Kingdom* (1996) 22 EHRR 293 the ECtHR held that enforcement proceedings arising from non-payment of a community charge which could lead to an order of imprisonment amounted to a criminal charge for the purposes of Article 6(3)(c). The proceedings which led to the imprisonment of the plaintiff in the present case therefore amounted to a criminal charge.

[54] Since there was no hearing prior to the execution of the warrants of commitment and since the plaintiff, perforce, had no opportunity to defend himself, I am satisfied that there was a violation of his rights under article 6(1) and 6(3)(c) of the Convention.

VIII Limitation

[55] A further issue between the parties is whether the plaintiff can maintain a claim for breach of his Convention rights in light of the limitation period provided for in the Human Rights Act 1998. Section 7, where material, states:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal,
>
> …
>
> (5) Proceedings under subsection (1)(a) must be brought before the end of—
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

[56] The issue is whether, on the facts of this case, I should, as sought by the plaintiff, extend time pursuant to section 7(5)(b).

[57] The 'act complained of' was the issuing of the warrant of committal in each case. That occurred, in the first case on 12 September 2011, and in the second case on 6 December 2011. As noted above the Writ of Summons was issued on 21 September 2017.

[58] In its skeleton argument the defendant cited a number of authorities in support of its submissions that there should be no extension of time. I have considered all those authorities. I have found two of the authorities particularly helpful in ascertaining the appropriate approach of the court. As was stated in *AP v Tameside Metropolitan Borough Council* [2017] EWHC 65 (QB):

> "… it is clearly the intention of the legislature that HRA claims should be dealt with both swiftly and economically. All such claims are by definition brought against public authorities and there is no public interest in these being burdened by expensive, time consuming and tardy claims brought years after the event." (paragraph 74)

[59] In the recent case of *Solaria Energy UK Ltd. v Department for Business, Energy and Industrial Strategy* [2020] EWCA Civ 1625 the Court of Appeal expressed the view that in deciding whether a longer period should be provided, it is for the court to examine all the relevant factors in the circumstances of each case — "The court should look at the matter broadly and attach such weight as is appropriate in each given case." (Coulson LJ at paragraph 32). Later in the judgment he said:

> "57. What are 'all the circumstances' relevant to the enquiry envisaged by section 7(5)(b)? They are any circumstance which is or might be relevant to the question of whether it is equitable to allow the claim to be brought in the 'longer period.' Whilst there can be no limit on the circumstances which are or may be relevant to that inquiry, it is common sense to observe that what the court will primarily be looking at are those circumstances which are or may be relevant to the delay, which has resulted in a claim being brought after the expiry of the one year stipulated by section 7(5)(a).
>
> 58. Such questions will usually include: what is the overall period of delay on the part of the claimant? Why did it occur? Is there a good reason for it? What was the conduct of the defendant during that period of delay? What effect did the delay have on both parties and any future trial? Those are the sorts of questions which civil judges regularly ask themselves in all manner of interlocutory applications, most regularly in

applications for relief from sanctions. They are therefore part of an analysis which civil judges are well-used to undertaking.

59. In addition, I note that these are also the questions which the judge must ask under section 33(3) of the Limitation Act 1980, which deals with the discretionary exclusion of the time limit in certain personal injury claims, and where the word 'equitable' is also used in the statute to determine the court's approach.

60. Accordingly, in my view, there is nothing in the words of section 7(5(b) which somehow denotes a different kind of investigation to that conventionally undertaken by a court considering issues of delay."

[60] I also note, from paragraph 65 of *AP*, that:

> "The discretion conferred on the court by the section is expressed in broad terms, and is a wide one."

[61] I have decided that it is equitable to extend the period pursuant to section 7(5)(b). I have come to that conclusion in light of the following particular circumstances of the case:

(i) It is clear from the report of the *McLarnon* judgment that initially the judicial review application was brought on a basis wholly different from the actual decision of the Divisional Court. It was not until the decision of the Divisional Court, handed down in March 2013, that anyone could reasonably have been aware that there was a Convention breach arising from the facts of the plaintiff's case;

(ii) It was not unreasonable for the plaintiff to have been unaware of the implications of the *McLarnon* judgment for some months;

(iii) The plaintiff instructed Trevor Smyth & Co Solicitors. The exact date of his first instruction is unclear, but it was some time prior to 24 September 2013;

(iv) Ms McMullan, a solicitor in that firm, said in evidence that the plaintiff profile within that firm would be clients of limited income and that almost invariably an application would be made for legal aid;

(v) Although the Court Service's letter of 1 October 2013 denied liability in relation to the plaintiff's claim, it cited Crown immunity as the basis for that denial. Such immunity was not available to Court Service in relation to any claim relying on a breach of Convention rights;

(vi) That letter referred to the *McLarnon and others* cases proceeding "as test cases in order to determine whether the periods of imprisonment imposed on foot of

warrants of committal for non-payment of fines can give rise to a compensatable tortious act";

(vii) I consider that that indication, together with the reference in the final paragraph of the letter to bringing the correspondence to the attention of the Legal Services Commission, might reasonably have led a reader to conclude, as I am satisfied it did Ms McMullan, that she was being asked to withhold proceedings until the outcome of the "test cases";

(viii) It was not until December 2016 that the "test cases" were settled. The fact that they were settled meant that there was no public judgment which a solicitor could have read to inform himself or herself of the basis for any award of damages;

(ix) Court Service wrote on 4 January 2017 referring to the settlement of those cases and informing the plaintiff's solicitor that there was "a basis upon which to progress appropriate offers of settlement." The letter went on to say: "You will appreciate there is a high volume of claims currently pending and it will take time to validate the merits of each of these";

(x) That letter specifically asked that the plaintiff's solicitors "consider not advancing claims any further until you have first considered the terms of any offer made";

(xi) That letter is silent as to Court Service's decision made around the time of settlement, as stated in evidence by Mr Luney, that only those cases would be settled in which the letter of claim had been received within 12 months of the date of the relevant plaintiff's imprisonment;

(xii) In the circumstances I am of the view that it was reasonable for Ms McMullan, as she told me, to believe that there was an agreement not to issue proceedings until after the *McLarnon* test cases had been resolved. Thereafter, in light of the subsequent correspondence, I consider that she had no reason to believe that the agreement (as she believed there was) had been resiled from by Court Service. I consider that the letter of 4 January 2017 reinforced her belief that a moratorium was in place by agreement between the parties;

(xiii) Having heard nothing further from Court Service, the plaintiff's solicitors wrote requesting an update on progress on 26 January 2017 and again on 19 April 2017, and I consider that this correspondence is entirely consistent with her belief that she was abiding by the agreement and waiting for further information as was promised;

(xiv) Neither of these letters prompted Court Service to inform her of the decision to which I refer in sub-paragraph (xi) above;

(xv) Finally, on 18 May Court Service wrote indicating that it was relying on the one year time limit and stating that the plaintiff had no cause of action;

(xvi) The agreed chronology provided in the plaintiff's skeleton argument records that an application was made for legal aid in July 2017 and was granted on 7 September;

(xvii) The writ was issued on 21 September.

[62] A further relevant circumstance to be considered is that that this is not, in my view, a case where a claim has been brought against the defendant "out of the blue" after a lengthy period of delay or (*per* Coulson LJ in *Solaria* at paragraph 62) where the defendant is facing a "stale" claim. This was one of a large number of cases about which the defendant was aware even before the promulgation of the *McLarnon* judgment. Mr Luney gave evidence that he was responsible within Court Service for the response to the *McLarnon* judgment and that, even prior to the judgment being handed down, Court Service had developed a project to deal with the consequences of the judgment. He also said that the defendant had been in receipt of legal advice throughout the relevant period. Thus, in my view, there is no prejudice to the defendant as a result of the delay; the defendant has at all times had all the necessary tools available to it to deal with these claims and is in no way disadvantaged by the fact that the writ was not issued until September 2017.

[63] The only prejudice identified by the defendant if there was to be any extension of the period is that the defendant will lose the right to rely on the limitation point. However, balancing all the particular circumstances of this case, I do not consider that such prejudice amounts to a trump card for the defendant.

[64] I therefore extend the period in which proceedings must be brought to midnight on 21 September 2017.

IX Remedy

[65] In the prayer in the most recently amended statement of claim the plaintiff "claims damages at common law and furthermore, the plaintiff relies upon his Convention rights and claims damages under article 5(5) of the [Convention] and under the Human Rights Act 1998." The plaintiff also alleges that as a result of the acts and omissions of the defendant he "has suffered personal injuries, loss and damage, upset, distress and inconvenience and was wrongly deprived of his liberty." At paragraph 7 of the amended statement of claim he asserts also a breach of his rights under article 6 of the Convention.

[66] I have found that the plaintiff's rights under article 5 and article 6 of the Convention were violated by the defendant. I recognise that in the jurisprudence of the ECtHR this is an important consideration when assessing remedy.

[67] As noted above the plaintiff did not give evidence. No medical evidence was tendered. Accordingly, there is no evidence before me of any personal injuries or the nature or extent of any upset, distress or inconvenience.

[68] Section 6 of the Human Rights Act 1998 provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right." The defendant

is a public authority. Section 7, the relevant part of which is set out in paragraph [55] above, provides a statutory cause of action against a public authority which has acted unlawfully by reason of section 6 of the Act. Section 8 of the Act "Judicial remedies" provides as follows, where material:

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

[69] Article 41 of the Convention, "Just satisfaction", provides:

> "If the Court finds that there has been a violation of the Convention …, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[70] There is a helpful summary of the approach to damages in such a claim in *R(Faulkner) v Parole Board* [2013] 2 AC 254:

> "26. These provisions were considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. In a speech with which the other members of the House agreed, Lord Bingham of Cornhill noted at para 6 that there are four preconditions to an award of damages under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. In relation to the third and fourth of these requirements, Lord Bingham observed that it would seem to be clear that a domestic court could not award damages unless satisfied that it was necessary to do so; but, if satisfied that it was necessary to do so, it was hard to see how the court could consider it other than just and appropriate to do so.
>
> 27. Lord Bingham also stated *(ibid*) that in deciding whether to award damages, and if so, how much, the court was not strictly bound by the principles applied by the European court in awarding compensation under article 41 of the Convention, but it must take those principles into account. It was therefore to Strasbourg that British courts must look for guidance on the award of damages. A submission that courts in England and Wales should apply domestic scales of damages when exercising their power to award damages under section 8 was rejected. Dicta in earlier cases, suggesting that awards under section 8 should not be on the low side as compared with tortious awards and that English awards should provide the appropriate comparator, were implicitly disapproved (para 19).
>
> 28. Lord Bingham gave a number of reasons why the approach adopted in the earlier cases should not be followed. First, the 1998 Act is not a tort statute. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to

> give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European court under article 41 not only in determining whether to award damages but also in determining the amount of an award. Lord Bingham commented that there could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents."

[71] Further, in *Al-Jedda v United Kingdom* [2011] 53 EHRR 789, the Grand Chamber said (paragraph 114):

> "The court recalls that it is not its role under article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage."

[72] Applying the guidance to be obtained from cases such as *Greenfield* and *Faulkner* to the particular factual circumstances of this case, I have concluded that an award of damages is necessary to afford just satisfaction for the two, albeit short, periods of imprisonment suffered by the plaintiff. I do not consider, as urged by the defendant in its written and oral submissions, that the declaration given by the Divisional Court in *McLarnon and others* or my findings in this court constitute the necessary remedy.

[73] Probably the closest case to the present in which any assistance may be gleaned from the approach of the ECtHR to the award of damages is *Beet and others v United Kingdom* (2005) 41 EHRR 23. The case concerned a number of applicants who had either been found liable to pay local taxes by a magistrate's court or had been fined by a court as the sentence following a criminal conviction. Following their failure to pay the sums due, enforcement proceedings were initiated against each applicant, during which the magistrates found that the non-payment was due to the applicant's wilful refusal or culpable neglect. Each applicant was sentenced to a period of imprisonment, suspended on terms that he or she make periodic payments towards the outstanding sum. Following the applicants' failure to comply with the terms imposed, a further hearing was held in the magistrates' court at which the suspended term of imprisonment was activated. Each applicant spent a period of time in prison. Free legal representation was not available for the enforcement proceedings at the relevant time and none of the applicants was legally

represented at the hearings in front of the magistrates. Subsequently the orders of the magistrates were quashed. The ECtHR found various violations of articles 5 and 6.

[74] At paragraph 46 the Court said:

> "… where there are findings of unlawfulness in the detention itself under the first paragraph of Art. 5, it may be noted that generally the Court makes an award which reflects the importance of the right to liberty which should not be removed save under the conditions provided for in domestic law and in conformity with the rule of law. As well as the length of the detention, the degree of arbitrariness disclosed by the circumstances of the case may be a factor influencing the appropriateness of making any award."

[75] The majority of the applicants, each of whom spent a matter of only a couple of days or a few days in prison (ie slightly fewer days than the plaintiff in this case) were awarded €5,000 for non-pecuniary loss. There were some factual differences between the various applicants who received that sum, but clearly the court took something of a broad brush approach to what was equitable. Those awards were made as long ago as 2005. With inflation, the figure today would be very approximately €6,300 (£5,250).

[76] Any such award has to be tailored to the facts of the individual case. In *Beet* there was some evidence of the effect of imprisonment on the individual applicants, leading to awards of (in today's approximate value) £5,250. Here, the fines were imposed on the plaintiff for two separate offences, one of criminal damage, one of theft, committed on different dates. The evidence shows that the plaintiff failed to act on foot of any of the warning letters which he received; two in relation to each of the fines. As a result he spent more days in prison on each occasion than the majority of the applicants in *Beet*. I note also that the plaintiff did not physically attend court for the trial of this action, but participated by way of Sightlink from HMP Maghaberry, whether on remand or as a sentenced prisoner I do not know. If he had wished to give evidence on his own behalf, arrangements could readily have been made for him to do so, but it appears that he chose not to do so. Therefore, there is no material before me on which I could assess the actual effect on him of the two short periods of imprisonment.

[77] I was urged by Mr McLaughlin QC to bear in mind that there are some 171 'active' writs and civil bills which were served on Court Service between 3 June 2014 and 8 November 2019. I know nothing of the factual circumstances of any of those cases and can make no guess at whether there is likely to be a successful limitation, or other, defence in some, or all, of them. In any event, having determined that an award of damages is necessary to afford just satisfaction to this plaintiff for what he endured in the circumstances of this case, I consider that it would be wrong of me to reduce the damages awarded simply because there are other claims in the pipeline.

[78] It is appropriate to deal with two further matters at this juncture. The defendant relied in its pleadings on the defence of ex turpi causa non oritur actio, a Latin maxim

meaning, broadly, that that a plaintiff will not be allowed to profit from his own wrongdoing. However, this pleading was not pursued during the hearing, and in my view wisely so. In the present case I am awarding damages, not on foot of the plaintiff's own criminality, which led to the imposition of the fines in the first place, but for the defendant's unlawful actions on foot of the warrants of committal, the fines having been imposed. In addition, while the defendant pleaded, in its defence, allegations of contributory negligence, those were not pursued at the trial.

[79] With all of the particular circumstances of this case in mind, I conclude that an award of £5,000 by way of damages in respect of each period of imprisonment meets those circumstances and is, in my view, broadly consistent with the approach of the ECtHR. I see no reason to award a different amount for each period of imprisonment, merely to take into account the slight differences in the length of detention. Further, I consider that it would be wrong in principle to reduce the award for either period simply because the total figure amounts to £10,000. The defendant is liable for, and each award is made for, the deprivation of liberty on two separate occasions. In line with the sentiments expressed by the ECtHR in *Beet* (recorded at paragraph 74 above) the sum awarded for each period takes into consideration the "importance of the right to liberty" enjoyed by the plaintiff.

[80] In relation to my finding that there was a breach of article 6 of the Convention there is no evidence upon which I could base any decision that had there been a further hearing before a district judge the resulting time spent in prison by the plaintiff would have been any different. The ECtHR refuses to speculate as to what might have happened in such a situation, and likewise I decline so to do. In such circumstances section 9(3) of the 1998 Act is relevant. It provides, where material:

> "(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than—
>
> …
>
> (b) to compensate a person for a judicial act that is incompatible with Article 6 of the Convention in circumstances where the person is detained and, but for the incompatibility, the person would not have been detained or would not have been detained for so long."

[81] As did the ECtHR in *Beet* I conclude that a finding that there has been a violation of the plaintiff's article 6 rights "constitutes, in itself, sufficient just satisfaction" for the plaintiff's article 6 claim.

[82] While I will hear the parties on the issue of costs, my preliminary view is that an award of his costs of these proceedings to the plaintiff would be a further significant factor in the overall just satisfaction at which the court is aiming.

X Postscript

[83] I consider it important to comment upon a matter which arose during the evidence of Mr Luney. It transpired that while he was in the witness box giving evidence an official

or officials from his department sent to his mobile telephone a text message or text messages directly relating to questions which he was being asked. While in this case nothing turned on the issue, nevertheless it is alarming that any official of a government department could feel it appropriate to make direct contact with a witness while he was giving evidence and in relation to his evidence. I stress that Mr Luney did nothing untoward and was merely the innocent recipient of the text message or messages, the receipt of which he properly drew to the attention of counsel.

[84] Sightlink permits wider participation in legal proceedings than might otherwise be the case. One drawback of remote or hybrid hearings, however, is that it is more difficult for the judge to be fully in control of what happens in court. Parties' legal advisers should make clear to those who attend by Sightlink that it is wholly inappropriate for them to make any contact by whatever means with a witness from the time he or she is sworn until he or she has finished giving evidence. If information has to be provided arising from any question or answer, it should be provided to the party's solicitor.

XI Last, but not least

[85] Finally, I would like to thank counsel for their helpful skeleton arguments and their cogent and clear submissions, and for the focussed way in which these proceedings were conducted. As a result all of the issues in this this complex case were appropriately ventilated and the case was completed within 1½ days of court time.