Unlawful detention by Magistrates Courts – a test case in waiting?

There is a potential way for recovering compensation from Magistrates Courts or, at least, challenging the law that provides them with immunity. This applies to cases where the Magistrates or their clerks have detained individuals awaiting trial either by refusing bail or issuing arrest warrants not backed by bail.

How Magistrates and their clerks have immunity

The Courts Act provides that actions against magistrates and their clerks for actions within their jurisdiction are barred - "No action lies against a justice of the peace in respect of what he does or omits to do — (a) in the execution of his duty as a justice of the peace, and (b) in relation to a matter within his jurisdiction" (s.31.1), and a similar provision protects justices' clerks. Crucially, this is not confined to private law actions – damages by way of judicial review face the same barrier.

The Act further provides that actions against magistrates and their clerks are only permitted for actions beyond their jurisdiction only if they are in bad faith: "(1) An action lies against a justice of the peace in respect of what he does or omits to do — (a) in the purported execution of his duty as a justice of the peace, but (b) in relation to a matter not within his jurisdiction, if, but only if, it is proved that he acted in bad faith" (s.32.1), and again a similar provision exists for clerks. If an action is brought which falls under either of these sections the defendant may apply to have the claim struck out and order the claimant to pay costs under s.33.

Why is it so difficult to get around the immunity?

Therefore, in order to succeed one needs to show that the magistrates and their clerks acted in excess jurisdiction and in bad faith. The test for excess jurisdiction is in McC v. Mullan [1985] AC 528 for three possible situations: if the bench acted without having jurisdiction over the cause, exercised its powers in a procedural manner that involved a gross and obvious irregularity, or if it made an order that had no proper foundation in law because of a failure to observe a statutory condition precedent. If none of these are proved the action is struck out. If any is made out then one has to prove bad faith. This was defined in North Kent Magistrates Court v. Reid, unreported, 4th April 2001, Chancery Division, as evidence of "improper motive" or motive not pursuant to the statutory purpose. Hence, unsurprisingly, few actions are mounted or succeed.

The European Court's controversial position

The ECHR's approach is to allow domestic law to have precedence. In Benham v UK (1993) 22 EHRR 293 the ECHR followed McC v Mullan, and the older statute, s.108 of the Courts and Legal Services Act 1990, which provided that magistrates are not liable for compensation if they act lawfully, that is within their jurisdiction or, in good faith. The claimant was imprisoned for non-payment of the community charge where the law empowered the magistrates to commit a person if they found their non-payment was due to culpable neglect. The ECHR held that because the magistrates had inquired as to whether Mr Benham's failure was due to culpable neglect, regardless of the fact that their finding could not be sustained on appeal, they had acted within their jurisdiction.

However, this led to some very difficult arguments about whether there was a valid distinction in the lawfulness of decisions that are void *ab initio* (at the outset) and that are voidable (e.g. on appeal). The majority wanted to avoid any precedent that allowed prisoners who had overturned their convictions or sentences on appeal to then seek compensation as subsequent claims would overwhelm the Court. Judges Bernhardt and Foighel, dissenting, argued if it was found that Magistrates acted within their powers, even if it was found later that there decision was not sustainable on the facts, there was a lack of clarity over the lawfulness of the decision. In that situation, the interests of the accused must be considered and the overall purpose of avoiding arbitrariness brought into play.

Why the European Court is behind the times

Since Benham v UK domestic law has changed as all domestic law has to be read in compliance with the Human Rights Act (HRA). Secondly, the HRA allows for recovery against judicial officers in cases of unlawful detention. Thirdly, the House of Lords has started to use ECHR concepts, such as proportionality and accessibility, to determine whether one can lawfully detain a person. Essentially, the law on Article 5 now goes beyond questions of acts within jurisdiction and good faith.

Basis for recovering compensation: The Human Rights Act and Article 5.5

The Human Rights Act s.9.3 has specifically allowed for recovery for acts of judicial officers in good faith in cases of unlawful detention: "In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention". Article 5.5 provides an enforceable right to compensation for victims of arrest and detention: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

Further basis for recovering: House of Lords guidance on Article 5

In R v. Governor of HMP Brockhill Prison ex p Evans (2) [2001] 2 AC 19, a prison governor calculated the date of release of a prisoner correctly in relation to time spent on remand. But during their detention the law changed and under the new law the detainee should have been released earlier. The Court held that the prison governor was liable as the tort of false imprisonment was one of strict liability and hence the new law could be considered retrospectively. What is most important is how Hope L, who gave the lead judgment on the facts and law, examined the prison governor's compliance with Article 5. He prescribed a three stage test for determining whether the detention of a person is lawful in regard to their right to liberty and security:

1. Was the detention lawful under domestic law? Or,
2. Was the restriction prescribed by law in an accessible and precise manner? Or,
3. Was the detention arbitrary in that "it was resorted to in bad faith *or was not proportionate*"[emphasis added]?

Hope L then applied each one of these tests separately to the circumstances of the detention of the claimant to find that the detention failed part 1 and passed the other two limbs. Clearly, this is an alternative test – a potential claimant can pursue any one or all of the limbs, and, these go beyond lawfulness and good faith. Therefore, according to the House of Lords' interpretation of Article 5 (HRA was not yet in force), in theory, a claimant could argue that a lawful detention was a breach of Article 5 if they are detained either in a manner where the restriction placed on their liberty is not sufficiently accessible or precise, or, in a disproportionate way.

An example of the type of case that could change the law

So when could a Magistrates act within their jurisdiction, in good faith and yet arbitrarily? A Magistrates issues a warrant not backed by bail for a defendant who fails to surrender for good reason of which the bench have notice (e.g. for very poor health). The defendant is detained overnight. This is an act within their jurisdiction (s.6 Bail Act) and arguably in good faith as it is without improper motive. Therefore, they would have immunity. But there is a clear argument that the detention is disproportionate. ECHR case law says detention must be not be disproportionate to the attainment of its purpose Winterwerp v Netherlands (1979) 2 EHRR 387. Here the purpose would be to secure attendance at a subsequent hearing. Arguably, his brief detention in the interim would only serve to punish the defendant not secure his attendance.

What's in it for the client

There is a very good argument that they might recover damages if the Courts Act could be read in compliance with s.9.3 HRA. Simply put, a magistrates or clerk who acts in breach of Article 5 is acting beyond their jurisdiction in the sense that they are making a decision that is not in conformity with the substance of domestic law. In effect, the Court could be invited to add a fourth limb to McC v Mullan.

Is it as simple as that?

However, there are three qualifications to this. First, Courts are slow to award damages for breach of human rights following the decision in Anufriyeva v Southwark LBC [2003] EWCA Civ 1406. It would have to be a case where damages were the last resort. The second possible difficulty, is obtaining legal aid. Most of the potential cases will be freestanding claims for HRA damages as an overnight detention is unlikely to necessitate a full judicial review challenge. The third consideration is that if the Court did not award damages, the client may seek a declaration that the law is incompatible with the HRA (the enforceable right to compensation under s.9.3 HRA is incompatible with s.31 of the Courts Act). This would be a victory of principle in pressuring the government to look at changing the law but it would not provide compensation. But for the right case – where there is flagrant disregard for the interests of the accused and a heavy handed approach to pre-trial detention – these concerns could be addressed.