Neutral Citation Number: [2020] EWCA Civ 29

Case No: C1/2018/2473 & C1/2018/1596

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE WILLIAM DAVIS
[2018] EWHC 2324 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2020

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE HOLROYDE
and
THE RT HON LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

THE QUEEN on the application of JASON MICHAEL	**Appellant**
- and -	
(1) THE GOVERNOR OF HMP WHITEMOOR	
(2) THE DIRECTOR OF HIGH SECURITY PRISONS	**Respondents**
- and -	
THE COUNTY COURT AT OXFORD	**Interested Party**

- -
- -

Philip Rule (instructed by **Coninghams Solicitors**) for the **Appellant**
Eric Metcalfe (instructed by the **Government Legal Department**) for the **Respondents**
The **Interested Party** did not attend and was not represented

Hearing dates: 30 and 31 October 2019

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Approved Judgment

The Lord Burnett of Maldon:

1. This is the judgment of the court to which we have all contributed.

2. The issue in this appeal is whether the decision of the prison authorities of 8 September 2017 to refuse to transport the appellant to the hearing of his civil claim in Oxford County Court, but instead facilitate his attendance by video link, was lawful. The appellant is a Category A prisoner who was sentenced in November 2009 to imprisonment for life with a minimum term of 18½ years. He was convicted with his son of murder, and on two counts of causing grievous bodily harm with intent, all by stabbing. He has since received a concurrent sentence for assaulting a prisoner at HMP Woodhill. At the time of the challenged decision he was serving his sentence at HMP Whitemoor. He is now located elsewhere. William Davis J dismissed the claim for judicial review: [2018] EWHC 2324 (Admin).

3. The claim was advanced on two broad grounds, although the second had two distinct components. First, that the failure to produce Jason Michael for the hearing of his claim in the County Court violated his right to a fair trial guaranteed at common law and by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ["ECHR"]. Secondly, (a) that the decision failed to have regard to all the material factors in Mr Michael's case, and indeed proceeded on a fundamental misunderstanding of central fact, and (b) the decision-maker applied an unlawful presumption (fettering of discretion) against producing a Category A prisoner in a civil court. Permission to apply for judicial review was granted on those grounds by Morris J. Shortly before the hearing of the claim for judicial review Mr Michael's representatives sought to introduce a third ground by amendment, namely that the decision refusing to produce him at court was unlawfully taken by an official in the prison when the governing statute required it to be taken by "the Secretary of State". In context, that meant an official within the relevant section of the Ministry of Justice. The argument was advanced in reliance upon the decision of the Supreme Court in *R (Bourgass) v. Secretary of State for Justice* [2016] AC 384. William Davis J refused permission to advance that ground ("the *Bourgass* point"). His refusal to permit the amendment is also the subject of appeal before us.

Summary of Conclusions

4. We are satisfied that the decision did not violate Mr Michael's rights to a fair trial and that the decision maker did not unlawfully fetter her discretion in refusing his request to be produced physically at the hearing of his claim. Moreover, we consider that the case management decision made by the judge to refuse leave to argue the *Bourgass* point cannot be impugned on appeal. It is clear, however, that the decision was taken on the basis of a fundamental misunderstanding of an important fact, namely that the hearing would take place in a court with a secure dock. We are unpersuaded that the decision would necessarily have been the same had the decision maker not made an error in assuming that the hearing would be in an ordinary court or the chambers of a judge. On that limited basis we have concluded that the decision is unsustainable and must be quashed. It will be retaken in the light of up-to-date information, including the location and practical arrangements for any hearing, the risks associated with Mr Michael's physical presence and the logistics, including cost, of arranging his attendance.

Legal Background

5. Prisoners retain the right of access to the courts: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 per Lord Bingham of Cornhill at [5], but they have no unqualified right to attend court hearings in the same way as those at liberty. The statutory provision governing the production of prisoners in courts and inquiry hearings is found in paragraph 3(1) of schedule 1 to the Crime (Sentences) Act 1997 ["the 1997 Act"]. It provides:

> "(1) If the Secretary of State is satisfied, in the case of -
>
> (a) a person remanded in custody in any part of the United Kingdom in connection with an offence;
>
> (b) a person serving a sentence of imprisonment in any part of the United Kingdom; or
>
> (c) a person not falling within paragraph (a) or (b) above who is detained in a prison in any part of the United Kingdom,
>
> that the attendance of that person at any place in that or any other part of the United Kingdom or in any of the Channel Islands is desirable in the interests of justice or for the purposes of any public inquiry, the Secretary of State may direct that person to be taken to that place."

6. This provision invests the decision maker with a discretionary power to produce a prisoner in a court having concluded that it is desirable in the interests of justice to do so. Matters that may fall for consideration at the discretionary stage include questions of security, expense, diversion of resources and the scope for abuse if the facility is too readily granted: see *R v. Home Secretary ex parte Wynne* [1993] 1 WLR 115 per Lord Goff of Chieveley at 122H to 123E considering section 29 of the Criminal Justice Act 1961 (materially the same as the current provision). By virtue of section 6 of the Human Rights Act 1998 the discretion falls to be exercised compatibly with a prisoner's article 6 rights.

7. The exercise of the power to produce a prisoner at court is governed by Prison Service Order 4625 (2002) "Production in Civil Proceedings". The Order is directed to officers considering requests for production and was designed to take account of article 6 ECHR. The introduction identifies the primary consideration as whether "it is in the interests of justice that [the prisoner] should attend" but that when the interests of justice test is satisfied "the normal security considerations (e.g. risk to the public) must be taken into account."

8. Chapter Two summarises factors that arise under article 6 in civil proceedings and the need for the prison to decide whether, for the proceedings as a whole to be fair the prisoner must attend personally at the stage in question. It notes:

> "If it appears that the prisoner's case will suffer detriment if they do not attend, this would be a strong case for allowing the production."

But continues:

> "An individual's rights under Article 6 are not absolute. They can be restricted provided this does not mean that the trial is unfair - i.e. if we restrict a prisoner's access to a court, we must be able to show that we did not restrict his ability to bring or defend his case (e.g., a production request might be refused if the prisoner is legally represented).
>
> Restrictions must be for a legitimate reason and proportionate, e.g. a refusal on security grounds must be necessary for the risk identified."

9. The chapter continues by noting that a refusal to produce is unlikely to infringe article 6 where a prisoner is represented and does not have to give evidence but that when a prisoner is representing himself, personal attendance is likely to be necessary. It notes that article 6 is only engaged when a case is arguable and concludes with a section entitled "Alternatives to production at court":

> "Many stages of the proceedings (particularly preliminary) can be dealt with in writing or by telephone if there are serious security concerns. The Court can advise on those hearings which must have the prisoner in attendance, and those which can be dealt with by other means.
>
> Make use of the video links system. This is becoming more widely available …"

10. Chapter Three deals with the interests of justice. It notes that the nature of the case may determine how important it is that the prisoner attends and identifies certain categories where "it will usually be desirable to produce the prisoner", including family and domestic cases and divorce. It advises care before refusing to produce when the Prison Service itself is a party to the proceedings, reiterates points about representation, and distinguishes between different stages in proceedings and the nature of the role of the prisoner in question (claimant, defendant or witness).

11. Chapter Four is concerned with "security and escorting":

> "4.1 When a decision has been made that the interests of justice require production at court, the normal security considerations (e.g. risk to the public) must be taken into account.
>
> **Security**
>
> 4.2 A prisoner does not have to be produced if the risk assessment indicates that the security risk outweighs the interests of justice. To defend a challenge under Article 6, we must be able to show that the decision is reasonable in all the circumstances – (alternatives to production have been considered – see Chapter 2).

> **Category A prisoners**
>
> All movement of Category A prisoners outside the prison must be authorised by the Directorate of High Security Prisons.
>
> 4.3 Chapters 37 and 38 of the Security Manual (PSO 1000) give instructions on escorting and security at court, with particular reference to Category A prisoners. These instructions must be followed."

12. This last document has been superseded in the intervening years. Prison Service Instruction 9/2013 "Management and Security of Cat A Prisoners – External Movements" now governs these matters. It is not a public document.

The Facts

13. Mr Michael's underlying civil claim was brought under the Data Protection Act 1998 against the solicitors who acted for him in his murder trial in 2009. It was commenced in June 2015 in the County Court Money claims Centre. He has other litigation in train. He believes that his former solicitors retain documents from the criminal proceedings which would assist him in making an out-of-time application to the Court of Appeal Criminal Division for leave to appeal against conviction, in particular a statement from his son. In form, the claim is made pursuant to section 7 of that Act on the basis that the solicitors have failed to comply with his data subject access request. The solicitors deny having any material to produce. With justification, the judge described the underlying claim as being "not easy to follow from the pleadings" and the basis of the claim "opaque". An application by the solicitors to strike out the claim in December 2016, which Mr Michael attended by video-link, was unsuccessful. The strike out application was heard at Cambridge County Court. Mr Michael was disturbed by the conduct of a prison officer supervising the link (he was said to be doodling) and also unhappy that the link was terminated too quickly, depriving him of the opportunity to have out-of-court discussions with the lawyer representing the solicitors. In consequence, he filed an official complaint with the prison. He has also later said that the noise outside the video-link room disturbed him.

14. The claim was eventually listed for hearing on 21 September 2017. An earlier allocation decision of 17 May had provided that the case be listed for hearing at Oxford County Court. The County Court is co-located with the Crown Court. The expectation was that arrangements could be made for the hearing to take place in a court with a secure dock to facilitate Mr Michael's physical presence. The Deputy District Judge recognised that the question of production was for the prison authorities. Mr Michael received notice of the trial date on 26 May 2017. On 5 June 2017 he applied to the prison authorities to be produced in person at the hearing. In the absence of a positive response the appellant later made an application to the court for a production order, which was dismissed by Mr Recorder Rowlands on 17 August on the basis that he had no power to make the order. There was no hearing and, although the application was served on the governor of Whitemoor, no written representations were made by or on behalf of the Ministry of Justice.

15. In the recitals to his order, the recorder noted that the power to produce a serving prisoner to court in civil cases lies with the Secretary of State and is delegated to the Governor of the prison, and continued:

> "AND UPON the Court noting that the case concerns the Claimant's liberty and that he asserts that he suffers from a disability which makes it difficult for him to participate via video link in a hearing and that therefore there are strong arguments that show that it would be in the interests of justice for him to be present in Court to present his case
>
> AND UPON the court noting that the Claimant has provided a copy of a letter showing that the application for a production order was made to the Prison governor who indicates that the interests of security are being prioritised which is arguably a breach of the Claimant's Article 6 rights but that no final decision on the Claimant's request for a production order appears to have been reached
>
> AND UPON the Court noting that the correct remedy for a refusal of a production order would be a claim for judicial review when a decision is reached
>
> AND UPON the Court directing the attention of the Governor and the Claimant to the provisions of PSO 4625...
>
> IT IS ORDERED THAT the application for a production order is dismissed ..."

He directed that the order be served on the Governor of the prison.

16. The recitals to the order did not amount to findings by the recorder. The reference to "liberty" does no more than reflect Mr Michael's assertion that he believes that his former solicitors have a document that will assist him before the Court of Appeal Criminal Division. It remains entirely unclear how. The recitals suggest that the recorder accepted, on the information provided to him by Mr Michael, that he had an arguable case for production.

17. The decision letter dated 8 September 2017, responding to Mr Michael's application to the prison authorities, was signed by Kayleigh Cox, an Offender Supervisor at the prison. It referred to Mr Michael's request to be produced, quoted part of the order made on 17 August 2017 and continued:

> "You have asked for a definitive answer as to whether we will provide you to court. Careful consideration has been given to your request, however the response to this question is no, this cannot be facilitated. The Court has been contacted and they confirm the hearing will take place in chambers, not in a court room and there is no secure dock available. Furthermore, as a Category A prisoner with a High risk of harm to the public the

> security risk of producing you in court outweighs the interests of justice.
>
> We note your claim that disability makes it difficult for you to participate via video link, but we are aware that you have used this facility before. In the interests of a Right to a Fair Trial we have received confirmation that video link facilities are available. If you require adjustments with the link, e.g. angle of the camera or zoom, then application can be made to the Judge, or you can speak with the staff facilitating the link, as there will be no court clerk. Should you require any further assistance during the hearing then it would be possible for an additional member of staff to be present, purely to offer additional understanding of what is being relayed. As your Offender Supervisor I would be happy to carry out this role should you require it.
>
> The offer of a video link with additional assistance complies with PSO 4625 as this facility will allow you the ability to argue your case."

18. The information and documentation which were in the possession of or available to Ms Cox when she wrote that letter were:

    i) The Notice of Allocation to the Small Claims Track (Hearing) dated 17 May 2017. The Deputy District Judge ordered that the hearing be listed "in a court room with both a secure dock and video-link facilities".

    ii) The Notice of Hearing for 21 September 2017.

    iii) Mr Michael's application of 5 June (452/17) to the litigation department of the prison in which he referred to the hearing date and said he required transport. He also said that there would be a secure dock, that he was a litigant in person and that he was happy to discuss the issue. He made no reference to any medical problems.

    iv) The litigation department's reply of 6 June noted that the decision rested with the security department, that production must be authorised by the Directorate of High Security Prisons and that the security department would need to liaise directly with the court to arrange either a video-link or production. The response advised that Mr Michael get in touch with the security department and provide them with the allocation order.

    v) Mr Michael's further application (460/17) on 8 June 2017, marked for the attention of the security department. He referred to the hearing listed for 21 September, repeated that he was a litigant in person and that there would be a secure dock. He said that he wished to discuss the matter and was aware of another Category A prisoner having been produced at Oxford County Court to a secure dock in 2015. He made no reference to medical problems. He added:

> "I am aware that I am a Category A prisoner, but I do not (and have never) required any police escort. I have previously had the secure dock made ready for a hearing at Oxford, but my presence was not necessary that time."

vi) In response to that application, a senior manager wrote a note informing Mr Michael that "the court will need to contact us regarding your court case, until we know what the court wishes to do we are unable to make a decision".

vii) The application to the County Court seeking an order for production. Mr Michael asked for the application for the production order to be served on the governor of the prison via the Government Legal Department. The respondent has not suggested that the application was not served, although there is a lack of clarity about where it ended up and who saw it. Ms Cox had the recorder's order but did not have the application or supporting material. In support of the application the appellant filed a witness statement, in which he said:

> "In December 2016 I provided evidence of a Pervasive Development Disorder and/or Aspergers/ASD to the Court to highlight certain issues that I encounter that places me at a disadvantage when having intercourse, which is compounded by the video-link."

His arguments in support of the order he sought from the court included that as a litigant in person with a pervasive development disorder he would be at a disadvantage if he were not physically present when the other side were being represented. He relied upon article 6 ECHR. He referred to a large number of external medical visits he had made whilst a Category A prisoner, emphasising that no additional police (as opposed to prison) escort had been required. He referred to the problems he considered he had faced at the hearing by video-link in December 2016. Mr Michael also attached to his witness statement a two-page "conclusions and recommendations" section of a report by Dr Carly Wilson, a chartered consulting psychologist, which refers to his difficulty with social interaction and social communication and his worry about how he is being perceived. Its conclusion was that his difficulty in understanding the thoughts and feelings of others could cause conflict. The extract did not confirm the claimed medical problems nor that as a result of them engagement via video link was more or less likely to be effective for Mr Michael.

viii) Mr Michael's further request of 22 August to the governor of the prison that he be produced at the hearing of his claim. He enclosed a copy of the County Court order and said that he would be happy for any representative of the litigation department to visit him so that he could provide further information. He warned that he might start legal proceedings if no suitable response was received within seven days. He also submitted a formal complaint (WRI/17/2112), to which he attached a copy of the County Court order and a copy of his letter to the "governing governor". He reiterated his wish to be produced at court in 21 September and complained that he had not received a final response to his applications.

ix) Another application for production the following day (627/17), 23 August, to the litigation department. The reply of 24 August quoted from the earlier letter of 6 June, noted that it would be for the governor to decide and stated that it was highly unlikely that production for a civil court hearing would be authorised for a Category A prisoner. It continued by repeating that it was not for the litigation department to decide.

x) On 29 August 2017 Mr Michael submitted a formal complaint to the governor (2148) in which he complained that "No one wishes to give a definitive answer and that is what is legally required". He asked for a definitive answer. On 1 September a governor wrote on it that the request would be referred to the Offender Management Unit in the Ministry of Justice and a decision would be made in due course.

19. Ms Cox was Mr Michael's offender supervisor. She had known him since 2016 both in that role and from her position as a manager of the Closed Supervision Centre in which he was held. In her witness statement, she describes her deep knowledge of his case and of the risk management of his offending behaviour. She was aware that he was regularly risk-assessed in the prison, including assessments by psychologists. In his oral submissions, Mr Metcalfe, on behalf of the respondent, accepted that Ms Cox was also aware in general terms that the appellant had mental health or psychological problems, but submitted that she was not aware of any specific diagnosis, whether of autism, Asperger's Syndrome, pervasive development disorder or any other condition.

20. Ms Cox was aware that video links had been used by the appellant in the past. She was aware that the appellant had made a formal complaint about the conduct of a video link to the County Court at Cambridge on 1 December 2016. Of the two underlying complaints (that one of the officers present in the video link room had spent most of the hearing doodling, and that the officer who controlled the video link had ended it prematurely) the first was rejected but the second was upheld. In his judgment below, William Davis J accepted that Ms Cox was aware that the appellant had further criticised the video-link facility used in December 2016 as being noisy due to people moving and talking immediately outside the room.

21. In her witness statement, Ms Cox said:

> "I have checked the [computer] records and there is no note of the claimant informing the prison that he had difficulties with video links. I am also not personally aware of the claimant having objected previously to using the video-link facilities in other cases nor am I aware of his having experienced any difficult in using these facilities."

The context of this observation is Mr Michael's reliance on medical difficulties. Prison staff do not have access to a prisoner's medical records and whatever information may have been provided to the County Court in 2016, it was not known to Ms Cox. Mr Michael agrees that he had not previously objected to using a video-link; indeed, he positively distinguishes his request in connection with this hearing from that of his general approach as demonstrating the importance of the issue to him.

22. Mr Michael remains a Category A prisoner with a standard escape risk, as he was at the time of the decision. A review of his categorisation shortly after the material decision concluded that he had made no significant progress in addressing his violent behaviour and that he would pose a high level of risk if unlawfully at large. There were continuing instances of aggressive behaviour "including adversarial attitudes and grievance thinking spilling over into aggression and confrontation."

23. A statement from Pete Lyddiatt, the Security Intelligence Manager with responsibility for external prisoner movement, explains that the video-link facility at HMP Whitemoor is of high quality and is run by dedicated staff with specialist training. He explains that a Category A prisoner would not ordinarily be escorted outside the prison without the prior authority of the High Security Prisons Group in the Ministry of Justice. Any movement must be in a vehicle with a trained navigator and driver who remain in constant contact with the police. In addition, three escorting officers are required. Additional police support may be required both for the journey and at the court. There may be a need to transfer the prisoner to a local prison for a few days before a hearing, but advance warning of a move would not be given for security reasons. There are regular risk assessments made of courts used for high security prisoners. Mr Lyddiatt explains that it is extremely rare for Category A prisoners to be produced for civil hearings. Quite apart from the onerous and expensive logistical burden in executing the production of a Category A prisoner, the planning and risk assessing of such an operation is time-consuming and labour intensive.

24. In the course of the proceedings in the Administrative Court the respondent was directed by Morris J to state its position regarding Mr Michael's production to a secure court, in other words on the basis of correcting the factual mistake that informed Ms Cox's decision. The answer in correspondence was that, nonetheless, Mr Michael would not be produced.

The Judgment Below

25. In a clear *ex tempore* judgment, the judge noted the lack of information about how the hearing in the County Court would proceed but inferred that there would very likely be one witness from the solicitors who would first have provided a witness statement which explained what materials they held and that all has been produced. Mr Michael's credibility would not be in issue. He referred to the earlier use of video-link facilities and the complaints Mr Michael had made about its use when he successfully resisted the strike out application. He recalled the high risk posed by Mr Michael. The judge discussed the psychological problems, of which Ms Cox was aware in general terms. Mr Michael had provided a substantial body of psychological evidence in the judicial review proceedings which might well

> "affect his capacity to engage in the process of the civil court trial although the psychologists' reports do not address that issue specifically. The psychologists do not consider whether Mr Michael would be more or less able to engage in the process were he to participate by [video link]. The behavioural issues which are said to render a [video-link] hearing unfair may make it difficult for Mr Michael to deal with situations which can arise in the setting of a court hearing. There is no evidence before me

> that those difficulties would be exacerbated if the hearing were to be via [video-link]. There is no evidence in relation to Mr Michael's personality and psychological make-up which would have led the reasonable decision-maker to the conclusion that personal attendance at court was necessary."

26. The judge had regard to the nature of the proceedings relating to a narrow issue heard by a judge alone. He rejected the argument that it was essential for a litigant in person to attend the hearing "to be able to assess and follow the demeanour of witnesses, other legal representatives and the judge". He considered that in civil proceedings tried by judge alone full participation does not require the physical presence of a litigant in person. He accepted that article 6 requires that a litigant be able to present his case effectively. He rejected the core submission that a litigant in person engaging in civil proceedings can only have a fair hearing if he is in the courtroom with all the other parties. He considered that the decision to facilitate attendance by video-link was justified and that "an article 6 compliant hearing could take place via the [video-link]".

27. The judge recorded Mr Rule's submission that PSO 4625 requires an improper balancing exercise between "the interests of justice" and "risk" but concluded that the order made clear that an assessment was required which satisfied article 6 in any given case. He was also satisfied that the decision maker applied the instruction. There was no fettering of discretion. The judge made no separate finding about the error in failing to appreciate that the hearing was listed in a secure court. He had earlier noted the error but said that it had later been corrected. That was a reference to the correspondence after the commencement of the proceedings, to which we have referred at paragraph 24.

28. On the *Bourgass* point, the judge concluded that the issue had been raised too late with the consequence that evidence directed towards the mechanics of decision-making, the practice since 2002, the usual involvement of the Department (the Home Office in 2002, the Ministry of Justice since 2007) and why such decisions had been delegated, was not before the court. Additionally, considering the merits of the question, he concluded that the decision in *Bourgass* did not assist Mr Michael.

Discussion

The article 6 grounds

29. Shorn of the gloss provided by article 6 ECHR, the discretionary decision whether to produce a prisoner for a court hearing pursuant to schedule 1 of the 1997 Act could be challenged on public law grounds. The context of the decision, namely access to justice and the need for fairness in the proceedings, would always have been important considerations which would have given rise to anxious scrutiny. Moreover, the question whether the impugned decision would result in procedural unfairness (if that was the challenge and having regard to all material factors) would be a matter for the reviewing court: *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 981 per Lord Hope at [6]. "Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required": per Lord Reed in *R (Osborn) v Parole Board* [2014] AC 1115 at [65]. The power (like its predecessor discussed in the *Wynne* case) contemplates a two-stage decision making process. First, do the interests of justice call for the physical presence of the prisoner at the court for the hearing in

question? Secondly, if the answer to that question is yes, production might yet be refused taking account of other factors such as risk and expense. The nature of the decision making remains the same, but as we foreshadowed in paragraph 6 above, any decision made pursuant to paragraph 3(1) of schedule 1 to the 1997 Act must respect the article 6 rights of the prisoner concerned. In this regard, we see no difference between the protection provided by the common law and by the ECHR.

30. Article 6(1) ECHR, as material, provides:

> "In the determination of his civil rights and obligations … 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 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."

31. There is no dispute that a subject access request under section 7 of the Data Protection Act 1998 involves a determination of the appellant's "civil rights and obligations". Equally, there is no dispute that article 6 is concerned to ensure that parties to proceedings receive a fair trial: *Airey v Ireland* (1979) 2 EHRR 305 at [24].

32. Mr Rule submits that justice cannot be done or be seen to be done at the trial of a civil claim in circumstances where one party is involuntarily present only by video-link whilst an opposing party is present in person at the trial; all the more so when the absent party is a litigant in person and the other is represented. By analogy he relies upon the decision of Tugendhat J in *Cummings & Others v The Ministry of Justice* [2013] EWHC 33 (QB), in which at [51] he held that fairness required that the prisoner claimants should give their evidence in person and be present in court when the defendant's witnesses were giving evidence. The decision we are concerned with, and indeed any decision to require a prisoner litigant in person to conduct a civil claim by video-link, necessarily violates his common law right to a fair trial and his article 6 rights. He submits that the decision denies Mr Michael "equality of arms", that is a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis the other party: *Dombo Beheer BV v. Netherlands* (1994) 18 EHRR 213 at [33]. He recognises that restrictions may be placed on the access of a prisoner to a court so long as that restriction is in pursuit of a legitimate aim and proportionate. He relies upon generic material which points to concerns about the use of video-links in the criminal courts for dealing with bail and sentencing as evidencing the disadvantages of participation in legal proceedings via video-link.

33. *Cummings* was a case very much on its own facts in which three serving Category A prisoners brought claims for racially motivated assault and misfeasance in public office against prison officers. It was to be tried by a jury. The defendant intended to call 25 witnesses and the claimants 35. The judge was asked to express a view on personal

attendance. The claimants argued that they should be present to given evidence and present when the defendant's witnesses gave evidence. They accepted that attendance by video-link was adequate for the balance of the trial, including when their witnesses gave evidence. The defendant wished all those in custody, including the claimants, to attend by video-link at all times. The judge concluded that "fairness does require that the Claimants give evidence in person and that they be present in court when the Defendant's witnesses are giving evidence". He did not express the same view about the claimants' witnesses. He accepted in principle that the consequence of producing the claimants would be that the Royal Courts of Justice would not be suitable as a venue. Woolwich Crown Court was suggested as an alternative because of its direct physical link to HMP Belmarsh.

34. Mr Rule also submits that the judge mistakenly approached the article 6 question on a *Wednesbury* basis, rather than by making his own assessment. He analysed the language used by the judge in reviewing the decision of Ms Cox. We do not accept this criticism as valid, as the judge's conclusion quoted in paragraph 26 above demonstrates. The question whether the non-production of a prisoner would violate his article 6 rights or common law rights to a fair trial is one which the court should judge for itself in judicial review proceedings, taking account of the views of the decision maker.

35. The Strasbourg Court has considered the question of the attendance by prisoners at court hearings on a number of occasions for article 6 purposes, both in its criminal and civil context. That consideration has included the role that can be played by video-link. Its jurisprudence does not support the broad submission advanced on behalf of Mr Michael to the effect that a prisoner litigant in person should always be produced in person for his civil trial if his opponent will be physically present in court, unless he waives his right or is excluded as a result of his conduct at court.

36. It is convenient to start with the Strasbourg Court's statement of principle in *Kabwe and Chungu v United Kingdom* (App. No. 29647/08 and 33269/08) applicable to civil proceedings. The applicants were defendants in civil proceedings for fraud in the United Kingdom but were unable to leave Zambia. They were subject to parallel criminal proceedings in Zambia. A condition of their bail was that they should not leave Zambia. One of the complaints made by the applicants was that provision for their attendance only by video-link violated their right to a fair trial. They took no part in the proceedings. There were other complaints not relevant for our purposes. All complaints were declared inadmissible. Having stated that criminal proceedings should usually take place in the presence of an accused, at page 11, the court continued:

> "However, in respect of non-criminal matters there is no absolute right to be present at one's trial, except in respect of a limited category of cases, such as those where personal character and manner of life of the person concerned is directly relevant to the subject matter of the case (see for, for example, *X v Sweden,* No. 434/58, p. 370, 1959 and *Muyldermans v Belgium,* 23 October 1991 para 64, Series A no. 214-A). It is incumbent on the applicant to show that his presence is necessary (see *X v Switzerland* no. 7370/76, 1977).

37. The court referred to *Marcello Violla v Italy* (App. No. 45106/04) at [67] (which concerned the appellate stage following conviction for murder and attempted murder):

> "Although the participation of the defendant in his trial by video conference is not, as such, contrary to the Convention, it is incumbent on the Court to ensure that recourse to the measure in any given case serves a legitimate aim and that the arrangements for the submission of evidence are compatible with the requirements of due process as laid down in Article 6 of the Convention."

38. In *Marcello Violla* at [69] the court noted the stringent security measures that would have been necessary to facilitate the applicant's physical presence and also, at [70], that attendance by video-link simplified the criminal process and reduced delay. His attendance via video-link pursued the legitimate aims of preventing disorder, preventing crime, and the protection of others, [72]. The court concluded, at [76], that the applicant was not

> "at a substantial disadvantage as compared with the other parties to the proceedings, and that [he] had an opportunity to exercise the rights and entitlement inherent in the concept of a fair trial, as enshrined in Article 6."

39. The Strasbourg Court returned to the issue in *Vladimir Vasilyev v Russia* (App. No. 28370/05) in a judgment which became final on 9 July 2012. It referred to both *Kabwe and Chungwu* and also to *Marcello Violla*. The case concerned civil proceedings brought against the state by a prisoner convicted of multiple murders. He alleged medical negligence in treating him. He was not produced for the hearings of his claim, which was dismissed in his absence after argument from the State. He complained that the civil proceedings had been unfair and that he had been given no opportunity to be present at the hearings to advance his case. He argued that his personal testimony about his medical treatment was necessary especially as his medical file had been lost. Russia contended that his participation through written materials was sufficient to vindicate his article 6 rights and that he could have used a lawyer. The Court noted, at [81], the practical difficulties in producing the applicant in person at the hearing. It continued:

> "84. Bearing in mind that there could be practical difficulties in ensuring the applicant's own presence at the civil hearing …. the Court reiterates that Article 6 of the Convention does not guarantee the right to be heard in person at a civil court, but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6.1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights. … For instance, as a way of securing the applicant's participation in the proceedings, the national authorities could have held a session by way of video link or in the detention facility. … However, these options were not considered."

40. The court concluded that legal assistance was not available and that the applicant's first-hand account of events was an indispensable part of his case. His written account was

insufficient. In the result there was a violation of article 6, but it is clear that had a video link been provided there would not have been.

41. The jurisprudence was summarised by the Strasbourg Court in February 2016 in *Yevdokimov and others v Russia (*App. No. 27236/05) where Russian prisoners who had brought various civil proceedings were neither allowed to attend the trials of their claim nor to participate by video link. In summary:

i) The Convention does not guarantee the right of personal attendance before a civil court. The question is whether the applicant, a party to the civil proceedings, has been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent, [22];

ii) In cases where the applicant is in custody, the Court has accepted that, in view of the obvious difficulties involved in transporting prisoners from one location to another, representation of the detained applicant by a lawyer would not be in breach of the principle of equality of arms provided that the claim was not based on the applicant's personal experience, [24];

iii) The personal participation of the litigant was held to be necessary from the standpoint of article 6 in cases where the character and way of life of the person concerned was directly relevant to the subject matter of the case or where the decision involved the person's conduct or experience, [25];

iv) If the claim is based largely on the detainee's personal experience, his oral submissions to the court would be "an important part of [his or her] presentation of the case and virtually the only way to ensure adversarial proceedings" (see *Margaretić v Croatia* (App. No. 16115/13) at [128], 5 June 2014). Only by testifying in person could the detainee substantiate his claims and answer the judge's questions, if any. In these circumstances, obvious solutions would be to conduct the proceedings at the place where the claimant is being detained, or to use a video link, [42];

v) As regards the use of a video link or video-conferencing equipment, this form of participation in proceedings is aimed, among other things, at reducing the delays incurred in transferring detainees and thus simplifying and accelerating the proceedings: *Kabwe* and *Marcello Viola*. Resorting to such facilities is not, as such, incompatible with the notion of a fair and public hearing, but the detainee must be able to follow the proceedings, to see the persons present and hear what is being said. He must be seen and heard by the other parties, the judge and witnesses, without technical impediment: *Sakhnovskiy v. Russia* [GC] (App, No. 21272/03) at [98], 2 November 2010, and *Marcello Viola,* [43];

vi) Organising a court hearing outside the courtroom is, by contrast, a time-consuming exercise. In addition, holding it in a place such as a detention facility, to which the general public in principle has no access, is attended by the risk of undermining its public character. In such cases, the State is under an obligation to take compensatory measures to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access (see

Starokadomskiy v Russia (No. 2) (App. No. 27455/060) at [55]-[63], 13 March 2014, and *Riepan v Austria* (App. No. 35115/97) at [30], [44].

42. The logistical difficulties, risks and expense of producing Mr Michael at Oxford County Court, when he was a prisoner at HMP Whitemoor, have been explained in the evidence of Mr Lyddiatt. As the judge observed, it is not established by the medical evidence produced in these proceedings, still less on what was known to the decision maker, that he would be better off physically present at the court. Indeed, the reference to conflict being generated by his difficulties in understanding or appreciating the position of others with whom he interacts at least raises the question whether it would be better for him to be at one remove, even though he believes he would be better off present. The judge's assessment of the likely nature of the hearing, namely that it would not involve the credibility of Mr Michael and would centre on the solicitors' explanation of the documents they held and whether they had been produced, was obviously correct. When considered in the light of the Strasbourg jurisprudence, it is not possible to sustain a contention that Mr Michael's participation by video link would violate his article 6 rights or that he would be deprived of a fair hearing if he attended by video-link. He would be able to participate effectively and present both his evidence and argument. He could question the witness from his previous solicitors. In such circumstances the judge, whose function is to ensure a fair trial, would be especially astute to ensure that Mr Michael was not placed at a disadvantage and would be alert to any practical constraints under which he was working.

43. We have not overlooked what the judge described as generic material placed before him (further material was placed before us) consisting of newspaper articles and two reports which raise concerns about the use of video links in some aspects of criminal proceedings. Newspaper articles which broadly support an underlying factual or policy contention being advanced in judicial review proceedings are rarely useful evidence of anything. Their proliferation in public law proceedings is an unwelcome recent development.

44. Mr Rule produced before us a 78-page article from the Tulane Law Review (Vol 78, 1089) from 2004 which argued against the use of video-conferencing in criminal proceedings in the United States, both for the appearance of defendants and witnesses by video link. It is an interesting and thoughtful piece of work but not one which supports the broad submission that the use of a video link in Mr Michael's case would result in his civil proceedings being unfair. The judge had before him a report from Transform Justice, a charity set up in 2012, the *alter ego* of Penelope Gibbs, a former magistrate, entitled "Defendants on video – conveyor belt justice or a revolution in access?". In her conclusions she makes the observation that "the unanswerable question is whether virtual justice does make any difference to justice outcomes. Bar the 2010 study on virtual courts we have no research in England and Wales which assesses the impact on court decisions." That study was concerned with a pilot that ran from May 2009 for 12 months in two magistrates' courts in London and North Kent. Amongst the concerns raised by Ms Gibbs is that the physical separation of a defendant in criminal proceedings from the court may itself result in less favourable outcomes. That is a subject ripe for further investigation, but the report does not advance Mr Michael's article 6 case.

Unlawful Fettering of Discretion

45. Like the judge, we are unable to accept the submission that PSO 4625 itself unlawfully fetters the discretion of a decision maker, or that Ms Cox otherwise fettered her discretion.

46. A fair reading of that Order, the material parts of which we have quoted and summarised between [7] and [11] above, shows that the interests of justice are capable of outweighing any security concerns. Indeed, it refers to the interests of justice being the primary consideration. In any event, the decision must respect the prisoner's fair trial rights and in terms states that "if it appears that the prisoner's case will suffer detriment if they do not attend, this would be a strong case for allowing the production". Ms Cox's decision, flawed though it was for reasons to which we will turn next, did not proceed on the basis that a Category A prisoner could never be physically produced in a civil court. In earlier correspondence it was said that it would be highly unlikely that a Category A prisoner would be produced in a civil trial. Given the security and logistical difficulties in doing so that is no more than a reflection of the reality, particularly given the availability of video-link participation which in most, if not all, circumstances would enable a self-represented prisoner to take part effectively in a civil trial.

The False Factual Premise

47. Ms Cox had the allocation order which stated unequivocally that Mr Michael's case would be listed in a court with a secure dock. Her decision letter suggests that someone at the court had suggested that the hearing would take place in the judge's chambers. No evidence of that communication has been produced. Be that as it may, the unequivocal order of a judge that the hearing take place in a court with a secure dock was before the decision maker.

48. This is an example of a decision which proceeded upon a straightforward and undisputed misunderstanding of a central material fact, of the sort discussed in *E v Secretary of State for the Home Department* [2004] QB 1044. That fact was at the heart of the request made by Mr Michael. He no doubt appreciated that there would be insuperable difficulties in producing him for a hearing of a small claim in the County Court in an ordinary court room or judge's hearing room. The original letter responding to his first request (which has the hallmarks of a *pro forma* response about it) noted the absence of a secure dock as the first factor which would make it unlikely that the request (when addressed to the correct department) would be acceded to. Similarly, in Ms Cox's decision letter, the absence of the secure dock is given as the first reason why production cannot be facilitated.

49. Mr Metcalfe submitted that, nonetheless, the error was insufficient to undermine the legality of the decision for two linked reasons. First, the decision letter explained that "furthermore, as a Category A prisoner with a high risk of harm to the public the security risk of producing you in court outweighs the interests of justice". That should, he submits, be read as a free-standing objection to production which is legally sufficient. Secondly, the correspondence from the Government Legal Department confirmed that the respondent's position would be the same even were a secure dock available.

50. The risk entailed in producing a prisoner to a secure dock in a court is self-evidently different from the risk in producing him to an ordinary court room or judge's chambers.

Quite apart from the security provided by the dock itself, courts with secure docks have appropriate reception facilities for the vehicles in which prisoners are transported and, as Mr Lyddiatt explained, are regularly risk assessed. Whatever linguistic construction may be applied to Ms Cox's letter, in our judgment the absence of a secure dock was a factor to which she attached significant weight in arriving at the decision to refuse to produce Mr Michael. The undoubted error of fact was material.

51. The second argument supports the submission that it would be futile to quash the decision and remit it for reconsideration in the light of the now prevailing circumstances, because it is inevitable that the same decision will be taken. Courts are wary of such arguments. A convenient summary of the position is found in the opinion of Lord Mance, on the Privy Council, albeit dissenting in the result, in *Lawrence v Attorney General* [2007] 1 WLR 1474 at [65]:

> "The relevant question is … whether the Tribunal would, if its members had properly directed themselves by reference to the relevant factors, undoubtedly have arrived at the same decision as they did. Lewis in Judicial Remedies in Public Law (2004), paras. 11-026 to 11-029 reviews the relevant authorities and points to 'the danger that the court might substitute its own view of the merits of the case for that of the decision-maker'; with the support of Feldman in English Public Law (2004) para. 18.67 (cf also Fordham's Judicial Review Handbook, 4th Ed., para.4.4) Lewis concludes that:
>
> 'For these reasons, the courts should not refuse relief unless the same decision would undoubtedly be reached irrespective of the error, and there is a clear countervailing public interest in not quashing the decision'.
>
> Among the authorities illustrating this principle are *R v. Inner London Coroner, ex p Dallaglio* [1994] 4 AER 129, 155e (where Simon Brown LJ was 'not prepared to say that a fresh coroner would be bound to' reach the same decision), *Simplex GE (Holdings) Ltd. v. Secretary of State for the Environment* [1988] 3 PLR 25, 42 (where Purchas LJ said: 'It is not necessary for [the claimant] to show that the minister would, or even probably would, have come to a different conclusion. He has to exclude only the contrary contention, namely that the minister necessarily would still have made the same decision') and *Raji v. General Medical Council* [2003] 1 WLR 1052 (PC), para. 17 (where the Privy Council said that 'the possibility cannot entirely be excluded that Dr Raji was disadvantaged by the flawed procedure'); cf also *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, paras. 39 per Lord Bingham of Cornhill and 52, per Lord Steyn.

52. The circumstances surrounding Mr Michael and his possible production for the hearing of his civil claim are not as they were in the summer of 2017. He is no longer at HMP Whitemoor. His personal risk profile may, or may not, be the same. His medical

condition may have changed for better or worse. The claim may, or may not, proceed in Oxford. It may or may not be possible for the claim to be heard in a court with a secure dock. It is clearly in the interests not only of Mr Michael but also of the solicitor defendants in the underlying civil action that it is resolved as soon as possible. The interests of justice embrace concepts wider simply than whether a fair trial is possible, as PSO 4265 recognises. In describing a balancing exercise in her decision, Ms Cox recognised that the interests of justice weighed in favour of production to some extent. We are very far from persuaded that it is inevitable, irrespective of the circumstances as they now are, that a decision maker would be bound to refuse Mr Michael's request for production. He should not read into that observation any hint (or otherwise) that his production should be facilitated. We have concluded that his participation by video link would not infringe his common law or ECHR rights to a fair trial. However, the Order requires a more subtle approach than simply to ask whether attendance by video link would accord with fair trial rights.

53. For these reasons, we are unpersuaded that the outcome of a fresh decision would necessarily be the same. It is therefore appropriate to quash the decision so that it can be taken in the light of up-to-date circumstances.

The Bourgass Point

54. Mr Rule submits that the delegation of a decision under paragraph 3(1) of schedule 1 of the 1997 Act outside the "the office of the Minister", by which we understand him to mean the directorate in the Ministry of Justice responsible for high security prisoners, is unlawful. The purported delegation "in most cases" to prison governors by PSO 4625 is invalid and of no effect. He submits that the position is directly analogous to the prison rule considered by the Supreme Court in *Bourgass.* He accepts that the judge's decision to refuse permission to pursue this new ground was made pursuant to the court's case management powers applying the provisions of Part 54.15 of the Civil Procedure Rules and Practice Direction. Nonetheless, he submits that the judge was wrong in the exercise of his discretion in refusing to allow the grounds to be amended to advance this ground. In particular, he submits that the evidence before the judge was sufficient for him to determine the issue.

55. The judge noted that the application to amend had been raised between five and six weeks before the hearing, despite the identity of the decision maker having been plain from the outset along with the content of PSO 4625 indicating that decisions were to be made by the governor in most cases, subject to authorisation of the directorate in the case of Category A prisoners. He took the view that a full analysis of the issue would be assisted by evidence. The respondent had also submitted that the grounds of resistance had not dealt with the point and that input and instructions from the Ministry of Justice and relevant directorate were necessary to deal with a point that might have far-reaching implications. For these reasons, the judge refused permission to introduce the new ground. Nevertheless, on the basis of the information that was available, the judge reached the provisional conclusion that *Bourgass* did not assist Mr Michael and that the decision had been taken by someone qualified to do so on behalf of the Secretary of State. His observations were *obiter.*

56. This court will interfere with a case management decision of a trial judge only in exceptional circumstances. It is well established that a case management decision will

not be interfered with or reversed by appellate courts unless it was, as Lord Neuberger put it in *Global Torch Ltd v Apex Global Management Ltd* (No. 2) [2014] UKSC 64 (approving of the test in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743), "plainly wrong in the sense of being outside the generous ambit where reasonable decisions-makers may disagree". We are entirely unpersuaded that the decision of the judge was plainly wrong. The respondent was not ready to argue the point and contended that it needed to be explored further before a definitive ruling could be given. In our view, the judge was entitled to agree with that submission.

57. In our view, there are a number of aspects of the argument that need attention in both evidence and argument. Both PSO 4265 and the correspondence state, as regards Category A prisoners, that decisions on production to courts be authorised by the Directorate of High Security Prisons. It is not clear whether this decision was referred to the Directorate; the evidence is silent on the point. We heard no argument on whether the Order envisages authorisation only if the governor has concluded (provisionally) that a Category A prisoner should be produced and thus whether refusal is left entirely to the governor. We also heard no argument, or had evidence, on the question of the extent to which a decision could be taken further down the hierarchy within a prison. There was no evidence about the relationship generally between the Ministry of Justice and prisons in decision making on production of prisoners, not only Category A but other prisoners too. Mr Rule's submission, if correct, would disable the staff in a prison from making decisions about the production to a court of any prisoner, not only those in Category A.

58. The submissions we heard touched on the *Carltona* principle, *(Carltona Ltd v Commissioner of Works* [1943] 1 All ER 560), that a decision allocated by statute to a Secretary of State may ordinarily be taken in his or her name by a suitably qualified official within the department for which that Minister is constitutionally responsible (discussed by Lord Reed in *Bourgass* between [48] and [52]). In *R v. Governor of Brixton prison, ex Parte Walsh* [1985] 1 AC 154 Lord Fraser of Tulleybelton, speaking of the predecessor power to direct production under section 29 of the Criminal Justice Act 1961 at 165D, recorded that the decision was "delegated" to the governor. Lord Reed observed that "it suggests that it was not the *Carltona* principle that [he] had in mind". Lord Reed also observed that there was no argument on the point.

59. The question upon which the decision of the Supreme Court turned in *Bourgass* was whether the segregation of the appellant within the prison was authorised as required by the applicable legislation, namely rule 45 of the Prison Rules, which explicitly confers the initial power upon "the governor". The same rule limits the period of segregation to 72 hours unless authorised by "the Secretary of State". Prison Service Order 1700 purported to authorise the Secretary of State's extension decision to be taken by governors and other senior prison officers in conjunction with others on a panel. The Supreme Court concluded that the governor, an office holder under the statutory scheme, and the Secretary of State have separate functions under rule 45. That precluded the governor (a term which itself has more than one meaning) exercising the Secretary of State's functions pursuant to the *Carltona* principle.

60. In the course of his judgment in *Bourgass* at [77], Lord Reed considered the decision of this court in *R v Secretary of State for the Home Department, ex parte Hickling* [1986] FLR 543, which concerned the rule which enabled the Secretary of State to

permit a woman prisoner to keep her baby with her in prison. The Secretary of State laid down criteria to be applied in such cases but left the final decision to the governor. Eveleigh LJ had said that this was not a case of delegation but of the Secretary of State laying down conditions which must be fulfilled. The conditions concerned matters that the governor was best placed to judge. It was therefore right to allow the governor to decide. As Lord Reed observed "this case was not an application of the *Carltona* principle".

61. This last case provides the closest analogy to the arrangements in place under PSO 4265 (subject to the position regarding Category A prisoners in which the Order envisages involvement of the Ministry of Justice in decision making). However, like the judge we conclude that the issue would be better decided in a case where it arises squarely, on the basis of full evidence and argument.

Conclusion

62. On the limited basis we have identified between paragraphs [47] and [53] above, we allow the appeal and quash the decision in question.