
Seal v UK: The End of the Story or Time for a Fresh Beginning?

Seal v UK, ECtHR, appn 50330/07

7 December 2010, [2011] MHLR 1

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Introduction

In a number of different legal settings, there are statutory provisions to the effect that permission is required to commence an action. Since litigants do not always abide by procedural obligations, a question might then arise as to what is the consequence of a failure to obtain permission: is the action a nullity or was there a procedural flaw that can be corrected? In other words, what actually was the nature of the obligation – a mandatory obligation that determines the jurisdiction of the court to proceed or a directory provision that ought to be met but is not an essential precursor to commencing an action?

This is a question that may be acute if the limitation period has expired by the time of the ruling as to whether or not the action is a nullity: in such a situation, absent an unlikely concession from a defendant that the limitation defence will not be raised if a further action is commenced, a finding that the procedural error has rendered the action a nullity effectively means that the merits of the action will never be assessed.

One of the relevant provisions is in the *Mental Health Act 1983*. Section 139 is headed “Protection for acts done in pursuance of this Act”. It provides, first, a defence of substance:

‘(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, ..., unless the act was done in bad faith or without reasonable care.’

In addition, there is a procedural safeguard:

‘(2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person

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in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions.’

Section 139(4) of the 1983 Act disapplies the provisions of the rest of the section in relation to proceedings against the Secretary of State for Health or NHS bodies.² But this does not apply in relation to private hospitals, local authorities or the police.

In *Seal v Chief Constable of South Wales Police*,³ it was held that the effect of section 139(2) was that an action commenced without leave was a nullity. It has now been determined by the European Court of Human Rights that this did not breach the right of access to a court for the purposes of Article 6 ECHR: see *Seal v UK*.⁴ However, it is suggested that this is not the end of the story, in particular because there is an argument of substance that remains open, namely that Article 14 ECHR, the non-discrimination provisions, have not been taken into account.

Similar Language in Other Contexts

In order to understand the potential of the Article 14 argument, it is worth bearing in mind what has been decided in the other settings where there is a procedural safeguard such as that in section 139(2): indeed, it is essential to a demonstration of discrimination, namely unjustified differential treatment on the basis of status.⁵ It is certainly the case that similar provisions in other legal contexts have been found to operate in a different manner, namely that the failure to obtain permission in advance does not render the action a nullity, but creates a procedural requirement that can be met by obtaining the necessary permission when the point is raised.

*Rendall v Blair*⁶ involved an action brought by a school-teacher seeking an injunction to prevent his dismissal from a school run by a charity (and consequent removal from his accommodation), but he had not obtained the leave of the Charity Commissioners. This led to the action being struck out at first instance as a nullity, but it was reinstated by the Court of Appeal, which held that any necessary leave could be obtained after the point had been raised. The relevant statutory language was section 17 of the *Charitable Trusts Act 1853*, which provided that:

‘Before any suit, petition, or other proceeding ... for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken, by any person whomsoever, there shall be transmitted by such person to the said board, notice in writing of such proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof ...’

The subsection continued by allowing the board (namely the Charity Commissioners) to authorise such action. There was also language to explain the consequence of a failure to obtain permission:

‘and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the

2. In Wales, this covers the Welsh Ministers, who carry out the functions of the Secretary of State by reason of devolution: see the *Government of Wales Act 2006*.

3. [2007] UKHL 31, [2007] 1 WLR 1910, [2007] MHLR 282.

4. ECtHR, appn 50330/07, 7 December 2010; [2011] MHLR 1

5. This is discussed further below.

6. (1890) 45 ChD 139.

said board. Provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity.’

So the operative language is that the relevant consent is required before the action “shall be commenced” and the consequence of a failure to obtain it is that the action cannot be “entertained or proceeded with”.

The Court of Appeal was doubtful that the proceedings commenced by the school-teacher were within the section, since the case did not relate to the administration of the trust deed, but held that if any consent was required, the action could be stood over to obtain it and would only be dismissed if the consent was not forthcoming at that point: in other words, it did not have to be obtained in advance. So mandatory language to the effect that the action could not be “entertained” without the relevant consent did not mean that it was a nullity: once the procedural defect had been noted, the relevant consent could be sought. Mr Justice Kay, sitting at first instance, had dismissed the claim: he held that the purpose of the section was to prevent charities being harassed with actions, and so a flagrant violation of the provision would mean that the action was a nullity.⁷ Lord Justice Bowen summed up the reasons for disagreeing with this: the statutory language was not clear in showing that the action was a nullity as opposed to being one that the courts could not consider further until the condition was fulfilled, and there was authority to show that various actions had been stood over to allow consent to be obtained after proceedings had been issued and the point had been noted. On the question of the statutory language, Bowen LJ noted:⁸

“... We are all of us familiar with the way in which Acts of Parliament are drafted to prevent actions being brought at all or writs being issued unless some condition precedent has been fulfilled. The language of such sections we are all familiar with, and the draftsman or the Legislature requires no obscure language if they desire to enact such laws. But this section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to, indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit – on all those three grounds I come to the conclusion that this section enables the Court, in such cases as I have indicated, to allow the action, to stand over in order that the blot which has occurred may be cured if possible. In the first place, the section only begins with the enactment, "Before any suit shall be commenced there shall be transmitted notice in writing to the board"; but it abstains altogether from saying that the action is to be dismissed if no, such notice is transmitted. On the contrary, it only indicates that, "save as hereinbefore provided, no suit, petition, or other proceeding shall be entertained or proceeded with by the Court"; that is to say, the enactment is directory. It directs what ought to be done. Unless the duty is complied with by the litigant the Court must hold its hand. But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until that consent, which as a matter of duty ought to be obtained in the first instance, is obtained at last. ...”

In short, the procedural duty is of a directory nature, and the court cannot proceed with the action in the absence of the necessary consent: but the court will not consider the action to have been a nullity; consequently, other procedural obligations, such as the need to commence an action within a limitation

7. *Pages 149-150.*

8. *Pages 157-158.*

period, would be considered to have been met.

Similarly, section 130 of the *Insolvency Act 1982* sets out the consequences of a winding-up order in relation to company. One of those, in section 130(2) is that “no action or proceedings shall be proceeded with or commenced against the company or its property, except by leave of the court ...”. The effect of this was considered in *Re Saunders*,⁹ in which it was held that the 1982 statutory language had not been designed to alter the practice already in place of allowing leave to be obtained after proceedings had been commenced. Mr Justice Lindsay, in so holding, declined to follow cases to the contrary, citing a lengthy list of cases from various common law jurisdictions to the effect that the statutory language did not prevent retrospective leave, despite the directive prohibiting the commencement of an action without leave.

A recent addition of a similar provision is section 329 of the *Criminal Justice Act 2003*. This regulates civil proceedings brought by an offender for trespass to the person, namely the situation in which a person has been convicted of an imprisonable offence but brings a civil action in relation to the same incident, claiming assault, battery or false imprisonment. A typical scenario for this would be an allegation of excessive force in relation to an arrest for an offence, or excessive time in police custody in breach of the requirements of the *Police and Criminal Evidence Act 1984*. Section 329(2) provides that that “Civil proceedings relating to the claim may be brought only with the permission of the court”. The section goes on to provide a defence to any claim for the defendant to prove that the action about which complaint is made was motivated by crime prevention or investigation and that the act was not “grossly disproportionate”. In order to obtain leave, the claimant must show that there is evidence that these two defence conditions are not met.

The effect of the substantive defence was described as an extreme one by Sedley LJ, giving the judgment of the Court of Appeal in *Adorian v Commissioner of Police of the Metropolis*:¹⁰

“The consequences should not go unnoticed. In place of the principle painstakingly established in the course of two centuries and more, and fundamental to the civil rights enjoyed by the people of this country – that an arrest must be objectively justified and that no more force may be used in effecting it than is reasonably necessary – the section gives immunity from civil suits, not confined to those involving personal injury, to constables who make arrests on entirely unreasonable grounds, so long as they are not acting in bad faith, and accords them impunity for using all but grossly disproportionate force in so doing. ... there is no indication that Parliament was aware, much less intended, that what it was enacting would have this effect.”

The question arising in *Adorian* was the procedural point of whether the proceedings were void because leave had not been sought in advance. The claimant had been arrested for disorderly behaviour in August 2004, subsequently charged with and convicted of obstructing police officers and granted a conditional discharge. But there was medical evidence that he suffered multiple fractures at the top of his right leg and hip of a sort that required trauma equivalent to falling from a significant height. A writ was issued just before the expiry of three years from the incident, naming trespass to the person and negligence as the causes of action. At that time, the incident was the subject of a complaint to the Independent Police Complaints Authority which had not yet been resolved (which might have been relevant to the litigation, including the prospects of settling it without the need to commence an action). A few months later, in

9. [1997] Ch 60.

10. [2009] EWCA Civ 18, [2009] 1 WLR 1859.

January 2008, the House of Lords ruled that a claim for battery causing personal injury was subject to the three-year limitation period that had been thought to be applicable only to negligently caused personal injury¹¹ rather than the six-year limitation period that had been thought to apply to trespass to the person in the form of assault or battery:¹² see *A v Hoare*,¹³ overturning *Stubblings v Webb*.¹⁴ The context of the House of Lords' decision was historic sex abuse claims: if they were not governed by the personal injury provisions, then they were time barred because they were more than six years old; but if they were covered by the personal injury provisions, they might be able to proceed because the three-year limitation period can be extended if it is equitable to do so.¹⁵

So the situation in *Adorian* was one in which sympathy would be with the claimant: there was an unexplained but serious injury consistent with a significant breach of his rights, he had not rushed to litigation because he had been taking sensible pre-action steps of complaining to the relevant investigative body, and he had been caught in a limitation trap because the House of Lords had changed the law. In that context, the police argument that his claim was a nullity because he had not sought leave in advance could be seen as an attempt to take advantage of a procedural bar to avoid a claim with clear prima facie merit. There was, however, little prospect of any such ruling preventing the claim being re-logged because the circumstances of *Adorian* were such that the three-year limitation period would have been extended, as it would clearly have been equitable to do so. Nevertheless, the Court of Appeal ruled that the effect of section 329 was not to render the claim a nullity in the event of non-compliance with the requirement of leave being obtained to bring proceedings. Rather, the requirement to obtain permission to bring proceedings was one that could be met after those proceedings had been commenced; the consequence of getting the procedure wrong was limited to an order relating to costs. Sedley LJ summarised the conclusions of the Court of Appeal:

“40. ... in our judgment s329 stipulates only that a claimant who sues someone for assaulting him in trying to prevent a crime or to apprehend him for committing it will have to show merits sufficient to defeat the special statutory defence if his action is to be allowed to proceed. It makes it legitimate to visit in costs an application which is made later than it should have been, but it does not either explicitly or implicitly involve the drastic step of nullifying proceedings, however sound, which have been initiated without first clearing this hurdle.

41. It follows, as it does in limitation cases, that a lawsuit within s329, begun without permission, can properly proceed to trial if the permission point is not taken. Where the claim is plainly eligible for permission, this is an economical and practical course. If it were otherwise, the point could not only be unanswerably taken against the claimant at an advanced stage of the proceedings, and costs be resisted on the ground that the progress of the action without permission has been entirely unlawful, but the judge would be required to take the point at trial. Moreover, a perfectly sound claim issued

11. Section 11 of the Limitation Act 1980: it provides that “(1) This section applies to any action for damages for negligence, nuisance or breach of duty ... where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person. ... (4) ... the period applicable is three years from— (a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured. ...”

12. Section 2 of the 1980 Act provides that the limitation

period for other tort claims is six years.

13. [2008] UKHL 6, [2008] 1 AC 844.

14. [1993] AC 498.

15. Pursuant to Section 33 of the 1980 Act: it applies only to the limitation period set in section 11, not that set in section 2. Section 33 also provides for various factors that should be taken into account, though all the circumstances of the case are said to be relevant: the reasons for the delay are expressly said to be relevant, as are steps taken to obtain appropriate advice, including legal advice.

late in the limitation period could be defeated, or at least placed at risk, by an opportunistic motion to strike it out, brought in the knowledge that by the time permission could now be obtained the claim will be out of time. In any such event a case which everyone knows is perfectly sound would collapse...

42. We hold accordingly ... that the requirement of s329 of the *Criminal Justice Act 2003* that the court's permission must be obtained to bring proceedings in the circumstances specified by the section is procedural and directory. It will follow that if such proceedings are brought without permission the defect can, if appropriate, be cured on application to the court, which can reflect in costs its view of the conduct of the proceedings. ..."

The Contrasting Finding in *Seal*

As has been noted, the provision of the *Mental Health Act 1983* that was in play in the *Seal* litigation was section 139 and its indication that "(2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court...". The language in *Adorian* – that proceedings "may be brought only with the permission of the court" – is the corollary of this: a direction that proceedings shall not be brought without leave is to the same effect as one that indicates that it is permissible to bring an action only if such leave is obtained. In neither case does the statutory language deal expressly with the consequence of the failure to abide by the direction. Parliament could easily have clarified this with additional language that made clear that the need for leave was mandatory, such as that "Civil proceedings purportedly commenced without first obtaining the leave of the court shall be a nullity". Of course, it could equally be said that the language of the statute does not make clear that the provision was directory in relation to the timing of obtaining leave; and it might be thought that the starting point should be to ask what is the point of having a requirement of leave if breach of it has no significant consequence. Such language would pose no real difficulty: for example, a provision that "No proceedings shall go to trial without the leave of the court" would make clear that the implication of the requirement of leave to commence proceedings was directory only. But the absence of language making clear that the provision is directory is not a matter on which much reliance can be placed in arguing that the language is mandatory: this is because the substantive point of principle outlined by Bowen LJ in *Rendall v Blair* was that the consequence of preventing access to a decision on the merits was such that very clear language was required to produce the result that the statutory language was mandatory rather than directory. This was also central to the reasoning in *Adorian*. It is a principle that is reflected in the common law in general: so, in *Pyx Granite Co Ltd v Ministry of Housing and Local Government*¹⁶ it was said by Viscount Simmonds that:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is ... a 'fundamental rule' from which I would not for my part sanction any departure."

In *Seal*, however, the holding in the domestic litigation was that the language was not merely directory but mandatory, such that a failure to obtain leave in advance meant that the action was a nullity. In the subsequent application to the European Court of Human Rights, it was held that this did not breach the right to a fair trial guaranteed by Article 6 ECHR. A separate argument that there was a breach of Article 14 as well, because of the differential treatment of those bringing claims caught by section 139 of the *Mental Health Act 1983*, was found to be inadmissible because it had not been argued in the domestic proceedings.

16. [1960] AC 260 at p286.

The facts in *Seal* can be boiled down to the following. In December 1997, Mr Seal was arrested inside his mother's house in Merthyr Tydfil for breach of the peace. He was taken outside and then a decision was made that he would be removed to a place of safety under section 136 *Mental Health Act 1983*. This power can only be exercised in a public place, and so could not have been exercised inside the house. Concerns have been expressed that the section 136 power of detention is used disproportionately in relation to people who are outside their homes, including after the use of another arrest power to remove the person to the public place. The Mental Health Act Commission, which operated as a statutory watchdog under the *Mental Health Act 1983* but which has now been merged into the Quality Care Commission, has expressed these concerns. So in its Twelfth Biennial Report, covering 2005-2007 and called "*Risk, Rights, Recovery*"¹⁷ it stated at paragraph 4.63, having mentioned the facts in *Seal*:

'... we have heard of several other instances where s136 has been used to detain a person who has been asked or made to step outside of their home (or another private property) by police. Indeed, at a meeting with one London-based social services authority in this period, we noted that its audit showed that 30% of s136 arrests were recorded as having been made at or just outside the detainee's home. Police officers were 'inviting' people out of their homes, or arresting them for a breach of the peace and 'de-arresting' them once outside to then invoke s136 powers. We suggested that this was at the very least a misuse of the powers given under the Act, and that the social services and police authorities should jointly explore alternative means of managing persons about whom the police have concerns that would not undermine the protections offered by the Act. We suggested, for example, that the police could be given a dedicated telephone number to contact ASWs and trigger an assessment under the Act.'

After being placed under section 136, Mr Seal was taken to a hospital and detained under section 2 of the *Mental Health Act 1983*; he was released by a Mental Health Review Tribunal. In August 2003, a pre-action letter was sent; this was done with legal assistance, and the claim made was that there had been no justification for the use of section 136. At the very end of the limitation period, Mr Seal, who was now acting without solicitors, commenced proceedings against the South Wales Police for damages arising out of his arrest and detention, naming "trespass, assault, wrongful arrest, misuse of police powers, misuse of section 136 of the 1983 Act, falsehood and personal injuries sustained" as the causes of action: central to the claim was that he had not been found in a public place and so section 136 had been misused. The defence raised various procedural points, including that there was no allegation made of bad faith or a failure to take reasonable care (as required by section 139(1)) and the absence of leave under section 139(2).

It was the latter procedural point that was litigated thoroughly. The entire claim was struck out by the District Judge on the grounds that the proceedings were a nullity in the absence of the necessary permission of the High Court under section 139(2). On appeal, the Circuit Judge reinstated that part of the claim that did not relate to the police's purported exercise of power under section 136, but the rest remained struck out. The Court of Appeal agreed with the Circuit Judge, rejecting the contention for Mr Seal – who was represented during the appeals – that the requirement for the leave of the High Court was directory rather than mandatory and that his failure to obtain leave initially could be remedied by a subsequent grant of leave with a stay of proceedings in the meantime.¹⁸ Mr Seal's further appeal to the

17. Available at <http://www.cqc.org.uk/findareport.cfm>, which under the heading *Publications from previous commissions* links through to the National Archives website and the relevant reports. This concern was repeated in its *Thirteenth Biennial Report, Coercion and Consent*, covering the period 2007–2009, at paragraphs 2.138–2.139.

18. [2005] EWCA Civ 586, [2005] 1 WLR 3183, [2005] MHLR 137.

House of Lords was unsuccessful, albeit only by a majority of 3 to 2.¹⁹ In the House of Lords there was an additional argument raised, namely that any construction other than that the statutory language was directory would breach Mr Seal's right of access to a court, as guaranteed by Article 6 ECHR; this was also dismissed. It is to be noted that there was no reliance on Article 14 of the Convention, the non-discrimination provision.

The consequence of the decision of the majority of the House of Lords was that, the limitation period having expired and the police having indicated that they would take the limitation defence in relation to any further proceedings, Mr Seal had no prospect of raising the central point in his claim, namely the police use of section 136. It is recorded in the European Court of Human Rights' judgment that he did not proceed with the remainder of the claim, which was clearly ancillary.²⁰

The reasoning of the majority – Lords Bingham, Carswell and Brown – looked at the domestic interpretation and then considered Article 6. In relation to the question through domestic eyes, the finding was that cases under the 1959 Act had held that proceedings were a nullity and so the statutory language used in the 1983 Act was to be interpreted on the basis that Parliament understood that and so had not effected any change.

Lord Bingham noted that the language of section 139(2) was not so markedly different from that considered in *Rendall v Blair* and in *Re Saunders* as to lead to a different result as a matter of the ordinary meaning of the language used; he also noted that the tendency of the law was not to elevate formal requirements over considerations of substantive justice.²¹ As such, he felt that it was necessary to look at wider considerations to work out the putative intention of Parliament in using the legislative language. The starting point for this inquiry was the legislative history.

The language that became section 139(2) of the 1983 Act was introduced by section 60 of the *Mental Health (Amendment) Act 1982*, as was the language that became section 139(4). These changes were then consolidated into the 1983 Act. The predecessor to section 139 of the 1983 Act was section 141 of the *Mental Health Act 1959*, which had the same heading, provided the same defence of substance in section 141(2), but had a slightly different provision for the procedural requirements:

'(2) No civil or criminal proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court, and the High Court shall not give leave under this section unless satisfied that there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care.

(3) This section does not apply to proceedings for an offence under this Act, being proceedings which, under any provision of this Act, can be instituted only by or with the consent of the Director of Public Prosecutions.'

So the changes were (i) leave in criminal proceedings moved from the High Court to the Director of Public Prosecutions in all cases,²² and (ii) the test for leave was changed from a "substantial ground" test to a judicial discretion. The test for leave has been held to be an arguable case: *Winch v Jones*.²³

19. [2007] 1 WLR 1910, [2007] MHLR 282.

20. [2007] UKHL 31, [2011] MHLR 1 at para 32.

21. [2007] UKHL 31, [2007] 1 WLR 1910, [2007] MHLR 282, para 8. See also Baroness Hale, who dissented; she noted at para 43 that the words considered in *Rendall v Blair* were "no less peremptory".

22. The provision to the effect that the leave requirement did not apply if the proceedings had to be brought by or with the consent of the DPP remains: section 139(3).

23. [1986] QB 296.

A similar provision to that in section 141 of the 1959 Act was contained in section 16 of the *Mental Treatment Act 1930*. This statute was the one that introduced the requirement of leave to bring proceedings: previously, section 12(1) of the *Lunacy Acts Amendment Act 1889*, which was consolidated into the *Lunacy Act 1890*, provided the protection of substance – namely that there was immunity for action taken in good faith and with reasonable care – but had as a procedural safeguard that the defendant could seek a stay if there was no reasonable ground to allege a lack of good faith or reasonable care.

The initial statutory language put the onus on the defendant to raise the point of substance, though that could be done before the expense of a trial was incurred by making it possible to seek a stay: such an application had no impact on whether proceedings were valid. The revised statutory language, requiring leave in advance, does not deal in terms with the consequence of a failure to obtain leave, and in particular whether any proceedings are a nullity. As has already been noted, such language would not be difficult to imagine – “Civil proceedings purportedly commenced without first obtaining the leave of the court shall be a nullity”, which would make clear that leave was mandatory. However, Lord Bingham opined that

“... the words first introduced in s16(2) of the 1930 Act (“No proceedings, civil or criminal, shall be brought ...”) appear to be clear in their effect and have always been thought to be so. They were introduced with the obvious object of giving mental health professionals greater protection than they had enjoyed before.”²⁴

Well, the response to that is surely that similar language in other statutes had not been felt to be clear; and the protection to the proposed defendant arises from the substantive defence in section 139(1). Clearly there was a change in procedure that puts the onus on the claimant rather than the defendant: but why does that have as a corollary that the failure of the claimant to obtain leave means that every step taken has been meaningless? An example of what might happen in practice makes this plain: what if the action had been commenced without leave long before any limitation problem, but the defendant had not raised the point in a defence or at a pre-trial stage; suppose then that the matter is listed for trial at a time after the limitation period has expired and at that stage the failure to obtain leave is raised for the first time. On the reasoning of the majority of the House of Lords, the trial judge would have no jurisdiction to do anything but declare that the proceedings were a nullity: this is such a harsh conclusion that the reasoning set out in *Rendall v Blair*, namely the need for clear language before such an unattractive conclusion is reached, is surely preferable.

There is, however, an additional part to Lord Bingham’s reasoning, namely that the effect of the language had always been understood to be that proceedings were a nullity. There were two aspects to this: the first was the absence of any academic writing to contrary effect;²⁵ and there was case law to the effect that criminal proceedings obtained without leave were a nullity.²⁶ But the absence of scholarly writing is not something that counts for much; and it is open to argument that the obligations on criminal prosecutors to be scrupulous in their compliance with procedure are of a different nature to those applicable to claimants in civil proceedings – particularly as there is no limitation problem to deal with,

24. [2007] UKHL 31, [2007] 1 WLR 1910, [2007] MHLR 282, para 18.

25. Paragraph 15.

26. Paragraph 12, citing *R v Bracknell JJ ex p Griffiths* [1976] AC 314 and other cases.

at least not in relation to indictable offences, such that the quashing of the proceedings as a nullity would not mean the loss of the chance to prosecute.

Having reached his view on the domestic approach, Lord Bingham then considered whether Article 6 of the ECHR required a different interpretation, and he concluded that the real issue was the limitation defence; a six-year limitation period had been found to be unobjectionable, referring to *Stubbings v UK*, in which it had been found by the European Court of Human Rights that English limitation periods did not breach the right of access to a court.²⁷ As to the question of whether section 139(2) breached Article 6, it was noted that it had been held in Convention proceedings that it was legitimate to offer protection against harassment of those responsible for the care of psychiatric patients, referring to *Ashingdane v UK*.²⁸

It has to be accepted that the particular facts of Mr Seal's case were such that he caused significant problems by leaving the matter so late. But, as noted above, the consequence of the decision could mean that a timely action would be dismissed without consideration on the merits if the procedural point that could have been taken at the outset was not taken until very late in the day but after the limitation period had expired. If the proceedings are a nullity, there is no option for the court to take the view that the defendant should be estopped from raising the procedural issue late in the day: it simply has no way of getting to the merits of the claim because there is no cause of action properly before it.

The decision on the point of law raised was clearly a close one, since, as has been noted, two members of the House of Lords, Lord Woolf and Baroness Hale, dissented. The minority conclusion was that there was inadequate clarity in the language of section 139(2) and so it could not be concluded that Parliament intended that the proceedings should be a nullity. This is consistent with the approach taken in all other circumstances. Baroness Hale noted that there was no reason to treat the authorities relating to criminal proceedings (which had involved concession rather than argument on the point as to whether the procedural error rendered the proceedings a nullity)²⁹ as having the same effect in civil proceedings, which raised different considerations.³⁰ The central point, she felt, was that in civil proceedings, the aim of leave was to protect a defendant from unmeritorious proceedings: whereas the conclusion that the proceedings were a nullity could mean that a meritorious claim was lost because of a procedural failure. As she put it:

“53. If spotted in time, the failure to obtain leave for civil proceedings can readily be put right and without prejudice to the legitimate interests of the defendant. If it is not spotted in time, and the action succeeds, no injustice will be done to the unsuccessful defendant if the judgment is allowed to stand; but a serious injustice will be done to the successful claimant if it has to be set aside, for by then it is not at all unlikely that the action will be statute barred. The fact that leave is required at all may not emerge until a relatively late stage in the proceedings. That a claimant who has suffered a wrong should be deprived of his remedy merely because of a procedural failure which no-one noticed at the time is an affront to justice.”

27. Paragraph 20; *Stubbings v UK* (1996) 23 EHRR 213.

28. Paragraph 20; *Ashingdane v UK* (1985) 7 EHRR 528.

29. And Lord Woolf had, as counsel, made that concession in the case of *R v Bracknell JJ ex p Griffiths* [1976] AC 314; he suggested that it breached the principle that limiting access to the courts required clear language, and was not binding in relation to a civil proceeding.

30. Paragraphs 52 and 53.

Lady Hale also felt that any other conclusion would breach Article 6 of the Convention, because it would be disproportionate.³¹

The European Court Proceedings

Two arguments were raised in *Seal v UK*,³² the first being a repetition of the Article 6 points that had been raised in the House of Lords in the domestic proceeding; the second was that there was a breach of Article 6 together with Article 14. The European Court of Human Rights agreed with the views of the majority of the House of Lords in relation to the first point, which was the only aspect of the claim it considered on the merits.³³ In short, it held – following its previous case law, which had been cited by the House of Lords – that any right of access to a court to consider the merits of a claim could be subject to restrictions that were for a legitimate purpose and not disproportionate: the limitation period pursued the legitimate aim of securing finality and certainty and preventing stale claims coming to court (and the Court noted that there had been no good reason put forward for the delays in Mr Seal's case), and the requirement of leave under section 139 of the 1983 Act pursued the legitimate aim of providing protection for those who exercised sensitive powers under that Act. The Court also noted that Mr Seal's legal advisors should have been aware of the provisions of section 139.

As to the second argument, namely that raising Article 6 together with Article 14, the Court noted that it had not been raised in the domestic proceedings, and so it could not be raised before the Court, given the rule about the need to exhaust domestic remedies first, contained in Article 35 of the Convention.

Discussion

The argument that Article 6 is breached by a six-year limitation period is not one that can be raised in the near future, given that the decision in *Seal v UK* upholds the approach already set in *Stubbings v UK* that it is a legitimate provision that does not breach Article 6. The other argument that was canvassed in full, namely the proper interpretation of section 139(2) as a matter of domestic law and whether the interpretation so far adopted is consistent with Article 6 ECHR, may also be difficult to raise as a practical matter, given that it will be necessary to take the argument at least to the Supreme Court to persuade it that it should depart from the domestic precedent and hold the language to be directory only (ie to adopt the approach exemplified by *Adorian*). Similarly, any reliance on Article 6 to support this view may well require a case that proceeds to the European Court of Human Rights to persuade it no longer to follow the approach in *Ashingdane v UK* as adopted in *Seal v UK*. However, the argument relating to Article 6 taken together with Article 14 has not been considered on the merits: as it was not taken in the domestic proceedings, it was not considered there, and so it was not legitimate to raise it in the European Court proceedings.

So what of this argument? Article 14 prohibits discrimination in the enjoyment of the other rights set out in the ECHR on the basis of status. This breaks down into several sub-issues. First, since Article 14 is not a free-standing right not to be discriminated against, the treatment involved has to be within the ambit

31. Paragraph 61.

32. [2011] MHLR 1, ECtHR, appn 50330/07, 7 December 2010.

33. *The Government argued that Mr Seal had failed to exhaust his domestic remedies because he had not pursued the rest of his claim or sought to start a fresh action: but this was dismissed on the basis that the claim he had been prevented from bringing was that relating to the misuse of section 136 of the 1983 Act, to which the rest of the claim was irrelevant, and there was no basis for suggesting that he could have brought a fresh claim, given that the limitation point would have been raised against him.*

of another right: in the circumstances, that is clearly met, the other right being the right to a fair trial in Article 6. Secondly, there has to be discrimination and, thirdly, this has to be on the basis of some form of status. The meaning of these second and third criteria has been considered recently in the case of *Clift v UK*,³⁴ which involved the question of whether requiring very long-term determinate prisoners – ie those serving 15 years or more – to satisfy both the Parole Board and the Secretary of State before they could be released on parole breached Article 14. The Court summarised the law as follows. First, in order to amount to discrimination there had to be a differential treatment that was not justified.

“66. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations ...

73. A difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

It went on to note that this was a matter in relation to which a margin of appreciation would be allowed, and offered guidance on the question of the scope of such a margin of appreciation. Wide margins would be allowed in relation to economic or social strategy, including penal policy, but a lesser margin in relation to issues of potentially arbitrary loss of liberty.³⁵ On the facts, there was a difference of treatment as between Mr Clift and others in his position and those serving either less than 15 years or a life sentence, both of whom were released if the Parole Board alone so decided.³⁶

Turning then to the question of the discrimination being on the basis of some matter of “status”, the Court noted that, whilst it had often used “status” to require some innate or inherent personal characteristic as opposed to a factual difference such as having been sentenced to a particular category of sentence, this would not necessarily prevent membership of a group of very long-term determinate prisoners from being within Article 14,³⁷ and in any event the proper approach to Article 14 could allow a status to arise from the fact of the differential treatment about which complaint was made:

“60. ... It should be recalled ... that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified.”

It then concluded that the importance of securing an absence from arbitrary detention was such that there was a need for “careful scrutiny of differences of treatment in this field”, and so Mr Clift was treated differently on the basis of a matter of status.³⁸

What this amounts to, in effect, is the flexible construction of Article 14 so that it is a tool to prevent arbitrary differential treatment in sensitive areas such as the right to liberty, which is done by finding the very difference in treatment to be the status on the basis of which the difference has to be justified. On

34. *Appn* 7205/07, 13 July 2010.

35. Paragraph 73.

36. Paragraphs 66-68. In other words, there was only one key rather than the two keys that detained Mr Clift, whose release had been delayed by some 2 years because a recommendation for release by the Parole Board was not adopted by the Home Secretary.

37. Paragraph 59.

38. Paragraphs 62 and 63.

the facts of Mr Clift's case, the House of Lords had already concluded³⁹ that the difference in treatment between very long-term determinate prisoners and others was not justifiable; the European Court agreed with this.⁴⁰

Applying this to a situation such as that involving Mr Seal, the starting point is that there is clearly differential treatment: in contrast to those who are raising a claim where they have been detained and prosecuted successfully (the *Adorian* situation) those who have been detained under Mental Health Act powers both have to seek permission in advance and face the consequence that their action is a nullity if they do not follow the procedural requirement whereas the former group merely have to obtain the relevant permission if the point is at some stage raised. It is a matter that arises within the ambit of Article 6, the right to a fair trial, which includes the right of access to a court. That leaves the questions of whether it is a treatment based on "status" and whether it is justified.

Is it a difference of treatment based on "status"? The Government was keen to note in *Seal v UK* that it was not a matter of the differential treatment of those with a mental disorder (which would quite obviously be a matter of status), but a difference based on the source of the power used by the defendant. The Court accepted this, noting at paragraph 77 that, whilst a number of Contracting States regulate the right of access to a court on grounds such as minors, bankrupts or persons of unsound mind, this did not apply to Mr Seal, and that the purpose of the provision was to protect those who act under the 1983 Act, which does not come with an assumption that those who have been on the receiving end are vexatious in some regards. This explanation, however, was in the context of whether there was a breach of Article 6 alone, not in the context of whether there was a breach of Article 6 taken with Article 14. In the Article 14 context, the question is the status of the claimant. In determining whether there is a difference based on a matter of status, whilst it will not be the case that everyone to whom section 139(2) applies will have been mentally disordered at the time (given the possibility of the professionals making an error, which error might well be the matter that is central to the litigation), it will be the case that everyone to whom section 139(2) applies will have been *thought* to be mentally disordered by someone whose decision is under challenge. That is the precursor to the use of any of the powers under the Act, and seems to be a differentiation of a group that has a status: and following *Clift*, it is a group to whom a different regime applies in relation to an important matter, namely access to a court, which should accord to it a status.⁴¹ In any event, the simple point is that the vast majority of people who will be affected by the provision will be people who do have a mental disorder: that is a group in relation to whom there is a sensitivity as to discrimination that should encourage a court to give a meaning to "status" that does not prevent it moving to the question arising on the merits, namely whether the differential treatment is justified.

39. *R (Clift, Hindawi and Headley) v Secretary of State* [2006] UKHL 54, [2007] 1 AC 484, [2007] Prison LR 125. The House dismissed his claim, however, on the basis that the unjustified differential treatment was not on the basis of a matter of "status".

40. Paragraph 78.

41. In *R (S and Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196, the House of Lords held that the retention of DNA from people who had been arrested but acquitted was not on the basis of a "status" of belonging to a group, namely those who had been arrested. In the follow-on proceedings, *S and Marper v UK* (2009) 48 EHRR 50, the European Court held that the House of Lords was wrong not to find that the retention of such DNA breached Article 8 ECHR and, in light of that, did not consider Article 14. However, it is clearly open to argument that the domestic conclusion in *S and Marper* is difficult to justify in light of *Clift*, whose status arose just as much from a fact, namely the sentence imposed, as the fact in *S and Marper* that the applicants had been arrested.

Turning, then, to justification: the contrast between *Adorian* and *Seal* is worth restating. Both involved police officers who were acting in difficult conditions: in the former, there was a public order arrest that was justified because there was a conviction, in the latter a Mental Health Act arrest; in both situations, there was a claim that powers had been misused in some way. So the question of justification has to ask why should it be that the police who are alleged to have misused Mental Health Act powers require a mandatory leave requirement in the civil proceedings whereas police who are alleged to have misused criminal arrest or detention powers require protection only in the form of a directory leave requirement? There is a further point of context, namely that there are powers to control vexatious litigants, to require those who are mentally disordered at the time of the litigation to act through a litigation friend, and to apply to a court for summary determination of a claim without merit. It seems clear that there is no obvious justification for the differential treatment.

It should also be noted that section 139(4) disapplies the requirements of the rest of the section – so both the substantive defence and the need for leave – in relation to the Secretary of State and National Health Service bodies. So there is another question as to why the police require additional protection compared to these public bodies. The same can be said of the other actors who are protected, namely local authorities, whose social workers have a central role, and the many private hospitals that are engaged in carrying out the state power of detention under the 1983 Act. Whilst the contrast with the *Criminal Justice Act 2003* provision does not operate in their context, there is the question of why they should have a different protection from the other bodies exercising state power in relation to whom leave is not required. As for individual mental health professionals, who are in the same position as the police, the contrast with the 2003 Act can again be made. It will apply to a victim of crime who has overused self-defence or other powers to protect property against someone who is convicted of a criminal act: the question will be why should a professional operating under the 1983 Act have a different sort of procedural protection than a victim of crime who has confronted his or her assailant and is then sued by that assailant.

There is a hint of a justification given in *Adorian*. At paragraph 34, Sedley LJ states that “litigation by mental patients past or present, especially those acting in person, is a very particular problem”. It is fair to say that the judge was referring to an early acceptance of that proposition, since he quoted Sir John Donaldson MR, who, in *Winch v Jones* said:⁴²

“To be more specific, there are two fundamental difficulties. First, mental patients are liable, through no fault of their own, to have a distorted recollection of facts which can, on occasion, become pure fantasy. Second, the diagnosis and treatment of mental illness is not an exact science and severely divergent views are sometimes possible without any lack of reasonable care on the part of the doctor.”

This is not acceptable: it is the sort of broad-brush tarring of a group and making of assumptions that reveals an attitude that must be guarded against; it is a comment that requires good evidence.⁴³ Such improper attitudes were behind the United Nations Convention on the Rights of Persons with Disabilities which was adopted by the UN General Assembly in December 2006⁴⁴ and opened for signature in March

42. [1986] 1 QB 296 at 302.

43. In this context, see paragraph 57 of the speech of Baroness Hale in *Seal* in the House of Lords, where she notes the problems of the blanket restriction in section 139 despite the great variations in patients, and the lack of any empirical evidence that all patients should be treated as somehow suspect.

44. 13 December 2006, during the 61st session of the UN; General Assembly resolution A/RES/61/106.

2007;⁴⁵ it currently has 147 signatories, and 98 states have fully ratified it.⁴⁶ The United Kingdom signed it on 30 March 2007 (the first day it was open for signature) and ratified it on 8 June 2009. The preamble to the CRPD points to the need to counter problems faced by persons with disabilities arising from attitudes in society towards people with disabilities: “disability” is described as an evolving concept that:⁴⁷

‘(e) ... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others ...’

The provisions of the CRPD are designed to overcome these problems. Non-discrimination is the first obligation, set out in Article 5, which states:

‘1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.’

This is reinforced in relation to access to justice by Article 13, which provides that:

‘1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others ...’

These provisions no doubt supplement the arguments that arise under Article 14 ECHR. There is clearly a significant argument to be had: hence the suggestion that *Seal v UK* is the end of a chapter involving Mr Seal, but by no means the end of the book because there are arguments that have not yet been ventilated fully that merit a hearing.

45. See Art 42 of the Convention.

46. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-15&chapter=4&lang=en (last accessed 3 March 2011). Entry into force was 30 days after the twentieth ratification: Article 45(1); for countries that ratify subsequently, the Convention enters into force 30 days after they deposit the instrument of ratification or accession with the UN (see Art 45(2)).

47. An interesting prospect arising from the use of an impact-based definition and the acceptance that it may change over time is that certain things might cease to be counted as a disability – and indeed the concept of disability might cease to exist – if society changes so that there is no longer an impact arising. Indeed, that could be seen as an aim of the Convention, namely to create a situation in which it falls into desuetude because it has achieved its purpose.