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Neutral Citation Number: [2018] EWHC 17 (Admin)

Case No: CO/4711/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES
DIVISIONAL COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 17/01/18

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE LEWIS

- -

Between :

THE QUEEN ON THE APPLICATION OF MELANIE WOOLCOCK

Claimant

- and -

(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) THE SECRETARY OF STATE FOR JUSTICE
(3) THE WELSH MINISTERS

Defendants

- and -

(1) BRIDGEND MAGISTRATES' COURT
(2) BRIDGEND COUNTY BOROUGH COUNCIL

Interested Parties

- -
- -

Cathryn McGahey QC and **Rose Grogan** (instructed by **Steel & Shamash**) for the **Claimant**
Tim Buley (instructed by **Government Legal Department**) for the **First Defendant**
James Segan (instructed by **Government Legal Department**) for the **Second Defendant**
Jonathan Moffett QC (instructed by **Blake Morgan LLP**) for the **Third Defendant**
The **Interested Parties** did not appear and were not represented

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Hearing dates: 18-19 December 2017
Further written submissions: 28 December 2017

- -

Approved Judgment

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Lord Justice Hickinbottom :

Introduction

1. This claim concerns the enforcement of liability for unpaid council tax by way of imprisonment. The Claimant contends that the system as currently operated by magistrates' courts in England and Wales is unfair and unlawful; and she seeks a declaration against the Secretary of State for Communities and Local Government ("the SSCLG") and the Welsh Ministers (as being responsible for the relevant regulations in England and Wales respectively), and the Secretary of State for Justice ("the SSJ") (as being responsible for magistrates' courts and the training of magistrates), to that effect.

2. Before us, Cathryn McGahey QC and Rose Grogan appeared for the Claimant, Tim Buley of Counsel for the SSCLG, James Segan of Counsel for the SSJ and Jonathan Moffett QC for the Welsh Ministers. At the outset, I thank them all for their contribution to the debate.

Council Tax

3. Council tax is a system of local taxation introduced by the Local Government Finance Act 1992 ("the 1992 Act") to replace the community charge. It is now used in England, Wales and Scotland to fund approximately one-quarter of expenditure on local services such as adult social care, children's services, refuse collection, schools and leisure facilities. It is administered by local authorities. The applicable law and procedure in England (where there are 326 billing authorities) and Wales (22 billing authorities) is materially the same. The application of council tax in Scotland plays no part in this claim, and I need say nothing further about it.

4. Although it also has a personal element, council tax is primarily a property tax on dwellings. In England, approximately 24.1m dwellings have been identified for council tax purposes, of which 23.5m are liable for the tax. Each dwelling is allocated to one of eight bands based upon its notional value as at 1 April 1991. In Wales, approximately 1,426,000 dwellings have been identified, of which 1,370,000 are liable for the tax. Each dwelling is allocated to one of nine bands based upon its notional value as at 1 April 1991. In both England and wales, each local authority then sets a tax rate for each band. Some homes are exempt or benefit from reduced rates, e.g. when the property is empty or when occupied by a particular class of person such as students or members of the armed forces.

5. In respect of the personal element, by way of example, where there is only one resident adult then generally only three-quarters of the full rate is payable (the single person discount). In Wales, of the 1,370,000 dwellings that are liable for council tax, nearly 500,000 are entitled to a one-quarter discount, largely as a result of single occupancy.

6. Further, by section 13A(2) of the 1992 Act (inserted by section 10(1) of the Local Government Finance Act 2012), local authorities in England are required to make a scheme specifying reductions in council tax to be payable by persons or classes of person in financial need (a council tax reduction scheme), which must comply with the detailed requirements of Schedule 1A of the 1992 Act and the Council Tax

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Reduction Schemes (Prescribed Requirements) (England) Regulations 2012 (SI 2012 No 2885). In England, just over 4m individual claimants benefit from a local council tax support scheme.

7. Similarly, by section 13A(4), the Welsh Ministers may require such schemes by way of regulations; and, by the Council Tax Reduction Schemes and Prescribed Requirements (Wales) Regulations 2010 (SI 2012 No 3144) (W 316), each local authority in Wales is required to make a council tax reduction scheme. In Wales in 2016-17, 292,000 households were in receipt of reductions in council tax under a council tax reduction scheme, of which 220,000 had their council tax reduced to nil.

8. Part I of, and Schedules 1 to 9 to, the 1992 Act provide for the levying and collection of council tax. Section 6 provides that the tax is normally payable by the residents of a dwelling; and, if there are no residents, the owner.

9. Importantly for this claim, Schedule 4 to the 1992 Act, given effect by section 14(3) and entitled "Enforcement: England and Wales", contains provisions about the recovery of council tax payable. It should be said at the outset that the recovery rate for council tax is exceptionally high: 97.1% in England, and 97.4% in Wales.

10. Paragraph 1 of Schedule 4 empowers the Secretary of State to make regulations in relation to the recovery of council tax. By article 2(a) of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No 672) and paragraph 30(2)(a) of Schedule 11 to the Government of Wales Act 2006, in respect of Wales that function now lies with the Welsh Ministers, to whom is also devolved general competence in respect of "local government finance" (sections 107-108 of, and paragraph 12 of Schedule 7 to, the Government of Wales Act 2006).

11. The Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992 No 613) ("the 1992 Regulations") are made under paragraph 1 of Schedule 4 to the 1992 Act. They have been amended, from time-to-time, for England by the Secretary of State and for Wales by the Welsh Ministers and their predecessors; but, for the purposes of this claim, there are no material differences in the regulations which now apply in England and Wales. The 1992 Regulations are supported by guidance for England issued by the Secretary of State (Guidance to local councils on good practice in the collection of council tax arrears (June 2013)), and for Wales issued by the Welsh Assembly Government (Collection of council tax arrears good practice protocol (July 2009)), which each (e.g.) require local authorities, in their communications to council taxpayers, to include information about where they can go for help and advice.

12. The 1992 Regulations enable council tax to be collected in monthly payments. Regulation 23 requires a local authority to send out a reminder notice to a council taxpayer when an instalment is missed, giving him seven days to pay the outstanding instalment. If no payment is made, the right to pay by instalments is lost, and the entire amount of council tax becomes due. If the taxpayer fails to pay that sum, and does not respond to a final notice served under regulation 33, then the authority can seek a liability order from the magistrates' court, under paragraph 3 of Schedule 4 to the 1992 Act and regulations 33-36 of the 1992 Regulations. An application for such an order is by way of complaint and on at least 14 days' notice, so the person alleged to be liable has an opportunity to pay the debt or make such representations as he

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wishes to make. In England, paragraph 3.5 of the Secretary of State's Guidance specifically requires a local authority to take all reasonable steps to exhaust all other options before seeking a liability order.

13. A liability order confirms the amount of the outstanding debt, and the identity of the liable person. It is, in many ways, the equivalent of a judgment, which can be enforced in any of the ways set out in regulation 52 of the 1992 Regulations, i.e. (i) making an attachment of earnings order (regulation 37 of the 1992 Regulations); (ii) applying for sums to be deducted from certain state benefits (regulation 2 of the Council Tax (Deductions from Income Support) Regulations 1993); (iii) making an application to the county court for a charging order (regulation 50 of the 1992 Regulations); (iv) taking control of the debtor's goods and selling them (section 45 of the 1992 Act and Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 ("the Schedule 12 procedure")); and (v) bringing insolvency proceedings (regulation 49 of the 1992 Regulations).

14. Furthermore, paragraph 8 of Schedule 4 to the 1992 Act provides that regulations under paragraph 1 of that schedule may provide for a council tax debtor, who is an adult, who is the subject of a liability order and who has been the subject of the Schedule 12 procedure but has been found to have insufficient goods to satisfy the amount due, to be committed to prison. That paragraph sets out in some detail the procedure for such a committal for which regulations may provide. For example, paragraph 8(3)(c) gives power for regulations to include "provision allowing remission of payments when no warrant is issued or term of imprisonment fixed".

15. Regulation 47 of the 1992 Regulations (as amended from time-to-time) largely replicates the procedure for which provision is made in paragraph 8 of Schedule 4. So far as relevant to this claim, regulation 47 provides as follows:

> "(1) Where a billing authority has sought to enforce payment by use of the Schedule 12 procedure…, the debtor is an individual who has attained the age of 18 years, and the enforcement agent reports to the authority that he was unable (for whatever reason) to find any or sufficient goods of the debtor to enforce payment, the authority may apply to a magistrates' court for the issue of a warrant committing the debtor to prison.
>
> (2) On such application being made the court shall (in the debtor's presence) inquire as to his means and inquire whether the failure to pay which has led to the application is due to his wilful refusal or culpable neglect.
>
> (3) If (and only if) the court is of the opinion that his failure is due to his wilful refusal or culpable neglect it may if it thinks fit –
>
> (a) issue a warrant of commitment against the debtor, or

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(b) fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions (if any) as the court thinks just.

(4) The warrant shall be made in respect of the relevant amount; and the relevant amount for this purpose is the aggregate of –

(a) an amount equal to the amount outstanding…, and

(b) a sum of an amount equal to the costs reasonably incurred by the applicant in respect of the application.

(5) The warrant –

(a) shall state the relevant amount mentioned in paragraph (4),

(b) may be directed to the authority making the application and to such other persons (if any) as the court issuing it thinks fit, and

(c) may be executed anywhere in England and Wales by any person to whom it is directed.

(6) If –

(a) before a warrant has been issued, or a term of imprisonment fixed and the issue of a warrant postponed, an amount determined in accordance with paragraph (6A) below is paid or tendered to the authority, or

(b) after a term of imprisonment has been fixed and the issue of a warrant postponed, the amount (if any) the court has ordered the debtor to pay is paid or tendered to the authority, or

(c) after a warrant has been issued, the amount stated in it is paid or tendered to the authority, the authority shall accept the amount concerned, no further steps shall be taken as regards its recovery, and the debtor, if committed to prison, shall be released.

(6A) The amount referred to in paragraph (6)(a) above is the aggregate of –

(a) the amount outstanding…, and

(b) subject to paragraph (6B) below, the authority's reasonable costs….

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> (7) The order in the warrant shall be that the debtor be imprisoned for a time specified in the warrant which shall not exceed 3 months, unless the amount stated in the warrant is sooner paid; but –
>
> (a) where a warrant is issued after a postponement under paragraph (3)(b) and, since the term of imprisonment was fixed but before the issue of the warrant, the amount mentioned in paragraph (4)(a) with respect to which the warrant would (but for the postponement) have been made has been reduced by a part payment, the period of imprisonment ordered under the warrant shall be the term fixed under paragraph (3) reduced by such number of days as bears to the total number of days in that term less one day the same proportion as the part paid bears to that amount, and
>
> (b) where, after the issue of a warrant, a part payment of the amount stated in it is made, the period of imprisonment shall be reduced by such number of days as bears to the total number of days in the term of imprisonment specified in the warrant less one day the same proportion as the part paid bears to the amount so stated…".

In this judgment, I shall refer to any proceedings under regulation 47 as "committal proceedings". I shall refer to an order made under regulation 47(3) as "a committal order", an order made specifically under regulation 47(3)(a) as "a warrant of commitment", and an order made specifically under regulation 47(3)(b) as "a suspended committal order".

16. These provisions and their predecessors have been regularly considered by the courts, and we were referred to a number of authorities regarding their application, including Gordon v Gordon [1946] 1 All ER 247, R (Wandless) v Halifax Magistrates' Court [2009] EWHC 1857 (Admin), R (Aldous) v Dartford Magistrates' Court [2011] EWHC 1919 (Admin), and my Lord, Lewis J's earlier judgment in this claim R (Woolcock) v Bridgend Magistrates' Court [2017] EWHC 34 (Admin) ("Woolcock (No 1)").

17. It is unnecessary for me to cite from those judgments at length. The following propositions, drawn from the legislative provisions as construed by the courts in these cases, are now well-established and uncontroversial.

i) The power to commit is coercive: it is intended to be used to extract payment of the debt from those who are able to pay, not to punish the debtor.

ii) Because the liberty of the subject is at issue, even where the subject has been deliberately disobedient and/or has ignored the enforcement process brought against him, it is vital that the magistrates conduct committal proceedings strictly in accordance with the applicable regulations and case law. If they do not, any committal will be unlawful.

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iii) In committal proceedings, the burden of proof lies on the authority seeking to commit. The standard of proof to be applied is the civil standard, i.e. balance of probabilities. However, the authority may ask the court to make inferences from the billing and enforcement history including any response from the person liable for council tax, e.g. an inference that that person's failure to pay is the result of wilful refusal or culpable neglect. Given that the liberty of the subject is in issue, the court will only draw such inferences where the evidence clearly satisfies it that such an inference can properly be drawn.

iv) Before applying for committal, the local authority must have first obtained a liability order and sought to enforce payment by taking control of the subject's goods and selling them under the Schedule 12 procedure, and the bailiff must have reported that he was unable to find any or sufficient goods to enforce payment.

v) An application to commit in the form of a complaint to the magistrates' court must be made, and served on the subject council tax debtor, so that he has notice of the hearing. Before proceeding, the court must be satisfied that the subject has such notice.

vi) Before making a committal order, the magistrates' court must conduct a means inquiry in the presence of the debtor. This inquiry is important in respect of a number of issues which the magistrates will or may need to consider, e.g. whether to make a committal order at all, the conditions upon which such an order may be postponed or suspended (e.g. the appropriate rate at which arrears should be paid), and whether to remit all or part of the debt.

vii) The court must also consider, and determine, whether the failure to pay is the result of wilful refusal or culpable neglect, as any committal order (including a suspended order) can only be made if it is. Furthermore, even where the magistrates are satisfied that the failure to pay is the result of wilful refusal or culpable neglect, they will need to consider the degree of culpability, as that will be a factor that may be relevant to (e.g.) the period of imprisonment imposed. A discrete inquiry as to means and conduct must be made in respect of each period of liability, because the reason for non-payment and/or the culpability for default may change over time.

viii) For the purpose of enabling an inquiry to be made into the subject's means and his conduct, the court may issue a summons for him to appear before the court or issue a warrant for his arrest without issuing a summons.

ix) Before making any committal order (including a suspended order), the magistrates' court must consider enforcement options to secure payment, other than imprisonment.

x) If, and only if, the court is of the opinion that the subject's failure to pay is due to his wilful refusal or culpable neglect, it may, if it thinks fit, issue a warrant of commitment, or make a suspended committal order (i.e. fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions as the court thinks just, usually of course as to payment of the arrears).

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xi) Although the subject must be present in court for the means inquiry to take place, it is not a requirement of the regulations for him to be present when any suspended committal order is made or warrant of commitment issued. However, before making any committal order, the court must ensure that the subject has been put on proper notice of the hearing; and will usually wish to make enquiries as to why he is not present, and consider steps to encourage or require his attendance. The magistrates have power to issue a summons or warrant to require that attendance. If the subject does not obey a summons and attend the hearing, then no doubt, in practice, magistrates should and will make reasonable enquiries as to why he has not attended (including enquiries to ensure he has been properly served with notice of the hearing), and take reasonable steps to ensure or at least encourage his attendance. Following those steps, it is likely that in the vast majority of cases the subject will be in attendance at the committal hearing. Nevertheless, if the magistrates are satisfied that the subject has been given notice of the committal hearing, and has chosen not to attend, it is open to them to proceed in his absence. In this regard, with respect, I do not agree with Collins J in R v Doncaster Justice ex parte Jack (1999) 164 JP 52 at page 164, when he said he found it "very difficult to conceive of circumstances which would justify a committal in the absence of a defendant". Magistrates should exercise caution before proceeding to make a committal order in the absence of the subject. However, each case will depend upon its own facts; and magistrates may be persuaded by (e.g.) the enforcement history that the subject has deliberately absented himself simply to avoid committal, and that the time and costs involved in a further summons, whether or not supported by a warrant of arrest, would not be reasonable, proportionate or warranted.

xii) At the hearing for committal, the subject of the summons has the right to be legally represented. Usually, he will be represented by the duty solicitor. Magistrates should not proceed unless and until they have ascertained whether the subject wishes to be represented; and, if he does, that his representative has had a proper opportunity to take the subject's instructions and give him advice before the hearing commences.

xiii) It is usual, although not obligatory, for magistrates to suspend at least a first committal order on condition that the subject makes regular instalment payments towards the arrears. However, they cannot make any unreasonable order for repayment. Therefore, each instalment to be paid must be reasonable in amount, given the assessment of means that has been conducted. Furthermore, the period for which instalments are to be paid must be reasonable. This is considered further below (see paragraphs 19 and following); but, generally, where the period is two or three years, an order will be reasonable. Cases will be rare in which an instalment period of over three years will be appropriate. In no case has an instalment period of over five years been considered appropriate.

xiv) Where instalments are made a condition of a suspended committal order, the appropriate course is for the magistrates' court to remit such part of the arrears as will reduce the total sum in respect of which the order is made to a sum

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which can be met by the instalments envisaged within the reasonable period as assessed by the court. I consider this further below (paragraphs 24-25).

xv) The maximum period of imprisonment that may be specified in a committal order (whether suspended or not) is three months.

xvi) The serving of a term of imprisonment does not formally eradicate the subject's debt; but it makes that debt unenforceable. Service of the term of imprisonment is, to that extent, in lieu of enforceable payment.

xvii) No general appeal lies from a committal order, which may only be challenged, in this court, by judicial review or an appeal by way of case stated. When any committal order is made, the limited rights of challenge should be made clear to the subject.

18. Except for that relating to the instalment period, which I consider further below, these principles have largely been set out in guidance issued by the Justices' Clerks Society ("the JCS"), the professional society for lawyers who advise magistrates, since 2012, in its News Sheet No 17/2012 (see paragraphs 27-29 below).

19. Ms McGahey's case for the Claimant was founded to a considerable extent upon committals by magistrates on the basis of a failure of subjects to comply with a condition of a suspended committal order that arrears be paid in instalments over excessive (and, thus, unlawful) periods of time (see paragraphs 43 and 90 and following below). In respect of periods that may be regarded as unreasonable, we were again referred to a number of authorities, notably R v Newcastle-upon-Tyne Justices ex parte Devine [1998] RA 91, R (Broadhurst) v Sheffield Justices [2001] RVR 245 and, more recently, Soor v London Borough of Redbridge [2016] EWHC 77 (Admin).

20. In assessing what may be a reasonable period for these purposes, the courts have had regard to periods considered reasonable in the exercise of the power to order the payment of fines and costs in instalments in sections 139 and 141 of the Powers of Criminal Courts (Sentencing) Act 2000. Paragraph 2 of the Magistrates' Courts Sentencing Guidelines 2008 states that: "Normally a fine should be of an amount that is capable of being paid within 12 months". However, in R v Olliver and Olliver (1989) 11 Cr App R (S) 10 at page 14, having reviewed earlier authorities, Lord Lane LCJ made clear that each case depended on its own facts; and there is nothing wrong in principle in the period being longer – indeed, much longer – than one year, providing it is not an undue burden on the subject and so too severe a punishment having regard to the nature of the offence and the nature of the offender. He said that, certainly, a two year period would seldom be too long; and, in an appropriate case, three years would be unassailable, depending on case details. Referring to Olliver, in R v Guiness [2009] EWCA Crim 1205, I said that cases would be rare in which a fine or criminal costs instalment period of more than two or three years would be appropriate. Those cases appear still to represent the position in the criminal courts.

21. We were also referred to Child Maintenance and Enforcement Commission v Gibbons and Karoonian [2012] EWCA Civ 1379 ("Gibbons"), which concerned the enforcement of payment by a non-resident parent of child support by way of maintenance. Section 39A of the Child Support Act 1991 (as amended by the Child

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Support, Pensions and Security Act 2000) allowed the Child Maintenance and Support Commission ("the Commission") to apply to the magistrates' court for the committal of a non-paying non-resident parent where there had been wilful refusal or culpable neglect on the part of that person, and distress had failed. That scheme, too, was coercive; and, under it, suspended committal orders were common. Ward LJ expressed the view (at [51]) that "the upper limit of the period of suspension should rarely exceed two years". However, that scheme was significantly different from the scheme in respect of council tax, in that remittal was not available at any stage; and, once a period of suspension had run its course, it was open to the Commission to seek a further committal for any arrears outstanding thereafter. In my view, that observation has limited value in relation to the scheme with which we are concerned.

22. In the context of periods for instalment payments of council tax arrears, a similar line to that in the criminal courts has been taken. In Broadhurst (a case involving community charge, to which identical principles applied), in concluding that a period of five years was excessive on the facts of that particular case, Gage J (at page 247) referred to (without specifically identifying) the Court of Appeal (Criminal Division) cases "where it has been said that a period of payment of instalments of a fine of some three years is unassailable, but longer periods should not be considered". In Soor, having referred to Broadhurst, in concluding that a period of six years in that case was excessive on the facts of that particular case, Irwin J (as he then was) said, succinctly, that "a period of five years to discharge such a debt has for long been regarded as excessive. A period of three years is 'unassailable'".

23. Whilst I emphasise that the assessment of a reasonable instalment period for the payment of council tax arrears is an exercise of judgment for the magistrates' court on the facts of the particular case, in my view the cases clearly indicate that a period of no longer than two or three years will normally be entirely appropriate. We were referred to no case in which a period of more than five years has been found to be appropriate; and, in my view, such cases will be vanishingly rare, and would require very considerable and clear justification.

24. As I have indicated (paragraph 17(xiv) above), once the magistrates' court has assessed appropriate instalments, in amount and duration, then it is incumbent upon the court to remit the arrears to the extent that they exceed the sum of the instalments. That is particularly important because it is doubtful whether the court can remit arrears once any committal order (including a suspended order) has been made. The powers of the court once a term of imprisonment has been fixed and the issue of the warrant postponed were considered by this court in Teignmouth District Council v Saunders [2001] EWHC 344 (Admin), in which Richards J, referring to the judgment of Laws J in R v Mid-Hertfordshire Justices ex parte Cox [1995] JP 507, concluded that, once a suspended committal order has been made, that order cannot be revisited; and the powers of a later court are restricted to issuing a warrant, further postponing the issue of a warrant and/or varying the conditions attached to the suspension. He did so on the basis that regulation 52(1) of the 1992 Regulations (which provides that, when a warrant is issued, no further steps may be taken by way of enforcement of the debt) has to be read in the light of paragraph 8(3)(c) of Schedule 4 to the 1992 Act under which the regulation is enacted. That paragraph (referred to in paragraph 14 above) only gives the power for regulations to allow remission of payment where no warrant is issued or term of imprisonment fixed. However, if the court cannot remit

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any arrears after a suspended committal order has been made, there seems no reason in principle why in an appropriate case the conditions cannot then be varied to postpone the issue of a warrant for – and allow payment of instalments over – a period of any length of time, or even an indefinite period if, e.g., because of a change of circumstances, the subject becomes incapable of paying any arrears. Neither Saunders, nor any other authority, appears to suggest otherwise.

25. Saunders sets out the law in respect of the powers of the magistrates' court after a suspended committal order has been made, as it currently stands. As the issue of these powers is not crucial to the outcome of the claim before us, in my view, this is not a case in which that should be reconsidered. No party suggested otherwise. I shall therefore proceed on the basis that, once a suspended committal order is made, the magistrates' court has no power to remit arrears. That being the case, of course, it becomes even more important that, when considering a suspended committal order, magistrates do so with particular care; do not impose a condition for the payment of instalments over a more than reasonable period; and, at that stage, remit any balance of the arrears not included in the instalments directed.

26. In relation to instalment periods and remittal, Stone's Justices Manual – a, if not the, standard legal work for magistrates – reflects the case law to which I have referred. Paragraph 7.7671 of the current, 147th edition (2017), sets out regulation 47 of the 1992 regulations; and, in footnote 8, referring to Devine, it comments on regulation 47(3)(b) (conditions attached to a suspended committal order) as follows:

> "When postponing the issue of a warrant on terms as to repayment of the sum due by instalments, the court should be mindful of the principles applicable to the payment of fines in criminal cases. If satisfied that the particular person in front of the court is a person of limited means and if such an order is contemplated, the appropriate course is to remit such part of the arrears as will reduce the total sum in respect of which the order is made to a sum which can be met by the instalments envisaged within a reasonable period and certainly not a period in excess of three years…".

27. The case law is also, to an extent, now reflected in JCS guidance. In its News Sheet No 04/2017 (which was a revised version of News Sheet No 17/2012), dated 22 March 2017 (and, thus, after Woolcock No 1)), the following was added as paragraph A2(l):

> "When postponing commitment, the postponement should rarely exceed two years ([Gibbons]). In [Soor], the Administrative Court held that a period of 6 years was too long, and in [Gibbons] 11 years was held to be "an unreasonable and disproportionate penalty". Remittal is available if reasonable payment terms would result in an excessive period of payment."

Although, for the reasons I have given (see paragraph 21 above), I do not consider the reference to Gibbons to be the most appropriate, this guidance conservatively indicated that postponement of over two years should be rare.

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28. JCS News Sheet 11/2017 (dated 19 July 2017) said that a brief review of recent cases suggested some concern, particularly in relation to the adequacy of reasons, and gave a short summary, entitled "Getting it right", which included the following:

> "Postponed committal
>
> The reasons must be as cogent for a postponed commitment as an immediate. In addition, the rate of payment must be realistic and the order capable of being paid within two years.
>
> Remittal
>
> There is power to remit council tax. In general courts should be thinking about remittal if the court's instalment order would mean it would take more than two years to pay off. The Regulations do not permit remittal and committal in the same hearing."

The news sheet is accompanied by a Council Tax Enforcement Check List, which, under the part for remittal, refers to Gibbons, and says, in bold type:

> "**Payment should not take more than 2 years to pay**".

29. At about the same time (July 2017), the National Bench Chairmen's Forum issued to all magistrates a short summary of the key issues to consider when dealing with committal proceedings, together with a reinforcing message in a letter sent to all bench chairmen dated 27 July 2017. The aide memoire stated, under the heading "Remittal":

> "In general courts should be thinking about remittal if the court's instalment order would mean it would take more than two years to pay off."

In August 2017, that summary was adopted by the Judicial College, and included in the Magistrates' Court Adult Bench Book.

The Factual Background

30. The factual background to this claim was comprehensively set out by Lewis J in Woolcock (No 1). For the purposes of the issues now before the court, I can be brief.

31. The Claimant is a single mother, who lives with her son. Over several years, she failed to make council tax payments to the Second Interested Party ("the Council") in respect of two properties in Porthcawl which she occupied, the total amount unpaid in the period 2009-14 being £4,741.76.

32. Following the procedure required by the 1992 Regulations to which I have referred, on 14 August 2014, at the request of the Council, the First Interested Party issued two committal summonses, one in relation to each property, requiring the Claimant to attend the magistrates' court on 22 September 2014. She did not attend. A warrant was issued for her arrest. She was in due course arrested, and attended court on 20 October 2015.

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33. At that hearing, the Claimant was represented by the duty solicitor. The court was provided with an up-to-date account of arrears. A means inquiry was conducted in respect of the whole period of liability and default. The Claimant accepted that she had buried her head in the sand over the outstanding council tax. Other means of recovery had failed to secure payment; and, the court was told, the Claimant was no longer well enough to work, and therefore an attachment of earnings order was not an option. The court was told that she was in receipt of child tax credit and child benefit, and would be making a claim for further benefits. The Claimant accepted (and the magistrates found) that she was guilty of culpable neglect. She offered to pay £5 per week in respect of the arrears on each property, which the magistrates considered was a realistic sum she could afford.

34. The magistrates made an order, in respect of the first property, in the following terms:

> "To pay £1,748.97 or in default to serve 35 days suspended. Reason: Culpable Neglect. No other method of enforcement is appropriate. Payments terms: to pay £5 every 1 week. First payment to be made 03/11/2015."

The order in respect of the second property was in the same terms, except that the outstanding sum was £2,922.78, and the default term was 50 days suspended.

35. There is no evidence that the magistrates brought their minds to bear upon the length of time that it would take to pay off the arrears at the rate ordered – and the duty solicitor does not appear to have raised the point – but, as a matter of mathematics, at the rate provided, the period would have been about 6½ years for one property and 11½ years for the other.

36. The Claimant made the required instalment payments for a few months, but then stopped. Following a request from the Council for payment of the arrears on the ordered payments (£50), which met with no response, on 10 June 2016, the Claimant was served with a notice that a complaint had been made to the magistrates' court that the Claimant had failed to comply with the terms of postponement, and a warrant for her committal fell to be issued unless she paid the total amount outstanding, i.e. £4,536. A committal hearing was fixed for 18 July 2016. The Claimant did not attend that hearing, at which, in her absence, she was committed to prison for 81 days, i.e. the full period less four days to reflect the amount she had by then in fact paid.

37. On 5 August 2016, the Claimant made a payment of £100. However, on 8 August 2016, bailiffs and two policemen attended her home, and executed the warrant of commitment. They took her to Bridgend Police Station, and thence to HMP Eastwood.

38. Whilst in prison, apparently through her own devices, she learned that there might be grounds for considering her detention unlawful; and, on 16 September 2016, through solicitors, she made an out-of-time application for judicial review and an urgent application for interim relief in the form of bail. By then, she had served 39 days in prison. Within 24 hours of issue, Whipple J granted bail, and ordered that the application for judicial review be expedited and heard on a rolled-up basis. The claim was transferred to the Administrative Court in Wales, where it was heard by Lewis J on 9 November 2016.

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39. The claim for judicial review included several grounds of challenge to the orders of 20 October 2015 and 18 July 2016, by which, first, a suspended committal order was imposed, and, then, a warrant for the Claimant's immediate commitment issued. In addition, the Claimant sought to challenge the system by which a person may be committed to prison for non-payment of council tax. Sensibly, consideration of that last ground was adjourned, pending the outcome of the issues relating specifically to the Claimant.

40. In respect of those grounds, Lewis J gave judgment on 18 January 2017 (i.e. Woolcock (No 1)). Extending time for the application, he proceeded to grant permission to proceed and grant the substantive application, finding that, in relation to the 20 October 2015 order, the magistrates had failed to conduct a proper and adequate inquiry into the Claimant's means or to consider whether payment of the whole sum, at a rate of £10 per week (£5 for each property), would result in the suspension/payment period being unreasonable and unlawful, such that part of the debt should be remitted. The suspended committal order of 20 October 2015 being flawed, he concluded that the warrant of commitment of 18 July 2016, founded upon that earlier order, was also inevitably unlawful.

41. Following that judgment, the Claimant indicated that she wished to proceed with the adjourned ground, which alleged that the system under which she was imprisoned was unlawful. On 12 April 2017, Lewis J gave permission to proceed; and it is that ground alone which is now before us.

The Ground of Challenge: Articulation

42. During the course of the proceedings, the systemic ground of challenge has been somewhat fluid; but, by the conclusion of the hearing before us, the ground was singular and narrow.

43. Ms McGahey accepted that the relevant law relating to the committal of individuals under regulation 47 of the 1992 Regulations as construed by the higher courts was clear and well-established. She also made clear that she made no complaint about any part of the scheme for the enforcement of council tax liabilities prior to the engagement of council tax payers with the magistrates' court. However, she submitted, magistrates frequently failed to apply that clear and well-established law, notably by imposing a condition to a suspended committal order that required the payment of instalments over an unreasonably long period, and making committal orders *in absentia*. The clear and only proper inference that can be drawn from the sheer volume of unlawful committal orders made on the basis of either of these errors is that there is something inherently wrong in the system. She identified that element as ignorance of the law on the part of the magistrates who dealt with committal applications, such that they did not determine such applications within the scope of the law. That ignorance is compounded by the similar ignorance of the law by legal advisers who advise magistrates, and legal representatives (including duty solicitors) who appear before them. The ignorance of the magistrates etc is inherent in the operation of the system of council tax enforcement (and, thus, the system itself) at the stage where the magistrates' courts become involved, which leads to an unacceptable risk of a council tax debtor in the system being the subject of procedural unfairness. The system has shown itself, Ms McGahey submitted, to be incapable of correcting itself to ensure the required minimum procedural fairness is maintained.

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44. The Claimant thus seeks a declaration that the system of council tax enforcement under the 1992 Regulations, as currently operated by the magistrates' courts, is unlawful.

45. On the basis that the Secretary of State for Justice is responsible for magistrates' courts and the training of magistrates, and the Secretary of State for Communities and Local Government and the Welsh Ministers are responsible for the 1992 Regulations in England and Wales respectively, Ms McGahey submitted that they are all properly parties to this claim, because each is in a position to take steps to remedy the systemic failure (e.g.) by improving the training of magistrates and their legal advisers, or by making amendments to the 1992 Regulations.

46. This was, by the end of the hearing, the only ground of challenge. The Claimant's Detailed Grounds and skeleton argument (notably at paragraphs 39-44), suggested possible wider grounds. For example, there was focus on an alleged absence or inadequacy of magistrates' training; but, in her oral submissions, Ms McGahey made clear that she made no discrete challenge to any particular act or omission in relation to training. Indeed, the Claimant continues her complaint about magistrates' ignorance of the law, even after the JCS guidance has been changed to emphasise that normally a suspension period should not be more than two years (see paragraphs 27-29 above). There was also a complaint in the written documents that the system lacked flexibility, in that remittal of arrears is not possible after a suspended committal order has been made. However, as I have described (paragraphs 14 and 24 above), that restriction derives directly from the primary legislation (i.e. the 1992 Act), and Ms McGahey makes no challenge to either that or any of the 1992 Regulations made under it in this regard. Similarly, a complaint was made that the 1992 Regulations did not give magistrates proper guidance as to the how their powers of commitment should be exercised: but, Ms McGahey accepted, that guidance was adequately and clearly given in the case law and, again, she did not seek to challenge the lawfulness of the 1992 Regulations or any of them in this regard either.

47. Thus, the only submission Ms McGahey pursued in respect of training and the Regulations was that either could address the systemic deficiency in terms of magistrates failing to apply the clear and well-established law relating to applications to commit. She pursued no identified discrete claim that any act or omission relating to training, or in relation to the 1992 Regulations, was unlawful.

48. In respect of the ground of challenge that is pursued, it is a challenge to the system of council tax enforcement as operated by magistrates' courts. Before us, that led to considerable discussion in relation to (i) the nature of "systemic challenges" allowed by way of judicial review, and (ii) the evidence upon which the Claimant claimed that this case fell within the purview of such challenges. I will deal with those two matters in turn, before turning back to the Claimant's particular ground.

Systemic Challenges by way of Judicial Review

49. The High Court has a general supervisory jurisdiction over public authorities, including inferior courts, which it exercises through the judicial review procedure, governed by CPR Part 54. CPR rule 54.1(2)(a) defines a claim for judicial review as "a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function". This effectively defines

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the function of the Administrative Court in judicial review proceedings, which is "to adjudicate upon specific challenges to discrete decisions…": it is no part of its role to "monitor, regulate or police the performance by [a public authority] of its statutory functions on a continuing basis" (R (P) v Essex County Council [2004] EWHC 2027 (Admin) at [33] per Munby J (as he then was), cited with approval in R (O) v Hammersmith and Fulham London Borough Council [2011) EWCA Civ 925; [2012] 1 WLR 1057 at [51] per Black LJ (as she then was)). Therefore, a judicial review claim is required to identify the decision which is alleged to be unlawful, the public body responsible for that decision, and the duty or obligation of that public body which is said to have been breached. "Decision", for these purposes, of course includes all the matters to which reference is made in CPR rule 54.1(2)(a), including an enactment, an action, and a failure to act.

50. In making a decision, the relevant public body must adopt the minimum standards of procedural fairness imposed by the common law, as now reinforced by the procedural guarantees deriving from the European Convention on Human Rights ("ECHR"). In considering procedural fairness, the function of the court is not merely to review the reasonableness of the decision-maker's judgment of what fairness required: the court must determine for itself whether a fair procedure was followed (Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 WLR 781 at [6] per Lord Hope of Craighead, as confirmed in R (Osborn) v Parole Board [2013] UKSC 61; [2014] AC 1115 at [67] per Lord Reed JSC).

51. Most cases of alleged procedural unfairness by a public body are brought by an individual who considers and asserts that, had that body acted fairly, a decision it had made affecting that individual would or might have been different. However, the courts have recognised that a scheme may be inherently unfair if the system it promotes itself gives rise to an unacceptable risk of procedural unfairness, such that the scheme (or, at least, the part that gives rise to that risk) is unlawful. Where such a public law challenge is made, it is often referred to, by way of shorthand, as a "systemic challenge".

52. Each of the Counsel before us referred to a series of Court of Appeal cases in which the principles relevant to systemic challenges have been considered. Given that Ms McGahey on the one hand, and Counsel for each of the Defendants on the other, do not agree as to the correct approach to systemic challenges – of which, Ms McGahey submits, this is one – it would be helpful, even if briefly, to consider these cases.

53. The first in time was R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219. The challenge was to the Secretary of State's decision to establish a fast track pilot scheme for the adjudication of asylum applications by single male applicants from countries where the Secretary of State considered there was no serious risk of persecution. The entire process was compressed into three days.

54. The court recognised that the responsibility for devising such a system was a matter for the executive (at [8]); but considered that, if the established system placed applicants at "an unacceptable risk of being processed unfairly", judicial review would be available "to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself" (at [7] per Sedley LJ). The risk of injustice had to be inherent in the system itself. As Sedley LJ

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put it (at [5]): "There may of course be individual cases where an interview is said to have been so unfair as to have infected everything that followed, but such cases will decide nothing about the system itself". Consequently, the court refused to engage with individual complaints about the system – there were, as it happened, few – indicating that it was their task "to make an objective appraisal of the fairness of the… system". In the event, the court did not find the system inherently unfair or unlawful, because it had within it the flexibility to allow the more difficult cases to be taken out of the scheme and processed through the conventional scheme for processing asylum applications. The system could therefore operate without an unacceptable risk of unfairness (see [25]).

55. In R (Medical Justice) v Secretary of State for the Home Department [2011] EWCA Civ 1710, the challenge was to a policy for setting removal directions by Home Office officials. Restricted time limits were again at the heart of it. The policy required only 72 hours' notice to persons subject to such removal directions and, in certain exceptional cases, permitted less notice. It was submitted that the system governing exceptions resulted in a very high risk if not inevitability that the right to effective access to justice would be infringed.

56. Applying the approach in Refugee Legal Centre, the judge at first instance (Silber J) found that that submission had been made good ([2010] EWHC 1925 (Admin)). The Court of Appeal agreed. Again, there was no consideration of individual cases in which the policy was said, in fact, to have led to unfairness; but only an analysis of the system imposed by the policy itself, e.g. the policy did not include any provision for deferring removal if, in an individual case, despite his best efforts, the individual had been unable to obtain legal advice in the time available. The policy was thus found to be unlawful, and the paragraphs of the policy document that dealt with reduced notice of removal were quashed.

57. In R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827; [2014] 1 WLR 4620, the focus was upon the policy framework for the imposition of additional conditions on prisoners released on licence. The framework comprised various policy documents, in which the Secretary of State for Justice issued guidance. The policy was said to be inherently unfair because it provided no meaningful opportunity for the person potentially subject to such additional conditions to have his views taken into account.

58. Richards LJ, giving the judgment of the court, from [34], considered "the test for determining whether the risk of an unlawful outcome renders a policy unlawful". He emphasised that, in such a challenge, the question to be asked was "whether the system established by the guidance in the policy documentation is *inherently unfair* by [in that particular case] reason of a failure to provide the offender with a fair opportunity to make meaningful representations about the proposed licence conditions. If it is, then the guidance itself may be found to be unlawful; but if it is not, the correct target of challenge is not the guidance but any individual decisions alleged to have been made in breach of the requirements of procedural fairness" (at [35], emphasis in the original). Expressly endorsing and applying the approach laid down by Refugee Legal Centre (see [45]), Richards LJ indicated that, for the court to interfere, it must be satisfied that there is an "unacceptable risk of procedural unfairness", i.e. "a risk of unfairness in the system itself rather than one arising in the ordinary course of individual decision-making" (at [38]). The threshold is (he said) "a

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high one", and a court would be "slow to find that a system is inherently unfair and therefore unlawful" (see [49]). On the facts, he concluded that, whilst it would have been helpful if the guidance had included specific provision as to the requirements of procedural fairness, he did not accept that "the omission of such provision gives rise to inherent unfairness so as to render the policy unlawful" (see [55]).

59. In R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber) [2015] EWCA Civ 840; [2015] 1 WLR 5341, the issue was again focused on time limits. The claimant challenged the schedule to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014 No 2604), which set out "Fast Track Rules" for appeals to the First-tier Tribunal against refusals by the Secretary of State of certain asylum applications, on the basis that they were *ultra vires* section 22(4) of the Tribunal, Courts and Enforcement Act 2007. It was submitted that, because the Fast Track Rules provided very tight time limits for the appeal process, the appeal system they established was procedurally unfair. Given the difficulties in obtaining instructions from detained asylum applicants, it was submitted that it would be inevitable that a number would be denied a fair opportunity to present their case.

60. Lord Dyson MR summarised the general principles to be derived from the earlier authorities, as follows (at [27]):

> "(i) [I]n considering whether a system is fair, one must look at the full run of cases that go through the system;
>
> (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases;
>
> (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself;
>
> (iv) the threshold of showing unfairness is a high one;
>
> (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and
>
> (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts."

In respect of (iv), the Master of the Rolls added this:

> "I would enter a note of caution in relation to (iv). I accept that in most contexts the threshold of showing inherent unfairness is a high one. But this should not be taken to dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals."

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He concluded his analysis of the applicable principles as follows (at [30]):

> "Ultimately, the question that arises in this case is whether there is systemic or structural unfairness inherent in the [Fast Track Rules] such as to render them *ultra vires*…".

61. In the event, Lord Dyson found that the time limits were so tight that, in a significant number of cases, they made it impossible for there to be a fair hearing of the appeal; there was thus an unacceptable risk of procedural unfairness; and, so, the Fast Track Rules were systemically unfair, unjust and unlawful. The Fast Track Rules were quashed.

62. In R (S) v Director of Legal Aid Casework [2016] EWCA Civ 464; [2016] 1 WLR 4733, the challenge was to a scheme for exceptional case funding operated by the Director of Legal Aid Casework pursuant to section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It was said that there was a systemic failure in that the operation of the scheme frustrated the purpose of the Act by placing obstacles in the path of applicants resulting in an unacceptable risk that individuals would not be able to make an effective application.

63. In confirming the approach of the earlier cases to which I have referred, and dismissing the appeal on the basis that the scheme and its operation were not unlawful, Laws LJ (with whom Burnett LJ (as he then was) agreed) particularly considered the distinction between multiple instances of unfairness on the one hand, and an inherent failure of the system on the other. At [18], he said this:

> "While addressing the applicable test, I should add that I think this area of the law is prone to a particular difficulty. The subject-matter is a system which has to cater for many individual cases: how, then, in principle does the law encapsulate the difference between an inherent failure in the system itself, and the possibility – the reality – of individual instances of unfairness which do not, however, touch the system's integrity? The question points up the danger I have already outlined, that the judge may cross the line between adjudication and the determination of policy: he may (however unwittingly) be too ready to treat his individual criticisms as going to the scheme's legality. Even so the dividing line between multiple instances of unfairness and an inherent failure in the system is in considerable measure a matter of degree, and therefore of judgment. As the Master of the Rolls said at [29] of Detention Action, "the concepts of fairness and justice are not susceptible to hard-edged definition". The strength of the evidence supporting a challenge to the system as a whole will obviously be crucial. But as I have said, proof of a systematic failure is not to be equated with proof of a series of individual failures. There is an obvious but important difference between a scheme or system which is inherently bad and unlawful on that account, and one which is being badly operated. The difference is a real one even where individual failures may

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> arise, or may be more numerous, because the scheme is difficult to operate."

Briggs LJ (as he then was), agreeing as to the approach, drew a distinction between "a system which, although blighted by multiple instances of unfairness, is inherently lawful, and a system rendered unlawful by inherent unfairness".

64. Laws and Burnett LJ concluded that the defects in the new system for exceptional case funding, on balance, fell short of inherent unfairness; although, as Laws LJ indicated at [57], the extent of the difficulties were troubling, and, in his view, the Lord Chancellor should be sensitive to making improvements to it. Briggs LJ dissented on the application of the agreed approach in the particular case, notably because the application form was addressed to, and plainly designed to be completed only by, lawyers on the applicants' behalf – but there were considerable disincentives for any lawyer to do so (see [77]).

65. Finally, in R (Howard League for Penal Reform) v Lord Chancellor [2017] EWCA Civ 244; [2017] 4 WLR 92, the decision challenged was that of the Lord Chancellor to introduce the Criminal Legal Aid (General) (Amendment) Regulations 2013 (SI 2013 No 9), which removed funding from a number of areas of decision-making concerning prisoners from the scope of the criminal legal aid scheme. Permission to proceed was refused by the Administrative Court. The Court of Appeal granted permission to proceed with the judicial review, and itself retained the claim.

66. At the substantive hearing, Beatson LJ, giving the judgment of the court, once again approved and applied the approach in the earlier cases to which I have referred. At [53], he returned to the difficulty identified by Laws LJ in S:

> "We bear in mind… the difficulty identified by Laws LJ in [S]… of encapsulating the difference between an inherent failure in the system itself and individual instances of unfairness which do not touch the system's integrity. It is, however, a distinction that the authorities require the court to draw. It would be impossible to undertake the research that would be needed to provide a full-blown statistical or socio-legal study as evidence within the time limit for judicial review proceedings. Since the claimants do not have access to prisons and prisoners, all they can do is to furnish publicly available material and evidence of examples of how the system has operated in the five areas since legal aid became unavailable and of difficulties that have arisen. One way of drawing the distinction between inherent failure and individual instances of unfairness which do not touch the system's integrity is to distinguish examples which signal a systemic problem from others which, however numerous, remain cases of individual operational failure."

67. He found that, in respect of three categories of case (pre-tariff reviews by the Parole Board, category A reviews and decisions as to placement in close supervision centres), looking at the full run of cases, the other forms of assistance that were available were not adequate to enable a prisoner to participate effectively. The high

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threshold required for a finding of inherent or systemic unfairness had therefore been satisfied, to that extent.

68. I consider that these cases show a clear and consistent approach to what I have called systemic challenges. The following propositions can be derived from them.

i) Such a challenge concerns the fairness of the procedure used by a public body.

ii) Whether the procedure used is fair is a matter for the court.

iii) An administrative scheme will be open to a systemic challenge if there is something inherent in the scheme that gives rise to an unacceptable risk of procedural unfairness.

iv) Although Laws LJ said in S that "the dividing line between multiple instances of unfairness and an inherent failure in the system is in considerable measure a matter of degree, and therefore of judgment", there is a conceptual difference between something inherent in a system that gives rise to an unacceptable risk of procedural unfairness, and even a large number of decisions that are simply individually aberrant. The former requires, at some stage, consideration and analysis of the scheme itself, and the identification of what, within the scheme, gives rise to the unacceptable risk. As Garnham J properly emphasised recently in R (Liverpool City Council, Nottinghamshire County Council, London Borough of Richmond upon Thames and Shropshire Council) v Secretary of State for Health [2017] EWHC 986 (Admin) at [57] and following, the risk identified must be of, not simply some form of illegality, but of *procedural* unfairness. Despite the difficulties of distinguishing an inherent failure in the system and individual instances of unfairness which do not touch upon the system's integrity, that is a distinction which the court is required to draw, e.g. by distinguishing examples which signal a systemic problem from others which, no matter how numerous, remain cases of individual failure.

v) That does not mean that consideration of individual cases is necessarily irrelevant. Although some of the cases to which I have referred did not refer to specific cases at all, many systemic challenges will in practice be founded upon individual instances of unfairness; and, of course, the larger the number or proportion of aberrant decisions, the more compelling the evidence they may provide of an inherent systemic problem. In an appropriate case, it may even be sufficient to create an inference that there is such a problem. Nevertheless, in many cases, the number or proportion of aberrant decisions alone will not in itself satisfy the burden of showing that they result from something inherent in the system.

vi) Again because the focus is upon the system, in assessing that risk, consideration has to be given to "the full run of cases that go through the system", i.e. not merely consideration of a particular case or cases, or a hypothetical "typical" case.

vii) Although a systemic challenge differs from most judicial reviews in that it does not focus upon the consequences of unlawfulness for a particular

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individual or group of individuals – but rather upon the administrative system itself, and the risk of procedural unfairness arising from that system – the basic requirements of a judicial review are still in place. The claimant must identify the "decision" (in the wide sense of that word used above) he contends, and seeks to prove, is unlawful; and which public body is responsible for that decision as a matter of law. In each of the cases to which I have referred, that was done. It is a prerequisite. Given those requirements, although of course the court can give declaratory relief in an appropriate case, it is likely that the substantive relief will be in the form of an order quashing the particular regulation, policy or other "decision" (or part thereof) found by the court to be unlawful because it inherently gives rise to an unacceptable risk of procedural unfairness.

viii) Whilst there is a distinction between aberrant decisions which result from individual operational failure and those which signal a systemic problem, in considering systemic failure, there is no hard line between written regulations, policies etc, and their implementation. For example, in S, the challenge was based upon a systemic failure in the operation of the scheme, e.g. by the forms that were used being impracticable for those without legal representation in circumstances in which such representation was (quite successfully) discouraged. In Howard League for Penal Reform, the removal of funding was held to be unlawful because of a failure to replace the legal assistance which that funding had provided with any other form of assistance that would enable a prisoner to participate effectively. These could each be categorised as "operational", in the sense that they were failings in the implementation of policy – but the challenge was, properly, made to the executive policy (in the form of regulations or written policy) itself. An inherent risk of procedural unfairness may arise out of either the terms of an executive policy (in whatever form that might take) or its implementation.

ix) The threshold of showing unfairness is high; but that is tempered by the fact that the common law demands the highest standards of procedural fairness when the life or liberty of the subject is involved.

x) Where the system has an element that may lead to a risk of procedural unfairness (e.g. restricted procedural time limits), then an important question may be whether the system has inherent within it the capability of reacting appropriately to ensure that the irreducible minimum standard of procedural fairness is maintained (e.g. there being sufficient flexibility within the system to avoid unfairness occurring). That capability must be assessed, not hypothetically, but by reference to what happens in the real world.

69. I do not consider that the two cases particularly relied upon by Ms McGahey undermine any of the above principles.

70. First, she relied upon Gibbons in support of the proposition that, in a systemic challenge, it is not necessary to identify a particular "decision" that is alleged to be unlawful. However, Gibbons was not a systemic challenge – it was not a public law challenge at all – but rather involved two appeals against decisions to commit for failing to make child support payments. The Court of Appeal had to consider the routine practice adopted in relation to committal for non-payment of child support,

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but only because it was uncontroversial that the routine practice had been adopted in those two cases, and so the conclusions of the court would inevitably have consequences wider than the individual cases before it. All three members of the constitution of the court considered that the language used in the relevant summons was open to criticism, on the basis that it suggested the burden of proof (as to why a warrant should not be issued) fell on the subject (see [46] and [60]); and Richards LJ (with whom Patten LJ agreed) expressed more general concerns that the Commission had not considered with sufficient care the implications of the burden of proof being upon it. Whilst it is true that Ward LJ's observations in [34] and following are somewhat wider, they are *obiter*, expressly not agreed by Richards and Patten LJJ, and do not do anything to undermine the propositions drawn from the clear and consistent authorities to which I have referred (including that set out in paragraph 68(vii) above).

71. Ms McGahey also relied upon the judgment of Ouseley J in R (Detention Action) v Secretary of State for the Home Department [2014] EWHC 2245 (Admin), an earlier challenge by Detention Action to the lawfulness of the policy and practice applied by the Secretary of State in a scheme known as the Detained Fast Track, another scheme involving very tight procedural time limits. Ouseley J concluded (at [221]) that, without the early instruction of legal representatives to advise and prepare claims, and to seek referrals for those who needed them, with sufficient time before the substantive asylum interview, there was an unacceptably high risk of unfair determinations for those who may be vulnerable applicants. However, again, I do not consider that this authority is of any real assistance to Ms McGahey's cause. As I have indicated, it is well-recognised that inherent procedural unfairness can arise, not just from the wording of the relevant policy, but from its implementation. In this case, Ouseley J found that the relevant policy was not unlawful "in its terms", but that it was unlawful in its implementation, because, without early engagement with legal representatives (which the system effectively denied to many), there arose an unacceptable risk of unfairness. This judgment was, of course, at first instance, and is not therefore formally binding upon us; but, in any event, I do not consider that it is anything but orthodox, and in line with the series of Court of Appeal authorities to which I have referred.

The Claimant's Evidence

72. In addition to the facts of the Claimant's particular case (set out above: see paragraphs 30 and following), the Claimant relies upon an analysis of data produced by the Second Defendant with regard to the 95 individuals who were the subject of warrants of commitment in England and Wales in the 16-month period April 2016 to July 2017. The data, disclosed after a contested hearing before Fraser J, comprise a summary showing the various orders made in relation to each person, including the historic suspended committal orders leading to the issue of the warrant. In respect of the 95 individuals, a total of 134 suspended committal orders were made in the period 2011-17.

73. Ms McGahey submits that an analysis of these cases shows that, once cases get to the magistrates' court, the system in practice is incapable of guaranteeing the irreducible minimum level of procedural fairness that is required where the liberty of the subject is at stake. She makes two primary complaints, which, she submits, evidence a systemic failure. First, of the 134 suspended committal orders, 52 were suspended on

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condition that instalment payments were made over a period in excess of three years. Second, in two areas (Kent and South Wales), there appears to be a practice of committing debtors in their absence. There are other errors, confirmed or potential, identified – e.g. where the maximum 90 day period of imprisonment has been exceeded or imposed in a suspended committal order although there is a finding of only culpable neglect recorded; where there is no record of alternative disposals being considered; or where the subjects were required, contrary to the burden of proof, to show cause why a committal order should not be made – but Ms McGahey, rightly, accepts that none of those discloses a systemic failure as opposed to, at most, individual aberrance.

74. In respect of the 52 committal orders suspended for more than three years, it is suggested that all the warrants of commitment based on these are unlawful. However, the picture is more complicated than that. 21 of the 95 individuals appear to have had warrants for immediate committal issued against them following a first suspended committal order that involved a suspension of over three years. Of these, however, twelve were for a period of 3-5 years, of which four were for 3.1 years or less; and only nine were for a period of over five years. We have no details of the individual facts of the cases; but, all parties before the court were agreed that it seems that, certainly in the cases where the period was in excess of five years, the magistrates gave no consideration at all to the repayment/suspension period, merely assessing the rate that the subject could reasonably be expected to pay. Because of the fact-specificity of cases, I appreciate that this can only be an estimate – but, for the purposes of this claim only, I accept that the warrants of committal in respect of the nine individuals who had been subject to suspended committal orders which postponed commitment for over five years were almost certainly unlawful, and the warrants in respect of some of the eight individuals with a period of 3.2-5 years may well have been unlawful. On that basis, of the 95 individuals who were committed to prison in the 16-month period, the warrants of commitment of between perhaps nine and 17 (i.e. about 7-13 individuals per year, or 9.5-18%) would have been unlawful because they were resulted from a breach of a suspended committal order, itself unlawful as a result of the excessive period over which it extended.

75. However, there is an added layer of complexity in relation even to those, because there is no evidence that in any case did the subject of the (unlawful) order default in respect of arrears payments directed to be paid as a condition of suspension more than three years after the order had been imposed – or that the excessive period of the suspended committal order played any part in the default. Thus, there is no evidence that, if the magistrates had acted lawfully and imposed a suspended committal order at the same rate, but for a lawful period, the subject would not in any event have breached that order and been committed for that breach. That does not, of course, affect the unlawfulness of the orders; but it may possibly affect (e.g.) discretionary relief.

76. In respect of those who were committed *in absentia*, as I have indicated (see paragraph 17(xi) above), a magistrates' court has power to commit in the absence of the subject. In any event, committals *in absentia* appear to be prolific in only Kent and South Wales. This is confirmed by data voluntarily disclosed by the Second Defendant, which show that in England and Wales in 2014-15 there were a total of 36 committals *in absentia* (including 29 in Kent and 5 in South Wales), in 2015-16 there

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were 24 (including 13 in Kent and 8 in South Wales), and in 2016-17 there were 39 (18 in Kent and 16 in South Wales). The evidence suggests that over 90% of the committals in Kent, and over 80% in South Wales, were made *in absentia*. Therefore, if any systemic deficiency there be, it appears to be limited to those two areas.

77. There is no evidence to explain the figures for South Wales. In respect of Kent, in paragraph 29 of his statement of 15 November 2017, Samuel Genen (the Claimant's solicitor) says that on 25 August 2017 he spoke to the Clerk to the Kent Justices, who told him that "the justices had previously been of the view that once means assessment had taken place, there was no need for a debtor to attend subsequent proceedings, meaning that a debtor could be committed to prison in his or her absence". He was informed by the clerk that, between 2014-17, 55 of 58 people committed to prison for non-payment of council tax in Kent were committed in their absence in Medway Magistrates' Court. The clerk told Mr Genen, however, that "this practice is no longer adopted in Kent…".

78. In addition to the data concerning the 95 individuals to which I have referred, in his statement, Mr Genen also refers to three other actions in which he currently represents claimants who have been committed for non-payment of council tax, two other clients he represents in committal proceedings, and his experience in attending two magistrates' courts in London at a time when there was a council tax enforcement list. In my view, it would not be appropriate for this court to comment upon other proceedings currently before the courts; but I do take into account that in one of the five cases the initial period of suspension of the committal order was more than five years; and, in another, the claimant was committed *in absentia* at Medway Magistrates' Court in line with a policy which, the Claimant accepts, has now been abandoned.

The Defendants' Evidence

79. Siân Jones is employed by HM Courts and Tribunals Service ("HMCTS") as the Justices' Clerk for Cambridgeshire and Essex. In addition to carrying out the judicial functions assigned to justices' clerks (and supervising those to whom those functions are delegated in her area), she has been involved in collating data for these proceedings, and, with the President of the Justices Clerks' Society, in generating guidance to justices' clerks and assistant clerks as a result of the issues raised in this claim.

80. In her statement dated 11 December 2017, Ms Jones sets out the steps that have been taken since Woolcock (No 1) (which I have set out in paragraphs 27-29 above). Following the hand down of Lewis J's judgment, the JCS News Sheet No 17/2012 was revised by its News Sheet No 04/2017 on 22 March 2017, about two months after the availability of the judgment. Following a review of some sample cases, and the progress of the systemic challenge in this claim, further guidance was given on 19 July 2017 in JCS News Sheet 11/2017. An additional message was also sent in July 2017 to all bench chairmen by the National Chairmen's Forum, with a short summary of the key issues when dealing with commitment (the aide memoire), which was also then included in the Magistrates' Court Adult Bench Book.

81. Ms Jones also conducted her own review of the information disclosed to the Claimant in respect of committal orders made in the year 2016-17. She considered that,

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although there had not been a systemic failure, a number of individual courts had imposed orders which did not appear to her to comply with the regulations and case law. She brought her concerns to the attention of the HMCTS Deputy Head of Legal Operations and the Head of Magistrates' Policy, who agreed to put it onto the agenda of the Magistrates' Liaison Group ("the MLG") meeting on 27 November 2017. Ms Jones explains that the MLG advises the Lord Chief Justice on policy for the operation of the magistrates' courts, discusses general magistrates' matters and provides a forum to consult with the magistracy. It is chaired by the Senior Presiding Judge, and is attended by representatives of the judiciary in leadership positions within the magistracy, the President of the JCS and representatives from the Judicial College, HMCTS and the Ministry of Justice.

82. Ms Jones did not attend that meeting, but provided a paper for it. In that, she referred to this case, and said:

> "Irrespective of the merits of the case, it has exposed significant failing in judicial decision-making, and a clear training need. My recommendation is that the MLG should recommend to the chair and the Judicial College that the College should mandate training for legal advisers and that training should be considered by the relevant bodies for the other participants to the process.
>
> …
>
> It does not appear that there has been any training on this subject for many years. The caseload is tiny, and set against key issues in recent years the issue has not been salient.
>
> However in my view the evidence is clear that defects in dealing with this are so widespread, and have such a serious impact on the liberty of individuals, that all legal advisers require training in the near future, and it should form part of the training of legal advisers on appointment. The Chief Magistrate will also want to give thought to any training needs of district judges (MC).
>
> I do not recommend training magistrates as there are very few cases a year (and, in some benches, none); the key is to provide them with competent legal advice, and a structure, which now exists in the Bench Book."

Under the heading "Concerns", she said that:

> "… [T]he audits and my review reveal a clear lack of awareness on the part of some legal advisers and district judges of their powers and the grounds to impose commitment, and the result has been that some people every year have been imprisoned in circumstances in which there is a strong case that they should not have been…".

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83. At the hearing before us, Ms McGahey applied for disclosure of "the audits" to which Ms Jones referred. These, she hoped, would provide further information about the 95 cases which would further support the claim that these represented more than individual aberrations, but rather a systemic defect. We refused that application; and it is convenient, here, briefly to record my reasons for doing so.

84. Upon instructions, Mr Segan told us that Ms Jones was not referring to a formal audit of cases, but rather contact between herself and a number of other justices' clerks, usually by telephone, during which she made enquiries as to the procedure in their area. In fact, very few documents were produced as a result of her exercise – perhaps just half a dozen emails. She did not contact the justices' clerk for every area – which would have been a very extensive exercise beyond her time and means – and so the exercise was not in any event exhaustive or even representative. In the circumstances, I did not consider any disclosure would be helpful. As I have indicated, I will proceed on the basis that all the cases in which a suspended committal order of over five years was imposed was unlawful, and those where the period was 3.2-5 years may well have been. Although that is an estimate, it gives an appropriate basis on which to work for the purposes of this judicial review. It is highly unlikely that any information deriving from Ms Jones' enquiries, although leading her to the personal conclusions recorded above, would materially assist the court in determining the issues before it.

85. Ms Jones understands that her recommendation was not accepted at that meeting which, she says, "reflected, in part, a concern not to prejudice these proceedings and also to avoid a conflict with the role of the Judicial College in specifying training for judicial office holders" (paragraph 9 of her statement). However, the justices' clerks for virtually all areas have now confirmed to her that they have ensured that all legal advisers have received the most recent JCS Guidance; and that all legal advisers will in fact be trained in relation to council tax enforcement in this financial year or the next.

86. The steps referred to above were applied across England and Wales. Additionally in Wales, prior to the issues being raised in this claim, the Welsh Ministers had commissioned research regarding council tax collection and arrears management in Wales, and the research report was published on 28 September 2017 ("the Welsh Research Report"). Information was obtained from all local authorities in Wales. All are reported as considering there is a continuing need for committal action as a deterrent for the minority of those liable to pay council tax who will not (as opposed to cannot) pay; but all stressed that they regarded committal as a last resort, arrived at only after the investment of time and effort in trying to establish contact with individuals and the exploration of other recovery methods (paragraphs 4.58-4.60).

87. The evidence submitted on behalf of the Defendants (notably in paragraphs 15-16 of Ms Jones' statement of 22 September 2017, paragraph 58 of Mr Buley's and Mr Segan's joint skeleton argument and table 5.16 of the Welsh Research Report) also helps complete the statistical picture.

88. In England, as I have indicated (paragraph 4 above), approximately 23.5m dwellings are liable for council tax. The recovery rate is 97.1%. Ms Jones estimates that about 2.41m liability orders were made in England in 2015-16. We do not have the figure for the number of applications for committal for non-payment of council tax in

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England alone, but for England and Wales together for the calendar year 2014 there were 6,477 applications (in respect of which there were 85 (1.31%) committals to prison), and for 2015 there were 6,733 applications (66 (0.98%) committals). In light of the figures for Wales (see paragraph 89 below), it seems that more than 6,000 applications for committal are perhaps made in England each year. In 2015-16, in England, arising from those applications, 904 suspended committal orders and 48 warrants of commitment were made.

89. In Wales, 1,315,922 dwellings were liable for council tax in 2016-17. The recovery rate is 97.4%. In that same period, in 21 of the 22 local government areas – figures not being available for one area – 125,123 summonses for non-payment were issued; 92,547 liability orders granted; 326 applications for committal made; 159 suspended committal orders granted; and 20 warrants of commitment made.

The Ground of Challenge: Discussion

90. As I have already described, by the close of the hearing, Ms McGahey had crystallised the grounds upon which she relied thus. The enforcement of council tax by committal is systemically unfair, because magistrates frequently fail to apply the clear and well-established law relating to applications to commit, notably by issuing a warrant of commitment following (i) a failure by the council tax debtor to comply with an unreasonable and disproportionate (and, hence, unlawful) condition attached to a suspended committal order to pay instalments of arrears for an excessive period, and (ii) making committal orders *in absentia*. She accepted that other errors in making committal orders of which there was evidence amounted to no more than, at most, individual aberrations, and were not evidence of any systemic deficiency.

91. However, despite the considerable and able efforts of Ms McGahey and Ms Grogan, I am entirely unpersuaded that there is any basis here for a systemic challenge by way of judicial review.

92. Ms McGahey sought to show that the clear (indeed, the only) inference from "the sheer volume of unlawful orders… is that there is something inherent in the system which prevents [magistrates] from [making lawful orders]" (paragraph 54 of her skeleton argument). Of course, the imprisonment of any number of people – no matter how few – on the basis of an unlawful order is regrettable, particularly (as Ms McGahey properly emphasised) the imprisonment of the socially vulnerable such as the Claimant. However, the numbers here have to be considered in their full context.

93. I am unconvinced that Ms McGahey gains any significant support from the data relating to those committed *in absentia*. As I have described, although they should exercise caution before doing so, magistrates have the power to commit in the absence of the subject. On the data before the court, there is nothing to suggest that magistrates outside Kent and South Wales have at any time failed to exercise proper caution, the numbers of persons committed *in absentia* in all other areas being very small indeed. I accept that the historic figures for Kent and South Wales may prompt some concern – it can be put no higher than that – but, at least in Kent, any issue appears now to have been addressed. If magistrates in South Wales are acting idiosyncratically in committing *in absentia*, there is insufficient evidence to conclude they are acting unlawfully and certainly insufficient evidence to suggest any inherent systemic procedural unfairness rather than individual (or, at worst, local) error.

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94. In respect of those imprisoned on a warrant of commitment made following default on a suspended commitment order, unlawful because of the length of the suspension, there appear to be about 7-13 individuals per year, or 9.5-18% of those committed (see paragraph 74 above). Of course, in each case, an individual has lost his or her liberty on the basis of an unlawful order; and that level of error by magistrates is (as Ms Jones fully accepts) of concern and unacceptable. But neither the numbers nor the proportion of cases in which that error was made, without more, in my view comes close to being sufficient to draw the inference that there is a problem inherent within the system. Ms McGahey has focused upon that part of the system that takes place in magistrates' courts, but even in that small part of the system, the numbers and proportion of cases are small compared with the number of applications for committal made (see paragraphs 88-89 above). But, although for the purposes of this claim I too have focused on that stage, the provision for ultimate enforcement by way of committal is just one small part of a sophisticated system for enforcement of council tax liability set up by Parliament which, as a whole, is remarkably efficient at recovery (which is over 97%); and a part designed, not to put people in prison, but to encourage payment from those who have received various reminders and various court orders requiring them to pay their arrears of council tax, but who, despite being able to pay, have not done so. One can only speculate as to the extent to which the ultimate sanction of imprisonment is effective in ensuring such a high rate of recovery; but there is, in my view, some force in the submissions made on behalf of the Defendants that any error rate in committals has to be considered against that wider backdrop.

95. In any event, as I have explained, in promoting a systemic challenge by way of judicial review, it is incumbent upon a claimant to consider and analyse the relevant scheme itself, and identify what, within the scheme, gives rise to the unacceptable risk of procedural unfairness which lies at the heart of any systemic challenge. Ms McGahey, very properly, sought to do so. She submitted that it was this: magistrates frequently fail to apply the clear and well-established law applying to such applications to commit, notably by issuing a warrant of commitment on the basis of default on a disproportionately long (and, hence, unlawful) period of suspension/payment of arrears.

96. However, I am unpersuaded.

97. I have already dealt with the issue of numbers and frequency of errors; but, in my view, there is a more fundamental defect in the submission. Ms McGahey accepts that the council tax enforcement scheme set out in the 1992 Regulations, so long as operated in accordance with the case law, is fair and lawful. Her complaint is that magistrates ignore a clear and well-established element of that scheme, namely the requirement that the length of any suspended committal order is fair and proportionate. However, that is not in itself redolent of *procedural* unfairness, as (e.g.) committal *in absentia* might be. As Mr Moffett submitted, it is an example of possible *substantive* unfairness. Another way of putting that – as some of the cases do – is that the risk of unfairness does not arise out of the systemic procedures themselves, but rather arises in the ordinary course of individual decision-making in that magistrates simply fail to comply with the requirements of the scheme (see Tabbakh at [38] per Richards LJ, endorsing the principles set out in Refugee Legal Centre, referred to in paragraph 58 above).

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98. Of course, persistent errors in applying the law by magistrates might *evidence* unfairness as a result of a deficiency in the relevant scheme's procedures. For example, the errors may result from (e.g.) a decision not to provide magistrates with appropriate training because of budget constraints. Such a case would be in the territory of the Howard League for Penal Reform case, in which it was found that the removal of state funding from challenges to decisions concerning prisoners in a number of areas was, in the absence of viable alternative forms of assistance for prisoners, wishing to challenge such decisions, procedurally unfair and unlawful (see paragraphs 65-67 above).

99. But the Claimant makes no such focused case here, despite a formal request made on 11 September 2017 on behalf of the Welsh Ministers for details of "any particular enactment, decision, action or failure to act" on the part of any Defendant that the Claimant alleged was unlawful. The Claimant's response dated 18 September 2017 did not answer that question. It merely said that the 1992 Regulations comprised the system; they permitted unfairness and breaches of article 6 of the ECHR; and the Welsh Ministers, as being responsible in Wales for the Regulations, had the power to prevent such unfairness occurring by amending the regulations or issuing appropriate guidance as to how they should be applied. However, as Mr Moffett submitted, in a systemic challenge it is inadequate to assert that, whoever might have been responsible for an unfair system, any public body which has the power to act to eradicate that unfairness can be ordered so to act or declared to be acting unlawfully in not so acting.

100. Ms McGahey was, throughout, coy about identifying what, within the scheme, gives rise to the unacceptable risk of procedural unfairness. In my view, paragraph 5(a) of the Claimant's response to the Welsh Ministers' request for further information to which I have referred correctly identified the proper target of any claim as the 1992 Regulations, as they were in practice implemented; but the Claimant has failed to identify any inherent procedural unfairness in that scheme. Simply identifying that magistrates have, in several cases, made a suspended committal order of excessive (and, thus, unlawful) length does not do the trick. Given that no one suggests that any magistrate is acting with deliberate perversity, Ms McGahey appears to be right to condemn the relevant magistrates (and their legal advisers) as being ignorant of well-established law. However, the number of magistrates who have so erred must be a very small proportion of the corpus of magistrates; and, similarly, the evidence suggests that no more than, at most, a tiny proportion of legal advisers and solicitors representing council tax debtors are similarly ignorant. Such individual errors cannot be recast as a systemic deficiency because such ignorance might have been addressed earlier – as it now appears to have been addressed – by more training or more guidance.

101. Counsel for the Defendants submitted that the training and guidance that is now being given to magistrates and their legal advisers shows the system has within it the capability of reacting appropriately to ensure that the minimum standard of procedural fairness is maintained. However, in my view, procedural unfairness does not arise here; although it is comforting that those involved in ensuring that magistrates are fully informed as to the law relevant to committals have taken steps to address obvious concerns arising from the fact that it appears that some suspended committal orders have been made for a period in excess of a reasonable time. The fact that such

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concerns are being addressed does not, of course, mean that the concerns derive from something inherent in the system giving rise to procedural unfairness as opposed to a rate of individual error considered unacceptable.

102. Counsel for all three Defendants submitted, as a separate issue, that their particular Defendant was not a proper party to these proceedings. I see the force in those submissions; but I do not consider that this is, in truth, a separate point. In this claim, the Claimant does not identify any particular "decision" that she contends is unlawful because it leads to procedural unfairness. Without identifying such a decision, it is impossible to identify the public body (or, possibly, bodies) responsible for it. In the event, the Claimant has pursued not only the public bodies that are responsible for the 1992 Regulations in England and Wales respectively (understandable if the proper target of the claim is the 1992 Regulations as in practice implemented, although the claims against those bodies were not quite articulated in that focused way), but also the Secretary of State for Justice, who clearly cannot be held responsible for aberrant decisions of magistrates (see Mazhar v Lord Chancellor [2017] EWHC 2536 (Fam), especially at [65]-[66] per Ryder LJ) or for any wholly unparticularised failure to provide magistrates with adequate guidance with regard to the law.

103. Returning briefly to the evidence before this court, even if, contrary to my firm view, the challenge made is properly the subject of a claim for judicial review, it will be clear from the earlier parts of this judgment that, on the evidence before us, I do not consider that the Claimant has proved that there is anything inherent in the system of enforcement of council tax liability that means that the system (or any part of it) is unlawful as giving rise to an unacceptable risk of procedural unfairness.

Conclusion

104. For those reasons, applying the well-established law relating to the restricted parameters of systemic challenges by judicial review to the evidence in this case, I am unpersuaded that the claim put forward falls within the scope of judicial review; and, insofar as it might, on the evidence such a claim is not made out. Indeed, in my view, despite the considerable exertions of her Counsel, the Claimant has fallen very far short of persuading me on either issue.

105. Of course, nothing I have said affects the judgment and Order of Lewis J on the other grounds of challenge to the committal orders in respect of the Claimant made by the magistrates' court on 20 October 2015 and 18 July 2016. However, subject to the agreement of Lewis J, I would dismiss the remaining ground.

Mr Justice Lewis :

106. I agree.