



Neutral Citation Number: [2024] EWHC 1885 (Admin)

Case No: AC-2024-LON-000445

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2024

Before :

LORD JUSTICE EDIS
MR JUSTICE HILLIARD

Between :

DIRECTOR OF PUBLIC PROSECUTIONS

Claimant

- and -

LEWES CROWN COURT

Defendant

- and -

FELIX ERIC REILLY

Interested Party

Tom Little KC (instructed by The Crown Prosecution Service Appeals and Review Unit)
for the Claimant

Hearing date: 16 July 2024

JUDGMENT

**This Judgment is approved by the court
for handing down
(subject to editorial corrections)**

Lord Justice Edis:

Introduction

1. This is a claim for judicial review of a decision of His Honour Judge Mooney, “the judge”, on 14 December 2023. The issue is whether there is a custody time limit which governs the period following the remission to the magistrates’ court of a case from the Crown Court under section 46ZA of the Senior Courts Act 1981, and, if so, what that limit is. The judge held that the time limit is that which applies in the magistrates’ court (70 days) but that the time spent while in custody to the Crown Court before remission was to be taken into account in determining whether that limit has expired. He continued:-

“That simply means this, that if the custody time limit applicable to Mr. Reilly is one of 70 days and he has served 73 days and there has been no application for the custody time limit to be extended, he must be released on bail and that is the decision I reach.”

2. Although there was an error in the magistrates’ court who treated the operative custody time limit as 56 days, the judge was right to hold that it was actually 70 days. The calculation by counsel who then appeared for the prosecution of the time served to date as 73 days was wrong, but was adopted by the judge. It was in fact 81 days of which 22 days had been spent in the custody of the magistrates’ court and the rest in the custody of the Crown Court. The custody time limit had never been extended, but unless the time spent in the custody of the Crown Court was to be taken into account it had not expired.
3. The claimant, the DPP, submits:-
 - i) That the judge had no jurisdiction to determine the issue in a case which had been remitted to the magistrates’ court and was no longer before the Crown Court except for the limited purpose of an appeal by the interested party, Mr. Reilly, against a refusal to grant bail by the magistrates.
 - ii) When the Crown Court remits a defendant to a magistrates’ court pursuant to section 46ZA the custody time limit becomes 70 days, rather than the Crown Court limit which is 182 days, but the time spent in the custody of the Crown Court is not taken into account when calculating the expiry date of that limit.
4. The Interested Party has not appeared or made any representations and the Crown Court, as is appropriate, has taken no part in these proceedings.

The history of the proceedings

5. There is no need to set out any of the facts of the case. The point is one of law. A short explanation of what has happened in the proceedings may illustrate how the problem has arisen.
6. On 31 July 2023 Mr Reilly appeared before the magistrates’ court charged with an either way offence (breaching the notification requirements imposed by the Sexual Offences Act 2003). It was his first appearance on this charge. The plea before venue

procedure resulted in him indicating that he would plead not guilty if the offence were to proceed to trial and he elected trial by jury. His case was sent to the Crown Court and he was remanded in custody. The custody time limit was 182 days and expired on 29 January 2024.

7. On 28 September 2023 the Crown Court remitted the case to the magistrates' court under section 46ZA(1). This requires the consent of the person concerned, see section 46ZA(3)(b). In effect, Mr. Reilly withdrew his election. He was granted conditional bail. By our calculation he had been in custody for 59 days.
8. On 22 November 2023 Mr. Reilly was before the magistrates' court because it was alleged he had breached a condition of his bail and was remanded in custody.
9. On 14 December 2023 the judge heard an appeal against the refusal of bail and held that the custody time limit had expired because it was 70 days and the time spent in custody to the Crown Court was to be taken into account. It is not clear from the information either in the hearing bundle or in the Digital Case System exactly what had brought the case to the Crown Court. It is referred to as an "appeal" in the statement of Mr. Nigel Gibbs, the Crown Prosecution Service lawyer, in his witness statement. The judge described it as a "bail application". At this point the case was within the jurisdiction of the magistrates' court and the only jurisdiction the Crown Court had related to bail following refusal by the magistrates, or on appeal by the prosecution against a decision to grant bail.
10. On 2 January 2024 the judge decided that he had been correct in his earlier decision.

The statutory context

11. Section 46ZA makes no reference to custody time limits, and no amendments to any of the primary or secondary legislation in this area were made to deal with the question expressly when it came into force in April 2022.
12. The power to make regulations specifying time limits is contained in section 22 of the Prosecution of Offences Act 1985, "the 1985 Act". This provides:-

22 Power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings.

(1) The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period—

- (a) to be allowed to the prosecution to complete that stage;
- (b) during which the accused may, while awaiting completion of that stage, be—
 - (i) in the custody of a magistrates' court; or
 - (ii) in the custody of the Crown Court;

in relation to that offence.

13. 'Preliminary stage' is defined in section 22(11) of the 1985 Act as not including any stage after the start of trial.
14. Section 22(11) also defines "custody of a magistrates court" as "custody to which a person is committed in pursuance of section 128 of the Magistrates' Courts Act 1980 (remand)". This is the statutory power of the magistrates' court to remand on bail or in custody.
15. The Prosecution of Offences (Custody Time Limits) Regulations 1987, "the Regulations", have been amended on a number of occasions, but not amended to deal with section 46ZA. So far as relevant, they provide as follows:-

Custody time limits in magistrates' courts

4.....

(2) Except as provided in paragraph (3) below, in the case of an offence triable either way the maximum period of custody between the accused's first appearance and the start of summary trial or, as the case may be, the time when the court decides whether or not to commit the accused to the Crown Court for trial shall be 70 days.

(3) In the case of an offence triable either way if, before the expiry of 56 days following the day of the accused's first appearance, the court decides to proceed to summary trial in pursuance of sections 19 to 24 of the 1980 Act the maximum period of custody between the accused's first appearance and the start of the summary trial shall be 56 days.

Custody time limits in the Crown Court

5.....

(6B) Where an accused is sent for trial..., the maximum period of custody between the accused being sent to the Crown Court by a magistrates' court for an offence and the start of the trial in relation to it, shall be 182 days less any period, or the aggregate of any periods, during which the accused has, since that first appearance for the offence, been in the custody of the magistrates' court.

The submissions

16. **Ground 1 – The Crown Court Judge had no *vires* to determine the applicable CTL**

Mr. Little KC submits that Mr. Reilly's case was remitted for trial on bail to the magistrates' court on 28th September 2023. Thereafter, he says, the Crown Court was *functus officio* in respect of the custody time limits for that case. It follows that there was simply no jurisdiction for His Honour Judge Mooney to determine and rule upon the applicable custody time limit that applied to proceedings in the magistrates' court. At no stage did the judge say that he was acting as a District Judge in the magistrates' court to determine this issue on either 14th December 2023 or 2nd January 2024. That power arises under section 66 of the Courts Act 2003. The prosecution contends that

the judge had the power to consider the bail appeal on its merits but his decision to determine the applicable custody time limit was in the circumstances unlawful.

17. **Ground 2 – The Judge’s approach to the calculation of the CTL was wrong in law**
18. Mr. Little accepts that the 1985 Act and the Regulations are silent as to the effect of a remission under section 46ZA on the applicable custody time limit. He then identifies four possible options for this court in answering the question posed.
 - i) There is no custody time limit which applies to the period in custody following remission. Custody limits are a creature of statute, and the power to make regulations extends only to making provision for any specified preliminary stage of proceedings. The period post remission under section 46ZA is not specified in the Regulations.
 - ii) That the custody time limit is 70 days and that includes the total time spent in the custody of both the magistrates’ court and the Crown Court before the section 46ZA remission. This is what the judge decided.
 - iii) That the section 51 sending custody time limit of 182 days applies because it is extant at the time of the remission to the magistrates’ court and there is no provision which provides that it ceases to apply. Regulation 6B deals with this situation and should be read as applying to the period between sending and trial in the Crown Court, although the Regulation simply provides for the period between sending and “trial” without making it clear whether it includes summary trial or not.
 - iv) That the custody time limit is 70 days and the time spent in the custody of the Crown Court does not count against that period. This is the approach recommended in a document published by the Justices Clerks’ Society which was placed before us, and which was also supplied to the judge. Mr. Gibbs says that the CPS internal guidance is to the like effect.
19. Mr. Little submitted that options (i) and (ii) had nothing to commend them, and that the real choice was between options (iii) and (iv). He submitted that the correct outcome of that choice should be option (iv).

The judge’s decision

20. The judge did not rule specifically on the extent of his jurisdiction on 14 December 2023. He heard argument only from the prosecution and there was no clear objection to the jurisdiction of the Crown Court to determine whether or not the custody time limit had expired in a case which was before the magistrates’ court. He did return to it on a subsequent hearing when the prosecution was represented by different counsel on 2 January 2024. That hearing took place because the prosecution wished to contend that the judge had erred on 14 December in holding that the custody time limit had expired. It also wished to resist the making of a wasted costs order in relation to another hearing. The written note lodged by the prosecution which caused the hearing to be listed did not challenge the jurisdiction of the judge to determine the question. On the contrary it asked the court to determine the issue afresh but with a

different outcome. It is inherent in such a submission that the party making it accepts that the court has jurisdiction to decide whether to accept it or not. The judge dealt with the jurisdiction issue when he gave judgment. He said:-

“I say in passing that towards the end of his submissions, Mr. Imri made passing reference to the fact that I may not have had jurisdiction to make the order. I suspect that that’s something that developed organically during his argument to me, but it is the sort of argument which requires a far more detailed degree of scrutiny than a simple throwaway comment at the end of otherwise helpful submissions and I disregard it.”

21. On the substance of the question, whether the custody time limit had expired by 14 December 2023 or not, the judge gave reasons both on 14 December and on 2 January. The decision was the same on both occasions, but the reasons reflected the fact that the question was argued more fully on the second occasion. The actual decision was made on 14 December in circumstances which were, from the point of view of the judge, far from ideal. Counsel for the prosecution had been instructed only recently and there was only limited time available. Having made that decision, with or without jurisdiction, the basis on which the judge was then invited to make a different decision on the same issue is not clear to me. He either had no jurisdiction, in which case he had no business deciding it on 2 January, or he did, in which case he was *functus officio*. At all events, the decision which we are reviewing is a pure matter of law on which this court will decide, and the judge’s approach is either right or wrong, however it was reasoned.

Discussion and decision

22. The first question which we should clarify is that the custody time limit applicable in the magistrates’ court for these proceedings is that stipulated by Regulation 4(2), namely 70 days. That applies to either way cases “except as provided in paragraph (3) below”. Paragraph 4(3) is set out above and provides a shorter time limit of 56 days only where the court has decided to proceed to summary trial in pursuance of sections 19-24 of the Magistrates Courts Act 1980. No such decision was ever taken in this case and so the limit is that provided by paragraph 4(2). We understand that there is a custody time limit calculator in use which suggests otherwise. That must be corrected.

The jurisdiction issue: Ground 1

23. I consider that it would be very unsatisfactory to decide this application on the first issue. It is not straightforward, and was not properly placed before the judge. It is trite law that a challenge to the jurisdiction of a court ought to be made in clear terms and at an early stage. If it had been made in that way it is highly likely that the judge would have resolved any possible difficulty by sitting as a District Judge (Magistrates Court) under section 66 of the Courts Act 2003. Indeed, if properly addressing the question, the prosecution would have invited him to do that, given the position which they now take. Having failed to do so, this court should not now entertain its application to quash the order the judge made for want of jurisdiction.
24. The reasons why I say it is not straightforward are:-

- i) It is not self-evident that the Crown Court, hearing a bail application or appeal following a refusal of bail by the magistrates' court, has no jurisdiction to decide whether the custody time limit has expired without having been extended. The custody time limit question is very closely connected to the bail question and it is not obvious why the Crown Court should be entitled to deal with one but not the other.
 - ii) For my part, I would be reluctant to quash a decision on the basis that the judge lacked power to make it when in fact he did not lack that power. He did not say what power he was exercising, but if he had declared himself to be acting under section 66 of the Courts Act then the point would not arise. Does a failure to specify the power being exercised deprive a court of a jurisdiction which the law confers?
25. Given, as we shall discover, that the DPP succeeds on Ground 2 in any event, it is not necessary to grapple with these questions. Mr. Little has sought to assist us by alerting us to arguments which might be made against his position, but it would be easier and more satisfactory to determine them on hearing argument from more than one party.
26. Accordingly, we will deal with Ground 2 on its merits on the assumption that the judge had jurisdiction to deal with it, without deciding whether he did or not.

Ground 2: the custody time limit following section 46ZA remission

Option 1: No CTL for post-remission period

27. I would reject the suggestion that the effect of the absence of express words specifying the period post remission of the case under section 46ZA is that there is no custody time limit for that period. The clear intention of the 1985 Act and the Regulations is that all time spent in custody awaiting trial should be subject to a custody limit, and the words of the 1985 Act and the Regulations should be construed, so far as possible, to achieve that intention.
28. It is possible to construe both Regulation 4(2) and Regulation 5(6B) so they provide for a (different) custody time limit for the period under consideration. The task for the court is to decide which of those constructions is to be preferred. Once that has been achieved, then it is possible to say that the Regulations do provide a custody time limit for the period after remission, which is therefore part of a "specified preliminary stage of the proceedings" and the Regulations are within the scope of the power conferring provision in section 22(1) of the Act.

Option 2: the judge's solution

29. We agree with Mr. Little that the approach taken by the judge cannot be supported. There is nothing in the Regulations which requires or allows the time spent in the custody of the Crown Court to count towards the custody time limit in relation to the time spent in the custody of the magistrates' court.
30. The regime is clearly based on the premise that the accused is either in the custody of the magistrates' court or in the custody of the Crown Court. Regulation 4 deals with

the former and Regulation 5 the latter. There is only one provision which addresses how the period is calculated when the accused has been in the custody of both the magistrates' court and the Crown Court, and that is Regulation 5(6B), set out above at [15]. That provides that where an accused is sent for trial the custody limit is 182 days less any time spent in the custody of the magistrates' court. There is no warrant for construing Regulation 4(2) as if it contained the words necessary to produce the result which the judge preferred.

31. The remission of a case under section 46ZA requires the consent of the accused, who can suggest that it should happen. If it happens after the accused has spent 70 days in the custody of the Crown Court the judge's approach would mean that the custody time limit had expired at a time when the Crown Court time limit has not expired. It would follow that when the case is remitted back to them, the magistrates have no jurisdiction to extend the time limit for proceedings in their court because the time limit had expired at a time when they had no jurisdiction to extend it, nor any idea that this might be necessary. This would not be a sensible construction and, as I have said, there are no words in these provisions which require it.

Options 3 and 4

32. I take these together because they are tenable alternatives, and the task of the court is to identify which of them is the correct construction. They cannot both be right.
33. Regulation 5(6B) would provide a solution if the word "trial" was read to include both trial on indictment and summary trial. That is a natural reading of the word "trial".
34. The plain words of Regulation 4(2) apply a limit which includes all time spent in the custody of the magistrates' court between first appearance and the start of summary trial. They do not provide for any time spent in the custody of the Crown Court to count against that time limit, in contrast to the way in which Regulation 5(6B) deals with the opposite situation. The clear meaning is that all time spent in custody following a remand by the magistrates exercising their power under section 128 of the Magistrates' Courts Act 1980 between the first appearance and the start of the summary trial is to be aggregated for the purposes of determining when the 70 day limit expires.
35. I consider that the provision which governs the custody time limit in proceedings which have been remitted to the magistrates' court by the Crown Court under section 46ZA is Regulation 4(2) construed in the way I have just explained. The construction of Regulation 5(6B) suggested in paragraph [33] is less natural and also fits less well with the statutory purpose which reflects the fact that summary trials take less long to prepare and should come on more quickly than trials on indictment. It is not reasonable to hold people in custody for the longer Crown Court limit and the Regulations should not be so construed. A technical point of construction is sufficient to achieve this result. The word "trial" is used twice in Regulation 5(6B) and it clearly means the trial on indictment in the Crown Court where it first appears. The word should be construed so that it means the same thing in both places, unless there is some good reason to attribute different meanings to the uses of the same word in the same provision. The rule is well stated in *Bennion, Bailey and Norbury on Statutory Construction*, 8th Edition at 21.2 on page 635. In this case there is no such reason.

36. Moreover, on both occasions the word “trial” is unqualified, but where the Regulations intend to refer to summary trial, they do so by the use of that two-word phrase, see Regulation 4(2) at [15] above as an example.
37. For these reasons, in my judgment Regulation 5(6B) is to be construed so that it only applies to the period of time when the accused is awaiting trial on indictment in the Crown Court.
38. It may be thought that this result exposes an accused person to a risk that they may be detained for much longer than the Regulations permit, without any need for an extension of any time limit by the court. They may be sent to the Crown Court for trial on the first appearance in the magistrates' court, and then held in the custody of the Crown Court for 182 days. If they are remitted for summary trial at or near the end of that period they will be liable to be further detained for 70 days. The answer to that is, first, that remission under section 46ZA can only occur with the consent of the accused person. Secondly, the Crown Court when remitting the case can consider bail under section 46ZA(6), and the magistrates' court would also be able to entertain a bail application. The power under section 46ZA(6) only allows the Crown Court to give directions about bail or custody “until the accused can appear or be brought before the magistrates' court”. In many cases, but not necessarily all, remission to the magistrates' court will take place where the Crown Court considers that the sentencing powers of that court are adequate to deal with the case. A bail application made at a time when a person has served the time which would have to be served prior to release (currently half of the sentence) would have considerable force. This factor, combined with remission from the Crown Court, is very likely to amount to a change of circumstances enabling an application to be made and heard.

Conclusion

39. For these reasons I would allow this claim and quash the decision of the judge that the custody time limit had expired as at the 14 December 2023.
40. There is no need for any further order because the case against Mr. Reilly has now, we are told, concluded in the magistrates' court.

Mr. Justice Hilliard

41. I agree.