2015 EWHC 250 (QB)

Case No:3BM90280/2014

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ON APPEAL FROM DISTRICT JUDGE SHORTHOSE

BIRMINGHAM CIVIL JUSTICE CENTRE
33 BULL STREET
BIRMINGHAM B4 6DS

Date: 12th February 2015

Before :

HIS HONOUR JUDGE MCKENNA

Between:

(1) Mr Vijay Begraj **(2) Mrs Amardeep Begraj**	Appellants
- and - **Secretary of State for Justice**	Respondent

JUDGMENT

Adam Ohringer Counsel for the **Appellants** instructed by Newhall Solicitors LLP
Adam Wagner Counsel for the **Respondent** instructed by the Treasury Solicitor

Hearing date: 16TH December 2014

His Honour Judge McKenna :

Introduction

1. This is the hearing of an appeal against the order of District Judge Shorthose dated 13th October 2014 striking out the Appellants' claim for damages against the Defendant, the Secretary of State for Justice ("Secretary of State") under the Human Rights Act 1998 ("HRA 1998") in respect of the Secretary of State's alleged failure to comply with his obligations under article 6 of the European Convention on Human Rights to provide the Appellants with an impartial tribunal, permission to appeal having been granted by the District Judge at the conclusion of the hearing.

2. The Appellants assert that this Appeal raises a point of public importance, namely the scope and applicability of the doctrine of judicial immunity under section 9 (3) HRA 1998; and whether, in this case, that statutory immunity bars the Appellants' cause of action against the Secretary of State in respect of the consequences of a meeting between the police and two members of the judiciary at which information was imparted by the police which ultimately led to the collapse of a long running trial in the Employment Tribunal.

3. Put shortly, the issue at the heart of this case is whether that meeting constituted a "judicial act".

Factual Background

4. The Appellants brought a claim in the Employment Tribunal against their employers, a firm of solicitors, alleging discrimination of different kinds. The case was heard by an Employment Judge sitting with two non legal members in Birmingham on various dates between August 2011 and

January 2013. Approximately 30 days worth of evidence was heard in total.

5. On 19th October 2012 two police officers asked to see the Employment Judge and she together with the Acting Regional Employment Judge duly met the police officers concerned. The Employment Judge informed representatives of the parties of the police visit a week later on 26th October 2012.

6. On 31st January 2013 the respondents to the claim applied for the recusal of the Tribunal. The Appellants opposed that application but on 5th February 2013 the Tribunal recused itself holding that the test for apparent bias had been met.

7. The Appellants appealed to the Employment Appeal Tribunal ("EAT") who rejected their appeal on 17th June 2014. See Begraj v Heer Manak Solicitors (2014) ICR 1020.

8. The Appellants then issued proceedings against the Secretary of State on 28th October 2013 in essence alleging that their rights under article 6 of the European Convention on Human Rights had been infringed and therefore section 6 of HRA 1998 had been breached by virtue of the Employment Judge's failure to provide an impartial tribunal which failure arose from her conduct in meeting the police officers on 19th October 2012. The Appellants sought damages from the Secretary of State in respect of the wasted costs incurred by them.

9. The Secretary of State defended the claim arguing that (1) there had been no breach of article 6; (2) he was immune under section 2(5) of the Crown Proceedings Act 1947 ("CPA 1947"); (3) he was immune under Section 9 (3) of HRA 1998; (4) the claim was an abuse of process as the issues had

already been determined by the EAT when upholding the Tribunal's decision to recuse itself.

10. By an application notice dated 6th March 2014 the Secretary of State applied to have the claim struck out under CPR Rule 3.4 (2) (a) and/or (b) which was heard by District Judge Shorthose on 15th September 2014. He decided that: (1) The complaint concerned a judicial act and was therefore caught by section 2(5) of CPA 1947 and section 9 (3) of HRA 1998; (2) the alleged infringement of article 6 rights had already been considered by the EAT and the claim was an impermissible collateral attack on that decision;(3) the claim should be struck out under CPR 3.4 on the grounds that the statement of case disclosed no reasonable grounds for bringing the claim and was an abuse of the court's process.

The Legal Framework

11. Article 6 (1) of the European Convention of Human Rights is in these terms:

"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 the public may be excluded from all or part of the trial in the interests 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."

12. Article 47 of the Charter of Fundamental Rights of the European Union is in these terms:

"1.*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.*

2. 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."

13. Section 6 (1) of the HRA 1998 provides as follows:

"it is unlawful for a public authority to act in a way which is incompatible with a Convention right".

14. Section 9 of the HRA 1998 is in these terms

(1) Proceedings under section 7 (1) (a) in respect of a judicial act may be brought only-

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review or;

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

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

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

(5) In this section –

"judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge;"

Issues

15. The Appellants put forward 4 grounds of appeal which raise the following issues:-

(1) Whether the District Judge was wrong to strike out a case raising what is said to be "a complex and novel point of law"

(2) The scope of the immunity provided by section 2 (5) of CPA 1947 and Section 9 (3) of HRA 1998 which it is said must be interpreted as and applied consistently with the United Kingdom's obligations under the European Convention on Human Rights and should not be read so as to prevent a party from obtaining an effective remedy for breach of their convention Rights. In this regard, I should add that the Secretary of State has acknowledged that section 2 (5) CPA 1947 is only applicable to claims in tort against the State and on that basis the Secretary of State confines his argument to submitting that the District Judge was right to strike out the claim as being impermissible under section 9 HRA 1998 (and not section 2 (5) CPA 1947.)

(3) The District Judge was wrong to conclude that the claim was in respect of a judicial act in all the circumstances. The claim, it is said, involved a complaint about the conduct of the Employment Judge who was not part of a Tribunal or engaged in Tribunal proceedings. Furthermore, the Employment Judge's conduct was not capable of being challenged by way of appeal.

(4) The District Judge was wrong to conclude that the claim was a collateral attack on the judgment of the EAT since it was concerned with the question of balancing the rights of both parties before the Tribunal (and maintaining the integrity of the judiciary) after the Employment Judge's meeting with the police had come to light. It did not decide whether or not the Appellants had suffered an interference with their article 6 rights which was not remedied by the recusal of the Tribunal and further it had no power to make an award of damages to the Appellants had it been asked to find that they had suffered an irremediable breach of their human rights.

Ground One

16. What is said on behalf of the Appellants relying on such cases *as Farah v British Airways* (The Times 26.01.00) and *Richards (t/a Colin Richards & Co) v Hughes* [2004] PNLR 35 is that the District Judge was wrong to strike out the case since it raised a complex and novel point of law.

17. As will be apparent from what follows, I do not accept that submission. Contrary to how the Appellants would have me see it, the law relating to immunity for judicial acts set out in section 9 (3) HRA 1998 is plain and is of broad application and this case essentially concerns the application of that law to a straight forward albeit novel set of facts. The Appellants seek to argue for a narrower interpretation of judicial act, an interpretation for which there is no authority. Moreover, there is no conflict of fact. In the circumstances the District Judge was plainly entitled to consider striking out the claim.

Grounds Two and Three

18. It is convenient to deal with these two grounds together. What is said on behalf of the Appellants is that this case is not about a judicial decision but rather the responsibility of the State to provide access to justice and that section 9 of HRA 1998 must be interpreted and applied consistently with the United Kingdom's obligations under the European Convention on Human Rights and the Charter of Fundamental Rights and the section should not be read so as to prevent the Appellants from obtaining an adequate and effective remedy. The concept of judicial immunity stands in the way of that effective remedy. Moreover the concept is not clearly defined but fact sensitive and it must be applied to suit the particular factual circumstances. It is capable of being read consistently with the United Kingdom's obligations under the Convention and the Charter. Thus it is said that in a different context the European Court of Human Rights has found that a blanket immunity from suit is unlawful – *Osman v UK* [2000] 29 EHRR 245 and *Z v UK* [2002] 34 EHRR 3.

19. If the conduct complained of can be the subject of an appeal then that is the appropriate remedy and indeed the only remedy but, submit the Appellants, where, as here, the act complained of cannot be addressed by an appeal then the remedy must be provided by other means -and that other means is compensation in a civil claim. Thus where, as here, the wrong complained of is not the decision to recuse which, it is conceded, was a judicial act but the earlier decision made by the Employment Judge to agree to meet the police officers and to receive information from them the concept of judicial act should be interpreted effectively so as to be compatible. This can be done it is said by limiting the definition of the term "judicial act" to acts or decisions which can be the subject of an appeal or judicial review. Such an interpretation would give effect, it is said, to the Convention, to the intention of Parliament in enacting the HRA 1998 and

does no violence to the language. To the extent that it cannot be so interpreted I am urged to disapply the provisions of section 9 (3) HRA 1998.

20. I do not accept those submissions. As it seems to me, the scope of the immunity under section 9 (3) HRA 1998 and the concept of judicial act in particular must, in the light of the authorities, be given a broad definition. As counsel for the Secretary of State submitted, under section 2 (1) CPA 1947 the State's liability in tort to the actions of its servants only arises where it would be possible to hold the officer personally liable for that tort and as the purpose of section 9 (3) HRA 1998 is to preserve the section 2(5) CPA 1947 position in the context of human rights damages claims, it must be the case that where a judge would benefit from judicial immunity in respect of a particular act the State cannot be liable under s.9(3) of HRA 1998.

21. *Sirros v Moore* [1975] 1 QB 118 is the leading authority on the personal immunity of judges. In that case, it was held that judges have complete immunity for any act that is within their jurisdiction or which they honestly believe to be within their jurisdiction. It is plain that a very wide interpretation of what are protected acts was given. As Lord Denning MR put it at page 132D:

"Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error of ignorance, or was actuated by envy, hatred and malice, and

or uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a court of appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse the ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

22. He continued as follows at page 135C:-

"What is the test upon which the judges of the superior court are immune from liability for damages even though they are acting without jurisdiction? Several expressions are to be found. A judge of the superior court is not liable for anything done by him while "he is acting as a judge" or "doing a judicial act" or "acting judicially" or "in the execution of his office" or "quatenus a judge". What do all these mean? They are much wider than the expression "when he is acting within his jurisdiction". I think that each of the expressions means that a judge of the superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, or he may be mistaken in that belief and may not in truth have any jurisdiction. No matter that his mistake is not one of fact but of law (as in Bushell's (Case 1671) Vaughan 125) nevertheless he is protected if he in good faith believes that his jurisdiction to do what he does."

23. Had parliament intended that the phrase "judicial act" should only apply to judicial actions which were appealable or subject to judicial review as contended for by counsel for the Appellants, in my judgment it would have

breach of Article 6, since the Appellants did obtain a fair hearing before the reconstituted first instance court which represented an independent and impartial tribunal. His third way of putting the matter was that any breach of Article 6 was remedied by this court and/or by the retrial before the Restrictive Practices Court.

23. It is trite Convention law that an appeal court can remedy defects in first instance decisions where the appeal is in the nature of a full rehearing or otherwise involves a careful review of the merits (see, for example *Edwards v United Kingdom* (1992) 15 EHRR 417 and *Twalib v Greece* (Appln 41/1997/826/1032, judgment of 9 June 1998). In giving the judgment of the Divisional Court in *R (on the application of Shields) v The Crown Court at Liverpool* (at para 34) Brooke LJ said of two cases (*De Cubber v Belgium* (1985) 7 EHRR 236 paras 32-33 and *Findlay v United Kingdom* (1997) 24 EHRR 221) which had been cited to contrary effect:

> "These cases do not establish that an appeal court cannot remedy defects in first instance decisions by holding those decisions to be invalid. Indeed that is one way in which an effective remedy for breaches of Convention rights can be secured, as required by Article 13 of the Convention. In such cases the appeal court is not saving the decision notwithstanding the blemishes at first instance, rather it is invalidating the decision because of the blemishes at first instance. The court is then ruling on a criminal case that the original verdict cannot be allowed to stand, and that if there is to be a conviction, it can only be after a fresh trial in which the Convention rights are respected. It is simply upholding Convention rights."

If that court had had the benefit of Mr Sales's argument in the present case, the second sentence of this passage might well have been phrased in a different way.

24. The case of *Kingsley v UK* (Appln No 35605/97, judgment of 17 November 2000) provides a good illustration of the point Mr Sales was making to us. The European Court of Human Rights ("ECtHR") held (at para 50) that a panel of the Gaming Board had not presented the necessary appearance of impartiality to constitute a tribunal which complied with Article 6(1). It went on to say, however, in para 52:

> "However, even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6(1), there is no breach of the Article if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)'. The issue in the present case is whether the High Court and the Court of Appeal satisfied the requirements of Article 6(1) as far as the scope of jurisdiction of those courts was concerned."

25. The unusual feature of that case was that the courts on judicial review had no power to remit the case to any tribunal other than the one whose impartiality had been successfully impugned. This was the reason why the applicant was successful on the facts of that case (see para 59). More importantly, however, in the present context, the ECtHR made it quite clear (at para 58) that if the reviewing court had had the power to quash the impugned decision and either to make the relevant decision afresh or to remit the case for a new decision by an impartial body, then there would have been no breach of Article 6(1).

26.Despite this powerful recent authority to contrary effect, Miss Otton-Goulder maintained that the hearing before the re-constituted Restrictive Practices Court was not in itself sufficient to give effect to the requirements of Article 6, and that her clients must have compensation for their wasted costs as well. Unless they were granted this relief, she argued that there would be no *restitutio in integrum* and the breach of Article 6 would remain uncured.

27. By analogy, as it seems to me, in the present case, the potential breach of Article 6 was remedied by the Employment Tribunal itself. There is therefore no breach and therefore no entitlement to damages.

Ground Four

28. In the light of my conclusions in respect of grounds 1-3, I can deal with ground 4 very shortly. It is plain from a consideration of the Judgment of Langstaff J in *Begraj and another v Heer Manak Solicitors and others* [2014] ICR 1020 that the EAT gave careful consideration to Article 6. Indeed, ground two of the Grounds of Appeal before the EAT was to the effect that the Employment Tribunal's recusal failed to take proper account of the right to a fair hearing guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms because the cost of re-litigating the case was said to be beyond the means of the Appellants (see paragraph 30 of the judgment of Langstaff J). Before the EAT the Appellants lost and they are now seeking a second bite of the cherry. In my judgment that does squarely constitute a collateral attack on the EAT's decision since in these proceedings the Court will necessarily have to look at the recusal decision and decide whether the Appellants should be compensated which might involve ruling in a way contrary to that which the EAT had done.

CONCLUSION

29. In all the circumstances, the District Judge was correct to strike out the Appellants' claims notwithstanding the error in holding that Section 2 (5)

CPA 1947 applied, an error which had no material effect on his findings and I would dismiss this appeal.

30. I trust that the parties will be able to agree the terms of an Order which reflects the substance of this Judgment.

31. Finally I would like to take this opportunity to thank both Counsel for their very helpful Skeleton Arguments and oral submissions.