Neutral Citation Number: [2022] EWHC 859 (Admin)

Case No: CO/812/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

7th April 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of KHAZIR REHMAN)	**Claimant**
- and -	
GREATER MANCHESTER MAGISTRATES' COURT (sitting at Tameside Magistrates' Court)	**Defendant**
-and-	
CROWN PROSECUTION SERVICE	**Interested Party**

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The Claimant in person
The Defendant and Interested Party did not appear and were not represented

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Hearing date: 7.4.22
Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission for judicial review. The claim arises out of a conviction in the magistrates' court on 9 July 2021 of harassment, and the subsequent sentence on 16 August 2021 to a 12 week custodial sentence suspended for 18 months with conditions including unpaid work to be completed within 12 months. A two-year restraining order was also made as was an order for £600 in costs and the applicable surcharge. On 17 August 2021 the Claimant applied to the magistrates' court to have a case stated for an appeal to this Court. That application met with a reasoned refusal on 5 January 2022. The claim for judicial review impugns as its targets: the conviction of 9 July 2021, the sentence of 16 August 2021, and the refusal of 5 January 2022. Permission for judicial review was refused on the papers on 8 March 2022 by HHJ Stephen Davies ("the Judge"). The Claimant had filed an urgent consideration Form N463 with papers filed the previous day, explaining that the urgency was because the unpaid work was now starting. The Judge refused an application for interim relief to stay the execution of the sentence. The case was listed with expedition for an oral hearing of the application for renewal of permission notified by the Claimant on 10 March 2022. The Interested Party ("CPS") filed summary grounds on 30 March 2022.

Non-attendance

2. I began this ex tempore judgment at 2:20pm. The circumstances today are that there has been no attendance at Court by the Claimant who acts in person. The case was published in the cause list yesterday afternoon with its 2 o'clock start time. I have seen communications between the Court and the Claimant relating to the hearing. On 31 March 2022 the Claimant filed a skeleton argument. On 5 April 2022 the Claimant responded on 13:10 to an email sent to him at 13:00 by my clerk relating to the materials for this hearing which she said, in the first line of the email, was due to be heard before me on Thursday 7 April 2022. By email later on 5 April 2022 the Claimant forwarded some further materials he wanted to make sure that the Court had. The case has been called on in the corridor outside court. I am told and I understand that no communication has been received by the Administrative Court Office or by my clerk from the Claimant. I am quite satisfied that it would not be appropriate for me to defer or adjourn this listed oral hearing. Having regard to the interests of justice and the overriding objective I am satisfied that it is appropriate to proceed.

Late attendance

3. I interpose at this stage that at 2:28 the Claimant has come into Court, and I am therefore going to pause, to give him an opportunity to address me.

[later]

4. Mr Rehman has told me that he was unable to attend at court at 2 o'clock owing to a health condition. He is clearly intending and hoping that I will allow him to address me. In all the circumstances, and where I have not yet begun to address the position as it stood on the papers, what I have decided to do is to allow him to address me, and I will resume this judgment having heard and considered those representations.

[later]

5. The Claimant has addressed oral representations to me and has been able to assist me with the materials during the bundle. I have the advantage of a number of sets of written submissions from him. They include his grounds for judicial review, his grounds of renewal and his skeleton argument, all of which I had pre-read and all of which I have considered.

Delay

6. One of the reasons why the Judge refused permission for judicial review on the papers was delay. The Judge considered the delay in seeking to impugn the conviction and sentence not to warrant any extension of time. The Judge also considered that there was a lack of promptness in filing papers challenging the refusal to state a case.

7. I take a different view in relation to delay. If I were satisfied in this case that there were some arguable ground for judicial review, in respect of which there is no legally adequate alternative remedy, I would not shut the case out on the basis of delay. It is clear from the papers that the Claimant has sought to challenge the conviction and sentence and sought to do that promptly. Whether he took the right course is something to which I will need to return. But the very next day after he was sentenced, on 16 August 2021, he made an application to the magistrates to state a case. The decision on that application did not come until 5 January 2022. In the reasoned refusal to state a case, the District Judge expressly said this:

> ***Through no fault of the applicant the consideration of the application has been significantly delayed once received by the court. The application was incorrectly treated as an appeal against conviction. The appeal was processed and sent to the crown court in the usual manner. It is not clear what, if anything, the Crown Court did upon receipt of the appeal but the delay in dealing with the application was raised by the applicant in November 2021. Its concerns were referred to a legal team manager who identified the mistake and notified the District Judge. The applicant was so advised and requested to pay the appropriate fee for the application to state a case, which he duly did. The application was then served by the court on the CPS …***

In my judgment, it would not be just or fair to hold that passage of time against the Claimant in the light of those circumstances and those reasons, acknowledged in a reasoned determination by a judge. Then, when the refusal to state a case came on 5 January 2022 the Claimant wrote a letter before claim just over a month later on 8 February 2022 to which there was a response on 23 February 2022. He then attempted to file his judicial review claim but there were some difficulties as a result of which it was eventually issued on 7 March 2022.

8. The real issues in this case in my judgment are as to the alternative remedy of an appeal to the Crown Court and as to whether there is any arguable question of law which warrants the pursuit of judicial review and which would justify the grant of permission for judicial review. I will focus on those questions.

Alternative remedy

9. Turning first to the question of an alternative remedy, the point has resoundingly been made throughout to the Claimant that he had a right of appeal (within 15 business days of sentence) under Criminal Procedure Rules Part 34 and section 108 of the Magistrates

Courts Act to appeal against conviction and sentence to the Crown Court and to obtain a rehearing on the evidence including oral evidence in that court. It is clear that he was well aware of that option and that he chose not to take it, choosing instead the route of requesting a case stated appeal to this Court.

i) The application form that he used on 17 August 2021 said "use this form ONLY for an application to the court to state a case for the opinion of the High Court on a question of law or jurisdiction under Criminal Procedure Rules 35.2. There are different forms for appealing from the magistrates' court to the Crown Court under Criminal Procedure Rules Part 34".

ii) When the CPS responded to the request to state a case, they took the position that there was no arguable "point of law".

iii) In refusing to state a case, the District Judge said this: "the findings which the applicant seeks to challenge are findings of fact not matters of law" and "as such any challenge should have been pursued by way of appeal to the Crown Court".

iv) In refusing permission for judicial review on the papers, the Judge said this: "the Claimant had the option of appealing to the Crown Court against conviction and sentence and chose not to avail himself of such option".

v) In the CPS's summary grounds of resistance the point is repeatedly made that the "proper avenue" for the Claimant to challenge the conviction was "an appeal against conviction by way of rehearing to the Crown Court, that being an alternative remedy that was and remains available".

10. Undeterred by all of those references, the Claimant has maintained that he has an arguable "point of law", moreover one engaging "the public interest", which required an appeal by case stated and which, in any event, warrants the grant of permission for judicial review. The District Judge disagreed with that. So does the CPS. The Judge on the papers also reached an adverse conclusion on that point. My function is to make up my own mind, afresh, as to whether I think there is some viable, arguable "point of law" arising in this case.

A point of law?

11. The "error of law" which the Claimant says arises has been identified by him in the papers and today orally. In his Grounds of Renewal, he focuses on the question as to whether the four posts – which were the subject of the information laid against him – were "true" as to their "content". He says that the District Judge in the magistrates' court, in convicting him, adopted the position that the truth of the content did "not matter" and was "irrelevant". He submits that that was an error of law. He says that a "flaw" always needs to be found in the "content" of publications or postings in what is an objective test applicable in the context of harassment, and where a conviction for harassment will be exceptional in the circumstances of freedom of expression and Article 10 protection. In support, he cites – although he did not provide it with the many authorities in the bundle – a case which is also referenced in the CPS's summary grounds namely Trimingham v Associated Newspapers [2012] EWHC 1296 (QB), referring me to paragraph 267 (which the Claimant read out to me). He made reference too to the earlier case of Thomas v News Group Newspapers Ltd [2001] EWCA Civ

1233. He says that in the present case the magistrates' court needed to grapple with the question of whether the "contents" of the posts which were the subject of the information that had been laid against him were "true". He further submits that the significance of that "truthfulness" is linked to the principle regarding looking objectively at "content" and linked to the protection that freedom of expression has under Article 10 in the context of publication, whether publication is by the press or by a private individual in a posted content. And he submits that that was particularly important in the present case because it linked to the nature of the harassment alleged against him and the position as to alleged "distress" on the part of the complainant.

12. The Claimant accepts that the evidence on which he wished to rely, in order to seek to demonstrate the truthfulness of what he posted, was not evidence before the magistrates' court at his trial, which meant that the truthfulness of the posts "could not be tested". As he put it in his Grounds of Renewal: "the court also lost my evidence proving the posts were true" and "therefore the content could not be tested". As to that inability to test truthfulness of the content of the posts, he makes two points in particular. The first is that it was the magistrates' court's fault that that evidence was not available, to test the truthfulness of the content. He says the magistrates' court had "lost" the evidence which he had submitted to it on 4 June 2021, and that this was the reason evidence was not available at the trial on 29 June 2021. The second point is that he says that, in any event, the onus is on the prosecution. The CPS had to prove the commission of the crime and to the criminal standard. So, it was necessary for the prosecution to identify a flaw in the content of the posts, which in the present case involved grappling with the issue of their "truth".

13. In my judgment, there is no arguable "question of law" arising in this case, as a proper basis for the grant of permission for judicial review, or which undermines as unlawful or unreasonable or unfair – even arguably – the refusal to state a case. So far as what the magistrates' approach was, as the District Judge's reasoned refusal to state a case confirms:

> ***The applicant's case was that the matters referred to were true and posted by him in the exercise of his free speech. The applicant wanted the court to embark on an enquiry as to the truth of the allegation but adduced no evidence to enable the court to do so. As such the court declined to engage in such an enquiry and proceeded to determine the matter in issue on the basis of the evidence presented.***

14. The Claimant has confirmed to me that he had retained copies of the evidence which he says was relevant to the question of truthfulness. If it was the case that that evidence had been provided to the magistrates' court on 4 June 2021, that the Claimant still had his copies of that evidence in his possession, and that he was intending to rely on that evidence at the trial, it follows that he would have had that evidence with him at the trial. I am not, of course, making findings of fact. I am simply stating the obvious. Had it been the position that there was evidence, which the Claimant was saying that he had adduced by filing it in the magistrates' court on 4 June 2021, in readiness for reliance at the trial, and that he had that evidence available and with him at his trial, then he would have been able to raise that with the magistrates' court. He would be in a position to seek to adduce that evidence. It is possible that the question of adjournment might then have arisen. And if an adjournment, in such circumstances, had been refused, then it is possible that issues would have arisen out of that refusal.

15. As the CPS points out in its summary grounds of resistance, the District Judge's "decision not to embark upon an exploration of the truthfulness of the blog posts was reasonable in light of the absence of evidence in connection with this point" and the fact that the magistrates' court "did not need to resolve the truthfulness or otherwise of the conduct said to constitute harassment in order to determine whether the Claimant was guilty of the offence". So far as the latter point is concerned, the CPS in its summary grounds of resistance submits as follows: that irrespective of whether the blog posts were in fact true, the truthfulness of the material is not as a matter of law defence to the offence of harassment. In support it cites the Trimingham case and Sube v News Group Newspapers [2020] EWHC 1125 (QB). The Claimant has had ample opportunity to seek to provide any authority which undermines that submission. In my judgment, there is no reasonable argument presented to the Court as to why the "truthfulness" would need, either in principle, or in the present case, to be a precondition to a conviction. Nothing that I have seen, from the structure of the statutory scheme in the Protection from Harassment Act 1997, supports a conclusion in those terms. The questions which the magistrates' court had to decide were questions of fact arising from the statutory scheme, including any question arising from a section 1(3)(c) 'reasonable course of conduct' defence to the charge of harassment (and I emphasise that that provision is identifying a "defence"). In the Sube case (which is provided in the bundle for the Court) at §66 Warby J discusses harassment by "publication" and said this, in a part of the judgment relating to harassment, in which both Thomas and Trimingham are subsequently cited: "much harassment does involve the persistent publication of embarrassing or otherwise unwelcome statements, true or false, on the Internet or on social media".

16. I am quite satisfied and in the present case the issues that arose while the case-specific in fact-specific. There is no arguable question of law, still less engaging the public interest, such as would warrant a judicial review or (through a judicial review of the refusal of a case stated) would justify an appeal by case stated. I reach that conclusion, recognising that cases concerned with communications and freedom of expression can raise questions of law justifying coming direct from the magistrate to the High Court. A good example of that (in the bundle for this hearing) is Scottow v Crown Prosecution Service [2020] EWHC 3421 (Admin), which involved various errors of law in the approach of the magistrates in a case in which the prosecution had proceeded pursuant to the Malicious Communications Act 1988. Linked to all of this is the important and indeed, in my judgment, central feature of this case. That is that the Claimant had an entitlement, if he had wished to pursue it, to appeal by way of rehearing to the crown court. I have already referenced the occasions on which that was pointed out to him.

Other points

17. All of the other matters in the case, in my judgment, clearly fall within the umbrella of being questions of fact and evidence which would not be appropriate for judicial review. That is on two bases. The first is that they do not constitute an arguable public law error. Judicial review is not a "merits" forum in which the substance and evidence are re-evaluated afresh, by way of a rehearing. The second is that there is the alternative remedy route which I have already emphasised, which provides precisely such a forum.

Particulars

18. Two features of the case have been emphasised in particular, in submissions today by the Claimant. The first relates to the particulars given in the information which was laid against him in the magistrates' court on which he was convicted. A number of points have been made in writing and orally in relation to those particulars, the relevant timeframe, and the particular "course of conduct" identified in the four posts with their dates that are described in that information. The CPS has made the points that the evidence that was before the magistrates, read together with the particulars "illustrative" and "non-exhaustive" as they were, provided clarity so that the Claimant knew the case he was facing; that it was evident that he had grasped the issues; that the prosecution served all the evidence on which they were relying; and that the question is whether there was any "prejudice" arising from any defect in the way that the case was particularised.

19. The answer to all of these points, in my judgment, is that the "merits" remedy of an appeal in the crown court enabled the Claimant to have all of the issues considered by a court that would have been a "rehearing". The Claimant would have been able to make all and any arguments in the crown court about the way in which the case was presented, and all in any arguments about the nature of the incidents in the evidence and referenced in the particulars. It would be open to the crown court at an appeal by rehearing to reconsider any issue that arose as to the nature of the particulars. To take an example again in the (many) authorities that have been provided to the Court for this hearing, that is what had happened is the case of Ceredigion County Council v Robinson [2020] EWHC 3425 (Admin). That case has been put in the bundle because it deals with questions relating to particulars in a criminal prosecution. But it is a case which is helpful for another reason, in my judgment. That is that it illustrates a case, raising such considerations, that had gone on appeal from the magistrates to the crown court. It is also a case (see §18) which emphasises that the question which arises in relation to particulars is whether there was "prejudice" to the defendant.

Emails

20. The remaining point that was emphasised in submissions today concerns emails. The information which was laid against the Claimant related to postings on social media (ie. publication). The references throughout by the CPS referred to the case against the Claimant as having been based on such postings. The Claimant tells me that there were emails in the background and run up to the trial. His point relating to emails is that the District Judge, in refusing to state a case, has included reference to the "prosecution case" being that the Claimant "pursued a coordinated and pre-planned course of conduct to harass the complainant by sending emails to third parties and making posts on social media which were intended to impugn the character of the complainant". The Claimant's case is that, as a result of those reasons, there are concerns as to whether in fact his conviction was based on materials – emails – that were not properly before the magistrates' court and were not properly part of the prosecution case before the magistrates' court. The first thing in my judgment that is noticeable is that the very next paragraph of the District Judge's reasoned refusal to state a case focuses specifically on "posting". Having said that, the Claimant fairly points out that there is later in the refusal reasons another reference to "emails and social media posts". The point is also fairly made by him that the magistrates' court has not, for its part, responded to the hint given by the Judge on the papers, that it would be helpful to have any "note" of the magistrates' "reasons for conviction". Nor has such a note been provided by the CPS.

Indeed, the CPS in its summary grounds has, in fairness to the Claimant, said that it is accepted that it is "unclear whether emails were adduced at trial".

21. As the CPS puts it in its summary grounds: "It is submitted that even if this was an error in the District Judge's written reasons [ie. the reasons for refusing to state a case], this does not give rise to a proper ground for judicial review. There was a clear evidential basis for the conviction solely in relation to the blog posts, something which appears to be conceded by the Claimant in his grounds of renewal". The CPS goes on later to say that in relation to emails "the Crown's case was that the social media posts as particularised in the charge constituted the harassment but that there was a background of messages and emails being sent", which background was "relevant to the issues", but that "it is clear that the District Judge determined the issues on the basis of evidence adduced during the trial", and that "the reference to emails does not substantiate any procedural impropriety, irrationality or other unfairness".

22. I agree with those submissions. In my judgment, those references to "emails" by the District Judge in the refusal to state a case do not, of themselves, constitute a viable ground for judicial review either of the conviction and sentence, or of the refusal to state a case for an appeal to this Court. But, putting all of that to one side I return, in this context, to the alternative remedy. This is a case in which the Claimant had the untrammelled entitlement to ask the crown court at a rehearing to consider the evidence afresh. That, in my judgment, gave him a full and complete remedy in relation to any grievance that he felt that he had in relation to the evidence on which he had been convicted in the magistrates' court. By contrast, this Court's judicial review jurisdiction is restricted to arguable public law grounds, and appeal by case stated is restricted to questions of law or jurisdiction.

Possible extension of time for an appeal to the crown court

23. The Claimant, candidly, told me today that he is concerned that he would now be out of time if he tried to exercise, belatedly, his entitlement to have the crown court reconsider his case by way of an appeal. That question is not a question for this Court. If the Claimant made an application for an extension of time for an appeal to the crown court, that would need to be considered by the crown court. And the crown court would consider it on the basis of the material which is put before that court.

24. Having said that, it would however, in my judgment, be appropriate if I were to assist that court, and the Claimant and the CPS, to the extent simply of identifying some features of this case that the crown court may consider relevant, if the Claimant were belatedly to seek to exercise his right of appeal against conviction and sentence.

    i) The first point relates to the passage of time that the court took in dealing with the Claimant's application to state a case. As I explained at the start of this judgment, it has been recorded in a reasoned decision of the magistrates' court that the Claimant was blameless so far as that protracted delay is concerned. It is an irony that the reason for that delay was that the papers were evidently treated within the court as being the "appeal to the crown court" which I have found is indeed the Claimant's alternative remedy.

ii) The second feature to record is that it is clear that this is a case in which, rightly or wrongly (and I have held wrongly), the Claimant has been pursuing an alternative avenue in seeking to impugn and challenge his conviction.

iii) The third point which it is worth recording is that any issues which do cause concern, referable to the magistrates' court's reference to conviction being in part based on "emails", is only a matter that has come to light in this case by virtue of the reasoned refusal to state a case, dated 5 January 2022. If and insofar as that is a feature which plays into the consideration of whether it be just to allow an appeal by way of rehearing now to be pursued, it should be recognised that that has only come to light relatively recently.

iv) The fourth point is that this is a situation in which, so far as I can tell, on the face of it, there is as yet no note of the magistrates' reasons for the conviction.

v) The fifth and final point is that the CPS in summary grounds dated very recently (30 March 2022) have taken the position before the High Court that the proper avenue in this case to challenge conviction was appeal by way of rehearing which is "an alternative remedy that was, and remains, available". Those summary grounds go on to say: "The remains an alternative remedy, namely an appeal against conviction to the crown court (with an extension of time, see Crim PR rule 34.2)."

25. It would be right for the crown court, in considering any application for an extension of time, at least to be aware of those features, including the position that the CPS has taken before the High Court. But, I repeat: none of those observations involve this Court embarking on consideration of whether an extension of time for an appeal to the crown court is or is not appropriate in this case. Moreover, as will be obvious, this Court only has the visibility about this case that it has been given, based on what it has been told and shown. There may be other features of this case, of which I am unaware, about which the crown court would be made aware.

Conclusion

26. For the reasons that I have given, and having allowed the Claimant to address me in the circumstances that I described at the start of this judgment – since I can see no viable or properly arguable ground for judicial review, including when regard is had to alternative remedies – I refuse the renewed application for permission for judicial review. There will be no order as to costs.

7.4.22