



Neutral Citation Number: [2024] EWHC 416 (Admin)

Case No: AC-2022-LON-002128

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 27th February 2024

Before:
FORDHAM J

Between:
THE KING (on the application of
MALCOLM HUNTLEY POTIER) Claimant
- and -
SOUTHWARK CROWN COURT Defendant
- and -
METROPOLITAN POLICE COMMISSIONER Interested Party

The **Claimant** appeared in person
The **Defendant** did not appear and was not represented
Paul Jarvis (instructed by Metropolitan Police) for the Interested Party

Hearing date: 27.2.24
Judgment as delivered in open court at the hearing

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.

FORDHAM J

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

FORDHAM J:

Introduction

1. This is a renewed application for permission for judicial review. Permission for judicial review was refused by Lang J on the papers on 20 July 2023. The grounds of renewal were filed on 25 July 2023 and the hearing was eventually fixed for today. The Claimant filed a skeleton argument on 20 February 2024 and has addressed me orally. I have been much assisted by the written and oral submissions made by him and by Mr Jarvis who appears for the Interested Party (the “Police”; also described in the papers as the “Prosecution” and the “Crown”).
2. On 4 May 2021 District Judge Snow in the magistrates’ court ordered the renewal of a Violent Offender Order (“VOO”) originally made in May 2016 pursuant to the Criminal Justice and Immigration Act 2008. The applicant for renewal was the Police. An interim VOO had been made in 2015 following the Claimant’s deportation to this country from Australia, having served a criminal sentence there. Written statements were relied in obtaining the VOO and in obtaining the renewal. The Claimant tells me, and I accept from him, that he asked the magistrates’ court for a direction for cross-examination pursuant to rule 4 (to which I will return below), which was refused. The Claimant appealed from the May 2021 renewed VOO, pursuant to section 106 of the 2008 Act, to the Defendant (the “Crown Court”).

The Direction

3. In the appeal to the Crown Court, the Claimant (again) requested a direction for those witnesses whose statements were relied on by the Prosecution to attend by video link for cross-examination by him, acting in person. At a hearing on 29 October 2021, HHJ Griffiths (“the Judge”) acceded to that request and made a direction that witnesses be tendered for cross-examination.
4. The Judge’s clear understanding at that time was that rule 33.4 of the Civil Procedure Rules was applicable. Mr Jarvis has accepted in open court today that that approach was attributable to the position which the Police were at that stage inviting the Judge to take. Mr Jarvis also tells me that, because this proved to be a legally mistaken approach by the Police, there has been no pursuit of costs of the Acknowledgement of Service for which Lang J made provision in her order.
5. CPR33.4 provides as follows:

33.4. (1) Where a party – (a) proposes to rely on hearsay evidence; and (b) does not propose to call the person who made the original statement to give oral evidence, the court may, on the application of any other party, permit that party to call the maker of the statement to be cross-examined on the contents of the statement. (2) An application for permission to cross-examine under this rule must be made not more than 14 days after the day on which a notice of intention to rely on the hearsay evidence was served on the applicant.
6. The Judge considered CPR33.4 to be an applicable and relevant “rule of court”, pursuant to section 3 of the Civil Evidence Act 1995. Section 3 provides

3. Power to call witness of cross-examination on hearsay statement. Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with

the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief.

Discharge of the Direction

7. The Police subsequently invited the Judge to set aside the October 2021 direction. Mr Potier tells me, and I accept, that that was by way of an application made by the Police to the Judge. The Police pointed out that CPR33.4 was inapplicable to a section 106 appeal. Their position was that the direction had been made without any power. Mr Potier tells me, and again I accept, that at that stage the police commenced judicial review proceedings; and that in the event those proceedings were not pursued. I am satisfied that nothing turns for the purposes on of today on precisely how far that course of action or its pursuit ran.
8. On 4 April 2022 the Judge set aside the direction. As the Judge later put it: “I vacated my ruling under the Civil Procedure Rules”. Having done so, he allowed an opportunity for the Claimant to make written representations as to whether there was some other power to make such a direction and, if so, whether that power should be exercised. Representations were duly made. The Police continued to submit that there was no power; and in any event opposed a direction.
9. Several things became clear and were accepted by the Judge. (1) The first is that CPR33.4 was never applicable to the section 106 appeal. (2) The second is that the Crown Court Rules 1982 (SI 1982 No. 1109), which do apply to a section 106 appeal, contain no express rule of the type described in section 3 of the 1995 Act and found in CPR33.4. (3) The third is that rule 4 of the Magistrates Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, which had applied to the application for the renewed VOO before the magistrates’ court, was a rule containing an express power. I mentioned rule 4 earlier in this judgment and said that I would return to it. Rule 4(1) of the 1999 Rules provides:

4.— Power to call witness for cross-examination on hearsay evidence. (1) Where a party tenders as hearsay evidence a statement made by a person but does not propose to call the person who made the statement to give evidence, the court may, on application, allow another party to call and cross-examine the person who made the statement on its contents.

Fresh Decision

10. What happened next was this. By a determination on the papers on 13 June 2022, the Judge reasoned that he was “prepared to accede” to the Prosecution’s submission that the Crown Court had no power to make an order for witnesses to be tendered for cross-examination, on a section 106 appeal.
11. The Judge then went on in the ruling to ask this question: “if I am wrong, what orders I would have made if I did have power to do so?” The Judge recorded that he would have refused, as a matter of discretion, to exercise any power in the Claimant’s favour. His reasons for that emphasised: (a) the limits of an appeal against a renewed VOO, which does not entitle the affected individual to “revisit” the “original” VOO; and (b) the Claimant’s other means to challenge the material in the “recent” hearsay statements, without cross-examining the individuals, and by reference to submissions.

12. Pausing there, point (b) was plainly – at least in part – a reference by the Judge to the express terms of section 4 of the 1995 Act. It contains various provisions including (s.4(1)) that assessing the weight “if any” to be given to hearsay evidence in civil proceedings involves mandatory “regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence”. Section 4 also refers to permissible regard to reasonableness and practicability (s.4(2)); to any motive to conceal or misrepresent matters (s.4(2)(d)); to whether original statements were edited or made in collaboration with others or for any particular purpose (s.4(2)(e)); and to “whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight”.
13. The Judge’s reasons also recorded these points: (c) that the witnesses had confirmed via the Crown that they would not attend by video-link for cross-examination by the Claimant; (d) that there were no measures which the Crown Court could adopt to ensure their attendance; and that (e) the Crown Court lacked statutory powers to ensure that any cross-examination was undertaken by Counsel rather than by the Claimant in person.

Power to Make a Direction

14. The Claimant, as I see it, makes four key points. First, he says that the Crown Court had the power it needed all along. That is because of one or more of the following: (1) the applicability throughout of section 3 of the 1995 Act; (2) the fact that the Crown Court conducts a section 106 appeal as a rehearing “de novo”, starting afresh; (3) the fact that the magistrates for their part had an applicable power in Rule 4 of the 1999 Rules; and (4) the fact that section 106(3)(b) of the 2008 Act empowers the crown court “on an appeal” under section 106 to “make such incidental or consequential orders as appear to it to be just”. In his oral submissions today Mr Potier has laid particular emphasis on section 106(3) and has drawn my attention to section 106(3)(a) (“may make such orders as may be necessary to give effect to its determination of the appeal”), alongside 106(3) (b).
15. In the ruling of 13 June 2022 the Judge referred to Rule 4 of the 1999 Rules and said this:

although I cannot point to a provision my feeling is that, as this is a rehearing of the proceedings in the magistrates’ court, the crown court must have the power.

In my judgment, based on the materials cited to this Court, it is arguable that the Crown Court does and did have the power, all along, that the Judge thought it “must have”. There is undoubtedly an arguable defence to that, and Mr Jarvis has pointed to the powerful arguments that the Police marshall in support of that arguable defence. Those no doubt are the same powerful arguments as persuaded the Judge in June 2022 to be “prepared to accede” to the position that there was no power. But there has been no ‘knockout blow’, in my judgment, administered by the Police on this aspect of the case.

16. That does not mean the claim for judicial review is viable. The Claimant would also need to have a viable argument on his second or his third key points, to which I now turn.

Power to Revoke a Direction

17. The Claimant’s second key point is this. He submits that the Judge had no power in April 2022 to discharge the direction previously made in October 2021. In the written submissions, that is for three reasons. (1) The first reason is that rule 5A(8) of the 1982 Rules, which provides that “any power to give a direction under this rule includes a power to vary or revoke that direction”, is controlled by rule 5A(9) which provides that “a party may apply to vary a direction if” the court gave it without a hearing, or at a hearing in that party’s absence or if the circumstances have changed. Since this was a direction made in October 2021 at a hearing, and in the presence of the Prosecution, and where the Judge was not saying that the circumstances had changed, this governing restriction precluded any variation or revocation. (2) The second reason is that this was not the revocation of an unlawful direction. It was within the Crown Court’s powers all along (as seen in relation to the first key point) and so there was no basis purportedly to revoke it. (3) The third reason is that, if they wanted to impugn the October 2021 direction, the Police needed to judicially review or appeal it. It stood as a lawful direction unless and until overturned by another Court. The polices judicial review proceedings were not pursued; and nor was any appeal.
18. In his oral submissions today Mr Potier has, as I see it, modified part of that argument. He now accepts that rule 5A(9) does not operate as a restriction or preclusion, insofar as the crown court decides to act ‘of its own initiative’ in varying or revoking a direction; but what it does do is to restrict the bases on which an “application” can be made for that to happen. Mr Potier also submits, orally today, that the power to vary or revoke a direction other than on the three bases in rule 5A(9) must be limited to what he describes as “minor” or “administrative” matters and not something which – as he puts it – is at “the core of the case”.
19. These lines of argument, in my judgment, have no realistic prospect of success. Rule 5A of the 1982 Rules confers broad powers to make case management directions. Among the powers conferred is a power to give a direction “without a hearing” (rule 5A(7)(e)). But there is also a general power to give a direction of the court’s own initiative or on an application by a party. A direction may be given at a hearing. Here are rule 5A(8)-(10):
- (8) Any power to give a direction under this rule includes a power to vary or revoke that direction.*
- (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; or (c) circumstances have changed.*
- (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.*
20. Rule 5A(9) entitles a “party” to “apply” for a “variation”, invoking one or more of the three grounds, and complying with Rule 5A(10). But, in my judgment, it plainly does not operate as any controlling restriction on the broad power in rule 5A(8) to “vary or revoke” a direction which has been made. That power is available where the crown court reasonably considers it to be justified to revisit a case-management direction, for whatever good reason.

21. Even if not entitled by rule 5A(9) to make an “application”, relying on one of the three grounds in rule 5A(9)(a) to (c), it must be open to any party to draw to the court’s attention a good reason for revisiting a direction. Mr Potter’s oral arguments today give rise to the odd situation that a party would not be able to make something described as an “application”, but the court would have the power to revisit a direction, and ought to exercise that power. That raises the obvious question of how this is properly to be brought to the attention of the crown court judge. On the logic of the argument that would be presumably by means of a letter, or a request, or an invitation but not a formal “application”. In my judgment, beyond argument, the position is more straightforward. In the present case, the good reason which the Judge identified was that he had misappreciated the applicable powers. I record that Mr Jarvis, in his own oral submissions, has suggested that the circumstances of the present case, including the recognition that an inapplicable CPR power had wrongly been identified, would if necessary have constituted “circumstances [which] have changed”. In my judgment in the circumstances of the present case, and beyond argument, nothing turns that.
22. The key point for present purposes is that Rule 5A(9) does not ‘control and restrict’ Rule 5A(8). On this part of the case, Lang J held that the Claimant’s arguments have no realistic prospect of success. I agree. That means the Claimant needs a viable argument on his third key point.

Delay

23. Pausing there, I record that the Police’s summary grounds of resistance took a point on delay. The argument was that the true ‘target decision’ should have been the decision of 4 April 2022, being the decision which revoked the October 2021 direction. Lang J rejected that criticism, explaining that the Claimant had acted reasonably in awaiting the decision of June 2022 before then promptly bringing his claim for judicial review in July 2022. She formally recorded an extension of time to impugn the April 2022 decision. I wholeheartedly agree with that analysis. The delay objection was a bad point.

Lawfulness and reasonableness

24. This is the Claimant’s third key point. He submits as follows. Even if the Judge had the power to revoke in April 2022 the direction made in October 2021, the Judge did not act lawfully or reasonably, either in April 2022 or in June 2022 in changing his position and withholding the direction originally made.
25. The Claimant submits that it was, and is, clearly necessary in the interests of justice that there be a direction, in the appeal, for the witnesses’ attendance for cross-examination. He has identified the nature of the points that he wishes to raise, to test their evidence. This includes contentions that statements have been fabricated, pointing to what he says is clearly different handwriting. He says this at the core of the case and at its heart is the question of whether the content of statements is patently false. He says there are lots of questions to put to a group of seven who have made statements. He emphasises as a key question: “how did these handwritten statements come to be produced?” He has made points about the police and about what he says is the absence of police records. He has submitted that the fact that a wide set of materials have been adduced, for the narrower purpose of renewing the VOO, make all of the contents relevant for the purposes of the hearing of the appeal. He has, in effect, today taken the new point that the Judge was

wrong about the scope of the appeal and whether the original VOO could be “revisited”. He says that it was the interests of justice, as the Judge had rightly recognised in October 2021 when making the original direction, that the witnesses should be produced for cross-examination. He emphasises what he calls a “protective” environment, in which they could be produced and cross-examined by him. He submits that the Judge’s reasons in June 2022 were not a lawful or reasonable basis for taking a different position, departing from the interests of justice as they had been recognised, rightly, in October 2021.

26. Reading Lang J’s reasons fairly and as a whole, she clearly took the view that this was – beyond reasonable argument – a lawful and reasonable exercise of judgment and discretion by the Judge in all the circumstances. In any event, having considered the position afresh with the benefit of the Claimant’s written and oral submissions, that is my own conclusion.
27. Even if the Judge had a power all along, the Judge was entitled in all the circumstances to revoke the direction, having misappreciated the applicability of the CPR, and then reconsider the position. He adopted a fair process.
28. In revisiting the matter, the Judge then identified a lawful and reasonable basis – as an exercise of judgment and discretion – why he would have refused to exercise any power in favour of the Claimant and so would have revoked and not reinstated the previous direction. The points the Judge made were, in my judgment, beyond argument, a lawful and reasonable basis for the decision; and notwithstanding that a direction was originally made. Among the reasons, as the Judge explained, was the fact that the points that the Claimant wanted, and wants, to make about the hearsay statements would remain open to the Claimant by way of submissions, and any supporting materials, at the substantive hearing of the section 106 appeal against the May 2021 renewal order. That and the other points made by the Judge were, in my judgment, a cogent basis why the power, if it existed, would not have been exercised in the Claimant’s favour and why declining to exercise it in his favour was and would have been lawful and reasonable.

Hearsay

29. Finally, I need to deal with the Claimant’s fourth key point. In his skeleton argument he raised a new point, namely that the statements are not “hearsay” evidence at all. That, he says, is because what the statements assert are by way of specific and serious “first-hand” allegations against the Claimant (which he vehemently denies). This new point is unarguable. “Hearsay” means a statement which is made otherwise than by a person while giving oral evidence in proceedings (see section 1 of the 1995 Act).

Conclusion

30. In all those circumstances and for those reasons I will refuse permission for judicial review.

27.2.24