



Neutral Citation Number: [2022] EWHC 2347 (Admin)

Case No: CO/3262/2022
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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/09/2022

Before:

PRESIDENT OF THE KING'S BENCH DIVISION
and
MR JUSTICE CHAMBERLAIN

Between:

THE KING
on the application of
DIRECTOR OF PUBLIC PROSECUTIONS **Claimant**
- and -

(1) CROWN COURT AT BRISTOL
(2) CROWN COURT AT MANCHESTER
(MINSHULL STREET) **Defendants**

-and-
(1) WILLIAM DURSLEY
(2) BENJAMIN SMEDLEY
(3) ADAM MAYALL
(4) SECRETARY OF STATE FOR JUSTICE **Interested Parties**

Tom Little KC & Victoria Ailes (instructed by **Crown Prosecution Service**) for the **Claimant**
David Hughes (instructed by **Kelcey and Hall Solicitors**) for the **1st Interested Party**
Barry Grennan (instructed by **Howard Beanstein Solicitors**) for the **2nd Interested Party**
Ben Knight (instructed by **Cuttles Solicitors**) for the **3rd Interested Party**
Malcolm Birdling (instructed by the **Government Legal Department**) for the **Legal Aid Agency**
Louis Mably KC (instructed by the **Attorney General's Office**) as **Advocate to the Court**
The Defendants and the 4th Interested Party were not represented

Hearing dates: 15 September 2022

Approved Judgment

Dame Victoria Sharp, P. giving the judgment of the Court:

1. This is a directions hearing in two claims for judicial review. The claims are brought by the Director of Public Prosecutions (the DPP) and challenge the decisions made in two separate criminal cases to refuse to extend the custody time limits of three defendants, one in Bristol, two in Manchester, who are the first, second and third Interested Parties to these claims (the defendant Interested Parties).
2. It is unnecessary for present purposes to say anything about the underlying facts. As to the issues, it is sufficient to say that the DPP describes the issues in these cases as “a matter of the greatest importance to the running of the criminal justice system in the next few weeks.” The nature of the two core issues that arise can be encapsulated in this way: first, the implications for the extension of custody time limits of the recent action by members of the Criminal Bar Association who are in dispute with the Ministry of Justice about the basis and rates of payment for publicly funded legally aided work in the Crown Court; and secondly, whether this Court or the Crown Court has jurisdiction to extend custody time limits after their expiry, in a case where a refusal to extend before expiry has been quashed.
3. It is necessary to explain why this Divisional Court, which was convened to hear these judicial review applications as a matter of urgency, can now only deal with directions rather than with the substantive claims.
4. The claims were first received by the Administrative Court Office by email on the evening 7 September 2022, but not properly filed until 8 September 2022 (last Thursday). The DPP did not seek interim relief. Instead, he requested an urgent rolled-up hearing before the Divisional Court on the following day, 9 September 2022. This was because in the case of one of the defendant Interested Parties, the custody time limit was due to expire by midnight on that very day, i.e. 9 September, and because at that stage, the DPP’s stance was that the Court had no power to extend the time limit after its expiry, even in a case where the initial refusal took place before expiry and was later quashed (this is not the stance of the DPP now).
5. The matter was considered urgently by the immediates judge, Mr Justice Chamberlain, on 8 September. His Order of that date (as explained in the reasons for it) recognised that the claims raise important points of principle, that they were suitable for determination by a Divisional Court and that there was a strong public interest in resolving them quickly. However, it would have been impossible to have a fair hearing of the claims, urgent as they were, on the timetable sought by the DPP, since none of the interested parties had been given any opportunity, let alone a reasonable opportunity, to respond to the claims which potentially affected their liberty, or to obtain public funding so they could be properly represented to contest the DPP’s claim.
6. In those circumstances, a severely truncated timetable was set by the Court, with yesterday’s date fixed for the rolled-up hearing of the claims. This was the first order made by the Court. The Court made a second order last Monday, 12 September, the object of which was to ensure that the parties understood that the Court should be addressed on the principles of law and authorities, not merely on the facts of the individual claims.

7. Matters did not proceed smoothly however. On Monday 12 September, after the second order had been made, the Court was informed by counsel instructed for one of the Interested Parties in the criminal proceedings that, although emergency applications for legal aid had been made, they had still not been processed.
8. This was a matter of obvious concern since it put at risk the timetable for an effective hearing of the claims.
9. At the direction of the Court therefore, the Senior Legal Manager for the Administrative Court sent an urgent email that evening to the Legal Aid Agency, which expressed the Court's considerable concern at the delay in processing the legal aid applications and noted that the Court hoped and expected that the matter would be given the highest priority.
10. Unhappily, this did not happen. By the afternoon of Tuesday 13 September, the applications had still not been processed. It followed that, only one working day before the time set for the rolled-up hearing, the defendant Interested Parties were still unrepresented, and their applications for legal aid remained undetermined. In these circumstances, despite the obvious public interest in expedition, the Court had no option but to adjourn the rolled-up hearing (again) and to convert what should have been the hearing of the substantive claims into a directions hearing. In the Court's third Order, made on Tuesday 13 September, the Director of Legal Aid Casework was directed to explain in writing by 2pm on Wednesday 14 September why the defendant Interested Parties' legal aid applications had still not been processed. The directions made clear that the Court might thereafter direct personal attendance by the Director of Legal Aid Casework at the directions hearing.
11. At 1.48pm on Wednesday, so ten minutes before the time set for the explanation to be provided, the Administrative Court Office was notified by Mr Anthony Lawrence, a senior lawyer at the Legal Aid Agency, that public funding had now been agreed for the defendant Interested Parties. He also said that an explanation for the "funding issues" in these cases would be provided as soon as reasonably practicable under separate cover. This explanation did not arrive by 2pm.
12. In the light of this unsatisfactory state of affairs, late on Wednesday afternoon, in a fourth Order, we directed that the Director of Legal Aid Casework, should appear by counsel, at the directions hearing the following day. We also indicated that we would wish to be addressed on the processes the Legal Aid Agency has in place to avoid delays in urgent judicial review claims involving custody time limits.
13. At the directions hearing the next day, Thursday 15 September, the Director of Legal Aid Casework, through counsel Mr Malcolm Birdling, apologised to the Court, the parties and those representing them. Apology was made for the unsatisfactory way the applications for civil legal aid in these proceedings have been handled, for the delay this has occasioned to the determination of the substantive applications for judicial review and for the failure to provide a written explanation for this delay by 2pm on 14 September, as directed by the Court. Mr Birdling also provided an explanation of how the errors came to be made and what steps the Director of Legal Aid Casework would be taking to avoid such a situation arising again. The apologies were repeated in a Note provided to the Court after the directions hearing, which confirmed what Mr Birdling had told the Court in submissions.

14. In relation to why the delays occurred and future steps, we should briefly summarise what we were told.
15. Applications for civil legal aid are in general made using an electronic system called the Client and Cost Management System, or CCMS. CCMS is not familiar to all criminal providers but can be used for any associated civil application in criminal cases, including custody time limit judicial review claims. CCMS allows providers to flag an application as urgent and ensures an application for legal aid is automatically sent to the relevant team for determination (in respect of custody time limits for judicial review, this will be the Exceptional and Complex Cases Team (ECCT)). If there is particular urgency, providers may (after making a CCMS application) telephone the Legal Aid Agency and request particular expedition. Alternatively, criminal providers seeking legal aid for associated civil proceedings may (under current arrangements) make an application on paper. Such applications are sent to a generic email address and then triaged to the appropriate team.
16. The applications in this case were submitted on paper, and in the case of two of the defendant Interested Parties a series of human errors by Legal Aid Agency caseworkers meant they were not recognised as urgent or directed to the relevant casework team. In addition, when it became clear that the cases were urgent, the providers were told (wrongly) that the paper applications needed to be resubmitted electronically. In the case of the other defendant Interested Party (Mr Dursley) the paper application that was made simply cannot be located.
17. We are told that the Legal Aid Agency now intends to produce step-by-step user guidance for the CCMS system for use by criminal providers in related civil claims. This is expected to be ready by the end of October 2022, and it is hoped this will facilitate the use of CCMS in urgent cases. In addition, a number of steps will be taken to address the specific failures that occurred in these cases: these include the provision of revised internal case management guidance for urgent non-CCMS cases, a dedicated email address which will automatically forward applications by criminal providers for related civil proceedings to appropriate decision makers and a specific email address for such applications (contactECC@justice.gov.uk) until that dedicated email address is up and running.¹
18. The serious consequences of the errors that were made in relation to the provision of legal aid in these cases should not be underestimated. The Court's directions on expedition have been undermined, the time of the Court and the parties has been wasted and the resolution of an issue of immediate importance to these and other custody time limit cases has been delayed. It is to be hoped that the new arrangements which we have been told about will ensure that such difficulties will not happen again.
19. It is not necessary to set out in full the directions we gave at the hearing on 15 September 2022. We should indicate however, that their effect is that the earliest the rolled-up hearing originally listed for 15 September can now take place is on 26 September. In addition, we were told at the directions hearing that the Attorney General would appoint

¹ The Note also says that in all such cases, the subject line should read "Custody Time Limits URGENT" and be marked as high importance. If there is particular urgency, the application can be followed up with a call to the Legal Aid Agency on 0300 2002020, with the specific request for the application urgently to be brought to the attention of the ECCT.

an Advocate to the Court and with the consent of all parties, we directed that the Secretary of State for Justice be removed as an Interested Party to this claim.

20. Finally, we had intended to give this judgment last Friday (16 September). We have given judgment today however, as we were told that the details of the new arrangements to be put into place would not be put on the Legal Aid Agency website or publicised more widely until the period of official mourning for the late Sovereign, Queen Elizabeth II, had come to an end.