



Neutral Citation Number: [2021] EWHC 2869 (Admin)

Case No: CO/3549/2020

**IN THE HIGH COURT OF JUSTICE**  
**MANCHESTER DISTRICT REGISTRY**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Date: 27 October 2021

**Before:**

**LORD JUSTICE STUART-SMITH**  
**MRS JUSTICE MAY DBE**

sitting remotely at Manchester Civil Justice Centre  
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**Between:**

**THE QUEEN (ON THE APPLICATION OF THE  
CHIEF CONSTABLE OF LANCASHIRE  
CONSTABULARY)**

**Claimant**

**- and -**

**THE CROWN COURT SITTING AT PRESTON**

**Defendant**

**- and -**

**MR KENNETH MALIN**

**Interested Party**

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**Peter Sigeo** (instructed by **Lancashire Constabulary Legal Services Department**) for the  
**Claimant**

**James Fraczyk** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 19 October 2021  
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**Approved Judgment**

**Stuart-Smith LJ:**

1. This is the judgment of the Court.
2. The Claimant [“the Chief Constable”] brings Judicial Review proceedings against the Crown Court sitting at Preston [“the Crown Court”] with leave. The proceedings were issued on 2 October 2020. The decision to be reviewed is stated in the claim form to be “the decision of the Crown Court of the 10<sup>th</sup> December 2019 to extend time for service of the Notice of Appeal and/or allow the Appeal out of time and thereafter refusal to state case.” Confusingly, in the light of that description, the date of the decision to be judicially reviewed is said to be the “Refusal to state case on 3<sup>rd</sup> July 2020”. That is not the least confusing aspect of the background to this case; but it may reflect a recognition that an attempt to judicially review any decision taken more than three months before 2 October 2020 is time barred.
3. The Grounds of Judicial Review identify the following three issues:
  - i) Whether the Chief Constable has been denied the right to a fair hearing in respect of an Appeal which is presently before the Crown Court;
  - ii) Whether the Crown Court has acted contrary to a legitimate expectation that certain matters within the Appeal would be the subject of full argument and adjudicated upon by the Crown Court as preliminary issues;
  - iii) Whether the Crown Court's conduct of the Appeal to date has been procedurally unfair.
4. The first two of these issues appear naturally to relate to the impugned decision of the Crown Court on 10 December 2019. The third is more diffuse but could relate, at least in part, to the impugned decision of the Crown Court on 3 July 2020 not to state a case.

**The factual background**

5. The main thrust of the Chief Constable’s complaint is that, on an intended appeal from a decision of the Magistrates Court on 31 October 2019, the Interested Party issued his notice of appeal late but was allowed to proceed by the decision of the Crown Court on 10 December 2019. The Chief Constable asserts that there was no good or sufficient reason for the Crown Court to make the order it did. To make matters worse, and despite frequent requests, the Crown Court did not provide a formal copy of the decision to the parties and did not give reasons when asked to do so. Finally, when asked to do so the Crown Court refused to state a case.
6. The facts emerge from the documents and are not contentious.
7. At all material times the Interested Party was the founder and sole director of a company called Tower Trading Limited [“Tower Trading”]. The Interested Party opened a bank account for Tower Trading with Barclays Bank. In June 2017 the Chief Constable was notified of unusual activity on the Tower Trading account. After various other steps had been taken there was a contested two-day hearing at which the Interested Party was represented. At the end of the hearing the Magistrates Court made an order pursuant to

section 303Z14(2) of the Proceeds of Crime Act 2002 [“POCA”] forfeiting the sum of just over £250,000 which was the amount then standing in Tower Trading’s account.

8. S. 303Z16(1) of POCA provides a right of appeal to the Crown Court against such a forfeiture order. On 29 November 2019 the Interested Party sent by email to the Clerk of the Magistrates Court a document that was a form of appeal against the order of the Magistrates. This slightly elliptical description is because the Interested Party did not use the normal form for appealing against such a forfeiture order and questions have been raised about its adequacy for the task in hand, which we do not have to resolve. The date on which the appeal was sent to the Magistrates’ Court is also significant because s. 303Z16(2) provides that an appeal “must be made before the end of 30 days starting with the day on which the Court makes the order or decision.” 29 November 2019 was therefore the last day for making the appeal. Rule 7 of the Crown Court Rules provides that an appeal from the Magistrates Court shall be commenced “by the appellant’s giving notice of appeal ... in writing and ... to the designated officer for the magistrates’ court ... [and] ... to any other party to the appeal.” No notice was given to the Chief Constable as the other party to the appeal until 19 December 2019.
9. CCR Rule 7(5) provides for the Crown Court to extend the time for giving notice of appeal either before or after time has expired on an application being made to it. In this case, the Notice of Appeal stated “n/a” at the point where any application for an extension should be made. So far as we are aware, no application for an extension of time has yet been made to the Crown Court pursuant to CCR Rule 7(5) by the Interested Party.
10. It is therefore the Chief Constable’s case that the appeal was commenced out of time and that no application to extend time has been made. It is also his case that the appeal documents do not comply with the requirement of CCR Rule 7(4) that they should state the grounds of appeal. What was done was to annexe to the notice of appeal a copy of Counsel’s advice on appeal. In briefest outline, the advice of Counsel was that, if the evidence was as before the Magistrates Court, the Interested Party’s prospects of success were weak and Counsel advised against an appeal on that basis. However, if further supportive evidence were forthcoming, the prospects could improve. Apart from the most general implication that the Interested Party wanted to overturn the order of the Magistrates’ Court, no further explanation or grounds for an appeal appear from the Notice of Appeal. Although there is reference to evidence from a witness called Mr McRodden, no statement has yet been served from him.
11. On 10 December 2019, the Crown Court sent a letter to Tower Trading, the full text of which was:

**“RE Application for leave to appeal out of time -1900502409**

Your request for leave to appeal against the decision of Preston Magistrates Court on the 31st October 2019 has been granted by HHJ Lunt on the 10th December 2019.

The matter will be listed before the court in due course.”

12. This letter has variously been described as communicating an order or direction of HHJ Lunt on that day. Any such direction or order was made without hearing the parties

and without an application for an extension of time being made by the Interested Party. On 10 December 2019 the Chief Constable was informed by the Crown Court that the appeal had been lodged; but the Chief Constable was not served with a copy of the letter that had been sent to Tower Trading until 11 June 2020.

13. On 20 December 2019, HHJ Jefferies QC made an interim order after a hearing attended by the parties. We are told by Counsel for the Chief Constable that the Judge told the parties that HHJ Lunt had made an order on 10 December 2019 but that he did not announce the precise terms of the order. This was the first that the Chief Constable knew of such an order being made. The Chief Constable submitted that the Crown Court should decline to hear the appeal because it had not been properly commenced in time and that, if the Crown Court had made an order extending time *ex parte* then the order was *ultra vires* and should be set aside by the Crown Court. In the face of that submission, HHJ Jefferies QC gave various interim directions including that, by 7 February 2020, the Chief Constable should “serve submissions that the granting of permission to appeal out of time by HHJ Lunt on 10 December 2019 was “*ultra vires*””; and that, by 3 March 2020, the Interested Party should respond to the Chief Constable’s submissions. The Judge directed that there should then be a one day hearing of that and other preliminary issues on 19 March 2020 and a provisional 2-3 day hearing commencing on 20 May for the trial of the issues if the case was to proceed to appeal.
14. In compliance with the interim directions, the Chief Constable submitted a skeleton argument which submitted that any order extending time was *ultra vires* and should be set aside by the Crown Court. On 2 March 2020 the Interested Party responded, submitting that the appeal had been served within time and that HHJ Lunt had given leave to appeal on 10 December 2019. The Chief Constable served evidence, an opening note and a bundle of correspondence in relation to the issue and maintained that the appeal had not been served on the Chief Constable within the 30 day period and that any Order made by HHJ Lunt was *ultra vires*.
15. On 19 March 2020 the case was listed before HHJ Lunt, but Covid intervened. The Interested Party was self-isolating because of his age and vulnerability and could not attend, though Counsel attended on his behalf. The Court adjourned the hearing of the preliminary issue to 22 May 2020 and directed the Interested Party to file and serve a further skeleton in response to the matters raised by the Chief Constable. The Judge indicated that she would not be available to hear the case on 22 May 2020 so that another date would be needed if it was essential for the issues to be heard by her. She also indicated that, in the extraordinary circumstances of the pandemic, she was content for the parties’ Counsel to email her directly in relation to the appeal while Covid restrictions continued to affect the Court. It is plain that, as matters stood at the end of the hearing on 19 March 2020, the structure put in place by HHJ Jefferies QC remained in place, namely that the question of extending time for service of the appeal should be dealt with as a preliminary issue, and that the hearing of the preliminary issue was now to be on 22 May 2020.
16. On 9 April 2020 the Chief Constable asked the Crown Court to provide a copy of the Order made at the commencement of the appeal, submitted that the Court had jurisdiction to alter its order before it had been sealed, and asked the Court to hear submissions on whether it had jurisdiction to review or change its decision and to provide a sealed order (which had not yet been done).

17. On 21 April 2020 Mr Malin's Counsel told the Crown Court that neither Mr Malin nor the Chief Constable could make further submissions without a copy of the Court's Order which was the subject of the letter of 10 December 2019.
18. On 4 May 2020, by which time no substantive reply had been received to the parties' communications of 9 and 21 April 2020, the Chief Constable, by email to the Crown Court, invited the Court to give further directions for the hearing of the preliminary issues and asked the Court to provide a copy of "the Order that the Court made in December 2019". In context this was a request for the order extending time.
19. On 15 May 2020 the hearing on 22 May 2020 was vacated and adjourned to a date to be fixed. Instead of a copy of the order/direction of HHJ Lunt, the Crown Court sent a copy of the order of HHJ Jefferies QC made on 20 December 2019. The Chief Constable's Counsel responded within 15 minutes and asked the Crown Court to provide a copy of the December 2019 order made by HHJ Lunt which had the effect of extending time for the filing of the Appellant's notice. A chaser was sent on 10 June 2020. On the following day, the Crown Court replied by providing a copy of the letter of 10 December 2019, the contents of which I we have set out above.
20. On 15 June 2020 the Chief Constable asked the Crown Court to provide a copy of the document which the Court had treated as the Interested Party's request for leave to appeal and the Court's order setting out HHJ Lunt's decision dated 10 December 2019. On 16 June 2020 the Crown Court replied:

"The original notice of appeal, which was sent to us on the 29<sup>th</sup> of November 2019 but was only sent on to Blackpool Magistrates Court who now issue all appeal documents on the 4<sup>th</sup> of December. This seems to have been raised with Her Honour Judge Lunt and she directed that we treat it as an out of time appeal that she had granted there and then.

As such there was no Order made, just the Judge's direction. The only Order I can see on the file is a timetable set by the judge dated the 20th December 2019."

21. We are told that, during this period, the Interested Party was also requesting a copy of the order of the Crown Court dated 10 December 2019, with an equal lack of success.
22. On 2 July 2020, the Chief Constable invited the Crown Court to state a case to enable the parties to gain a sufficient understanding of the terms of what decision the Court had made and on what basis it had been made. The request made by Counsel for the Chief Constable to the Crown Court was sent direct to HHJ Lunt and was in the following terms:

"I regret that the parties have still been unable to obtain sufficient details of the decision/direction/Order that you made at the commencement of the appeal; we have been unable to ascertain the terms of the decision/direction/Order that you made, when, on what material and on what basis.

Without this further information I regret that the parties will struggle to assist the Court in progressing this appeal.

In those circumstances, the Respondent respectfully invites the Court to state a case in respect of the decision/direction/Order that you made at the commencement of the appeal. The Respondent respectfully invites the Court to provide this to the parties in draft form in the first instance so that the parties may: (1) reflect upon the effect of that decision/direction/Order; (2) consider whether it is appropriate to seek to make further submissions to the Court before the case and any linked direction/Order is perfected; and (3) if appropriate, suggest questions of law which the case raises.”

23. On 3 July 2020 the Judge replied, in the following terms:

“I have read and considered your email.

As I understand your case, your appeal is straightforward and is pursued on the ground that my decision was wrong in Law.

I decline your application to state a Case.”

24. On 30 July 2020 the Chief Constable asked the Crown Court whether it was willing to list the matter for a preliminary hearing to review or reconsider the December 2019 decision in the light of further submissions by the parties. That same day, the Court replied:

“Please note that all emails should be sent to the Court - caseprogression.preston.crowncourt@justice.gov.uk not directly to the Judge and I will refer if necessary.

There will be no more hearings except for the actual listing of the Appeal in due course and only when the Appellants Representatives have confirmed to the court that he is well enough to attend.”

25. We do not know whether that was the result of a judicial decision. In any event, it was a decision and direction made without a hearing and without receiving submissions from the parties. Until that moment the structure laid down by the December 2019 Order of HHJ Jefferies QC had remained in place despite Covid-induced adjournments.

26. These proceedings were, as we have said, issued on 2 October 2020.

## **Discussion**

27. Even allowing for the difficulties created by the pandemic, it must be said before looking at the technicalities of the present application, that the state of affairs revealed by the factual background that we have summarised is unsatisfactory.

28. The starting point must be the terms of POCA and the relevant rules, to some of which we have referred already. One further rule that is fundamental to the fair administration of justice is CCR Rules 5A(9) and 5A(10), which provides:
- “5A(9). A party may apply to vary a direction if, (a) the court gave it without a hearing; (b) the court gave it at a hearing in that party’s absence .....
- 5A(10). A party who applies to vary a direction must (a) apply as soon as practicable after becoming aware of the grounds for doing so; and (b) give as much notice to the other parties as the nature and urgency of the application permits.”
29. Two further Rules of the CCR are also directly relevant:
- i) CCR 5A(18) provides that “The court must make available to the parties a record of the directions given”; and
  - ii) CCR 7(6) provides that “An application for an extension of time shall be made in writing, specifying the grounds of the application ...”.
30. There are now two highly contentious orders that have been made without a hearing and without submissions being made, and to which CCR Rule 5A(9) is directly applicable, namely the decision of HHJ Lunt in December 2019 and the decision conveyed to the Chief Constable on 30 July 2020, which varied the order of HHJ Jefferies QC that the question of extension of time should be dealt with as a preliminary issue in advance of the full appeal. The Chief Constable was and is entitled to apply to the Crown Court to vary those decisions and to be heard on that application. By 30 July 2020 the Chief Constable had committed to the route of asking for a case to be stated. Accordingly, as we understand, no application has yet been made to vary the decision to have no further hearing before the full hearing of the appeal. We note in passing that no date for the hearing of the full appeal has yet been fixed.
31. Although we have seen no formal application by the Chief Constable to vary the decision of HHJ Lunt, that is not surprising given that the Chief Constable learned of the decision at the hearing on 20 December 2019, having not been copied in to the letter of 10 December 2019 to Tower Trading or otherwise notified of HHJ Lunt’s direction as required by CCR Rule 5A(18). In such circumstances it was proportionate, pragmatic and right for HHJ Jefferies QC to give directions without requiring a formal application and no point against the Chief Constable could properly now be taken on that score.
32. It is now tolerably clear (at least as a working assumption on which this Court can proceed) that (a) consistently with the terms of the Interested Party’s Notice of Appeal, no application for an extension of time was made; (b) as appears from the email from the Crown Court on 16 June 2020, the question whether the appeal was out of time was raised internally with HHJ Lunt in December 2019 who directed that it should be treated as an out of time appeal and gave a direction effectively extending time; (c) despite repeated requests from both parties, no reasons explaining the basis for HHJ Lunt’s order have been provided; (d) this state of affairs has continued despite both parties asserting that they could not properly prepare for the preliminary issue directed by HHJ

Jefferies QC without the basic information that had been requested. It is, we think, fair to suggest that the case would not have become mired as it has if the Crown Court had promptly made a record of HHJ Lunt's decision available to the parties as required by CCR Rule 5A(18) and had provided a clear statement of the Judge's reasons when requested to do so.

33. In his submissions to us Mr Sigeo, who has acted for the Chief Constable throughout, was at pains to emphasise that his client had taken the step of issuing Judicial Review proceedings with a heavy heart and that these proceedings should be seen as the product of intense frustration on the part of the Chief Constable at the apparent impasse that has been reached in the Crown Court which has stymied (our word, not his) the Chief Constable's attempts to have the application that he was entitled to make pursuant to CCR Rule 5A(9) disposed of fairly and expeditiously.
34. We have considerable sympathy for the position of the Chief Constable. That said, neither frustration nor sympathy are sufficient grounds for Judicial Review proceedings. The question for us is whether these Judicial Review proceedings are well founded. In our judgment, they are not, for a number of reasons.
35. First, the relief sought is that "all decisions of the Crown Court within this Appeal other than the order of HHJ Jefferies QC dated 20 December 2019 should be quashed and the Appeal remitted to a different Crown Court for determination." That formulation immediately runs foul of the 3 month time limit for issuing Judicial Review Proceedings, which excludes everything before the refusal of the Crown Court on 3 July 2020 to state a case.
36. Second, the request to the Crown Court to state a case was, in our judgment, misconceived. Requesting a Crown Court to state a case is an integral part of an appeal pursuant to s. 28 of the Senior Courts Act 1981. It is not, as was being proposed here, a mechanism for the obtaining of information or reasons for an order that has been made in order to support an application to the Crown Court itself to vary that order pursuant to CCR Rule 5A(9). Yet the request to the Crown Court was overtly with a view to progressing the application to vary HHJ Lunt's order that was already in progress.
37. Third, by 3 July 2020 the parties already had the necessary information to pursue (or defend) the application to vary the order. Although we have criticised the lack of clarity in the Crown Court's responses to the parties' requests, certain things were completely clear, at least so far as providing working assumptions for the basis of an application to vary the order. The Interested Party knew he had not requested an extension of time; and the Chief Constable was entitled to operate on the basis that he had not done so since (a) no application had been served on the Chief Constable and (b) the Crown Court's email of 16 June 2020 effectively confirmed that the Judge had simply treated the appeal as out of time and granted an extension "there and then". In addition, both parties knew that the Crown Court had made the direction without the parties being present or having an opportunity to make submissions and that it had not given any reasons for the decision. The Chief Constable was able to prove that the Notice of Appeal was not served on him in time. These facts alone were sufficient to put the onus on the Interested Party to justify (if he could) the extension of time. We express no view on the Interested Party's prospects of success (particularly where, as we understand, there has still been no application to extend time and no explanation for the delay in service): we are merely observing that the Chief Constable had sufficient



information to press his application for variation of HHJ Lunt's order under CCR Rule 5A(9) without resorting to the device of requesting a Case Stated.

38. Fourth, it is axiomatic that the Court will not intervene in Judicial Review proceedings where there is an alternative remedy available to the Claimant. In our judgment, an alternative remedy is available. It is provided by CCR Rule 5A(9) which *entitles* the Chief Constable to apply to vary both HHJ Lunt's order and also, in the circumstances now prevailing, the decision conveyed on 30 July 2020 that there would be no further hearings until the hearing of the appeal. Although the Chief Constable has asserted in the Crown Court that the issue should be resolved there, it appears that CCR Rule 5A(9) was not in the forefront of anybody's mind.
39. We have expressed sympathy with the frustration experienced by the Chief Constable. That said, we do not know the pressures under which this Crown Court was and is operating, save that it is notorious that the pandemic has imposed very great strains on all Crown Courts. For that reason, and because the Crown Court has maintained a neutral stance and has not addressed the facts on which the Chief Constable bases his complaints, we think it essential to concentrate on the position as it now stands, which is that the Chief Constable, having made (or been deemed to have made) his application in respect of HHJ Lunt's December 2019 decision is entitled to have it resolved by the Crown Court; and that, if a similar application were to be made in respect of the direction conveyed on 30 July 2020, the Chief Constable would be entitled to have that resolved too.
40. It is for the Crown Court to resolve any applications that are made, and we express no view on the eventual outcome. We would only note in passing that, on the information we have, the order made by HHJ Jefferies QC on 20 December 2019 seems to us to be sound, and is accepted by the Chief Constable to be so. We can see the obvious sense in dealing with the application to vary HHJ Lunt's order as a preliminary issue in advance of a main hearing of the appeal, since it could obviate the need for a full hearing if the Chief Constable is successful. That said, case management directions are for the Crown Court which will have a full appreciation of the constraints under which it may presently be operating.
41. We should add that we had the benefit of a helpful note on jurisdiction from Counsel for the Defendant. It is possible that in other circumstances arguments might have been advanced questioning the jurisdiction of this court to deal with interim orders in the court below by way of an appeal by case stated. Because of the views we have set out above, we have not addressed those issues and give this judgment assuming, but not deciding, that we would have had jurisdiction in an appropriate case.
42. In the result, we dismiss this application for Judicial Review for the reasons given above. But we wish to make clear, if we have not done so already, that CCR Rule 5A(9) entitles the Chief Constable to bring forward the application to vary HHJ Lunt's order and it is necessary for the Crown Court to make provision for its resolution. We therefore remit the case to the Crown Court to continue the Interested Party's appeal against the forfeiture order and, in particular, to make provision for resolution of the issue of extending time. We urge the Crown Court to hold a directions hearing in the near future to lay the ground for the disposal of the issue of extending time and the wider issues raised by the appeal.