Neutral Citation Number: [2021] EWHC 1964 (Admin)

Case No: CO/3218/2020

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

The Combined Court Centre, Oxford Row, Leeds

Date: 13/07/2021

**Before** :

**HIS HONOUR JUDGE GOSNELL**

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**Between :**

**THE QUEEN ( on the application of George Rayner)** **Claimant**

**- and –**

**Leeds District Magistrates Court** **Defendant**

**-and-**

**Leeds City Council**
**Interested Party**

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Mr Joseph Markus (instructed by Gallagher and Co Solicitors ) for the Claimant
The Defendant and Interested Party did not appear and were not represented

Hearing dates: 8th July 2021

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# Approved Judgment

**His Honour Judge Gosnell :**

1. By these judicial review proceedings the Claimant seeks to challenge the decision of Leeds District Magistrates Court ("the Magistrates Court") to refuse to state a case for the opinion of the High Court on 17th June 2020. The Magistrates Court, as is customary, have adopted a neutral position and have not appeared at court today to oppose the relief sought. Leeds City Council as Interested Party have adopted the same position.

2. **The Facts**

The Claimant is the tenant of 1 Aberfield Drive , Belle Isle , Leeds LS10 3PX ("the Property") and the Interested Party is his landlord pursuant to a secure tenancy commencing on 29th August 2017. The Claimant suffers from paranoid schizophrenia and has been detained under the Mental Health Act 1983 on two previous occasions. The Claimant's neighbours complained of extensive anti-social behaviour at the property , including noise nuisance , loud music, drug taking activity and the dumping and burning of rubbish. On 27th June 2019 the Interested Party served both an Abatement Notice under section 80 of the Environmental Protection Act 1990 and a Notice Seeking Possession of the Property on the Claimant. On 27th September 2019 the Claimant was detained in hospital and remained there until 22nd January 2020.

3. The Interested Party decided to apply for a partial premises Closure Order which would permit access to the property by the Claimant and a small list of friends and family but would restrict access by others , including those who might seek to exploit him. A Closure Notice was served on the Claimant on 26th January 2020 and he was advised to seek legal advice. The first hearing took place on 28th January 2020 which was the date the Claimant first sought legal advice. The application was adjourned until 12th February 2020 and the Claimant's solicitors applied for legal aid funding . Criminal legal aid was not available and the Claimant's solicitor had to apply for exceptional case funding. Exceptional Case Funding is to provide an avenue to legal aid funding in circumstances where failure to fund would result , inter alia, in a breach of a Convention right. Legal aid funding was refused on 7th February 2020 and the Claimant's solicitors sought a review of that decision. On 12th February 2020 the Claimant's solicitors sought a further adjournment so that the review could be completed and the Claimant could be represented at the trial.

4. The Magistrates refused the application for an adjournment and the Claimant's solicitors withdrew from the case. Ironically , they were notified later that morning that the review was successful and legal aid funding was granted. By this time however the court had granted the application for a partial premises Closure Order for a period of three months, it appears with the Claimant's consent.

5. On 3rd March 2020 the Claimant applied for the Defendant to state a case for the opinion of the High Court. The Defendant refused to do so issuing a certificate on 17th June 2020 confirming its decision on the grounds that the application was frivolous. This is the decision which the Claimant seeks to challenge in these proceedings.

## 6. The Law

The power to make Closure Orders is set out in the Anti-Social Behaviour , Crime and Policing Act 2014 in particular in section 80 which provides as follows:

> *"80. Power of court to make closure orders*
>
> *(1)Whenever a closure notice is issued an application must be made to a magistrates' court for a closure order (unless the notice has been cancelled under section 78).*
>
> *(2)An application for a closure order must be made—*
>
> *(a)by a constable, if the closure notice was issued by a police officer;*
>
> *(b)by the authority that issued the closure notice, if the notice was issued by a local authority.*
>
> *(3)The application must be heard by the magistrates' court not later than 48 hours after service of the closure notice.*
>
> *(4)In calculating when the period of 48 hours ends, Christmas Day is to be disregarded.*
>
> *(5)The court may make a closure order if it is satisfied—*
>
> *(a)that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises, or*
>
> *(b)that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public, or*
>
> *(c)that there has been, or (if the order is not made) is likely to be, disorder near those premises associated with the use of those premises,*
>
> *and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring.*
>
> *(6)A closure order is an order prohibiting access to the premises for a period specified in the order.*
>
> *The period may not exceed 3 months.*
>
> *(7)A closure order may prohibit access—*
>
> *(a)by all persons, or by all persons except those specified, or by all persons except those of a specified description;*

*(b)at all times, or at all times except those specified;*

*(c)in all circumstances, or in all circumstances except those specified.*

*(8)A closure order—*

*(a)may be made in respect of the whole or any part of the premises;*

*(b)may include provision about access to a part of the building or structure of which the premises form part.*

*(9)The court must notify the relevant licensing authority if it makes a closure order in relation to premises in respect of which a premises licence is in force."*

7. The power to adjourn and make temporary orders is contained in the following section , set out below:

*"81(3) The court may adjourn the hearing of the application for a period of not more than 14 days to enable—*

*(a)the occupier of the premises,*

*(b)the person with control of or responsibility for the premises, or*

*(c)any other person with an interest in the premises,*

*to show why a closure order should not be made.*

*(4)If the court adjourns the hearing under subsection (3) it may order that the closure notice continues in force until the end of the period of the adjournment."*

8. A Magistrates Court however has a general power to adjourn any hearing under s 54 of the Magistrates Court Act 1980:

*" 54. Adjournment and stays*

*(1)A magistrates' court may at any time, whether before or after beginning to hear a complaint, adjourn the hearing, and may do so, notwithstanding anything in this Act, when composed of a single justice.*

*(2)The court may when adjourning either fix the time and place at which the hearing is to be resumed or, unless it remands the defendant under section 55 below, leave the time and place to be determined later by the court; but the hearing shall not be resumed at that time and place unless the court is satisfied that the parties have had adequate notice thereof."*

9. Closure applications should therefore in theory be dealt with within 48 hours of an application if possible but there is a power to adjourn for a further 14 days under s 81 (3) above. I am satisfied, however, that the Magistrates Court retain the power to adjourn further under s 54 Magistrates Court Act 1980 as Mr Justice Mitting found in *Commissioner of the Police of the Metropolis v Hooper* [2005] EWHC 340 (Admin). So the Magistrates Court had the power to adjourn the application for a Closure Order on the Claimant's application on 12th February 2020 but exercised their discretion not to do so.

10. If a party is unhappy with a decision of a Magistrates Court a right of appeal is available to the Crown Court under section 84(4) of the Anti-Social Behaviour Crime and Policing Act 2014 on the merits. There is also a right of appeal by way of case stated to the High Court on the basis the decision was wrong in law or done in excess of jurisdiction. The Claimant in this case chose the latter course which engages section 111 of the Magistrates Court Act 1980 :

> "111. *Statement of case by magistrates' court.*
>
> *(1)Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31st December 1879 is final.*
>
> *(2)An application under subsection (1) above shall be made within 21 days after the day on which the decision of the magistrates' court was given.*
>
> *(3)For the purpose of subsection (2) above, the day on which the decision of the magistrates' court is given shall, where the court has adjourned the trial of an information after conviction, be the day on which the court sentences or otherwise deals with the offender.*
>
> *(4)On the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision to the Crown Court shall cease.*
>
> *(5)If the justices are of opinion that an application under this section is frivolous, they may refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused; but the justices shall not refuse to state a case if the application is made by or under the direction of the Attorney General.*

> *(6)Where justices refuse to state a case, the High Court may, on the application of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case."*

11. There is an issue in this case whether the claim is now academic because the Closure Order expired after three months and was not renewed. The Claimant remains in the property as secure tenant and no possession proceedings have been brought against him. Counsel for the Claimant submits that the making of the Closure Order is sufficient to engage section 84A of the Housing Act 1985 which confers on the Interested Party as landlord an absolute ground for possession in any subsequent possession proceedings. The relevant passages of section 84A are as follows:

> "84A Absolute ground for possession for anti-social behaviour
>
> *(1)If the court is satisfied that any of the following conditions is met, it must make an order for the possession of a dwelling-house let under a secure tenancy.*
>
> *This is subject to subsection (2) (and to any available defence based on the tenant's Convention rights, within the meaning of the Human Rights Act 1998).*
>
> *(2)Subsection (1) applies only where the landlord has complied with any obligations it has under section 85ZA (review of decision to seek possession).*
>
> *(6)Condition 4 is that—*
>
> *(a)the dwelling-house is or has been subject to a closure order under section 80 of the Anti-social Behaviour, Crime and Policing Act 2014, and*
>
> *(b)access to the dwelling-house has been prohibited (under the closure order or under a closure notice issued under section 76 of that Act) for a continuous period of more than 48 hours*
>
> *8)Condition 1, 2, 3, 4 or 5 is not met if—*
>
> *(a)there is an appeal against the conviction, finding or order concerned which has not been finally determined, abandoned or withdrawn;*
>
> *(b)the final determination of the appeal results in the conviction, finding or order being overturned."*

12. It is clear from s 84A (2) above that there is a review procedure available to the tenant which is set out in section 83ZA of the same act which provides :

> *"(1) This section applies in relation to proceedings for possession of a dwelling-house under section 84A (absolute ground for possession for anti-social behaviour) …*

> *(2) The court must not entertain the proceedings unless the landlord has served on the tenant a notice under this section.*
>
> *(3) The notice must—*
>
> *(a) state that the court will be asked to make an order under section 84A for the possession of the dwelling-house,*
>
> *(b) set out the reasons for the landlord's decision to apply for the order (including the condition or conditions in section 84A on which the landlord proposes to rely), and*
>
> *(c) inform the tenant of any right that the tenant may have under section 85ZA to request a review of the landlord's decision and of the time within which the request must be made.*
>
> *…*
>
> *(7) A notice which states that the landlord proposes to rely upon condition 4 in section 84A—*
>
> *(a) must also state the closure order concerned, and*
>
> *(b) must be served on the tenant within—*
>
> *(i) the period of 3 months beginning with the day on which the closure order was made, or*
>
> *(ii) if there is an appeal against the making of the order, the period of 3 months beginning with the day on which the appeal is finally determined, abandoned or withdrawn."*

13. This means that the Interested Party can only rely on the granting of the Closure Order as an automatic ground for possession under s 84A Housing Act 1985 if it has served a notice on the Claimant under s 83ZA within 3 months of the date of granting of the Closure Order or within 3 months of the determination or withdrawal of any appeal. It is accepted that in fact the Interested Party has not done so. Mr Markus for the Claimant submitted during the hearing that s 84A Housing Act 1985 and the granting of the closure order against the Claimant represented a lasting form of jeopardy in relation to his security of tenure. When we considered the terms of s 83ZA however we agreed that any right the Interested Party has to commence possession proceedings is subject to the time limit under s 83ZA (7).

14. In my view, the Interested Party's right to commence possession proceedings under s 84A has expired under s 83ZA (7)(b)(i). Whether that period may be extended under subsection (7)(b)(ii) depends on whether there is an appeal against the making of the Closure Order. It may be argued that the attempt to state a case to the High Court was not an appeal against the Closure Order because it was concerned with the dismissal of the application to adjourn, not the making of the Closure Order itself. Mr Markus for the Claimant would dispute this but, in any event he agrees with me that any such appeal as might arise after these judicial review proceedings are concluded has not yet commenced as no Appellants Notice has been filed (nor could be filed unless the

Magistrates Court agree to or are ordered to state a case). As we stand therefore today, the Interested Party has no right to start possession proceedings relying on the Closure Order. Ironically, if the Claimant were to succeed in these judicial review proceedings, the Magistrates would be ordered to state a case and the Claimant could then start the appeal process by filing an Appellant's Notice. By doing so , it may perhaps be arguable that he has started the clock running again under subsection (7)(b)(ii). It is clearly not in his interests to do so, as currently he is under no risk whatever of possession proceedings being brought relying on s 84A.

15. The Claimant remains in the property as secure tenant , the Closure Order has long expired and these proceedings are now academic as a consequence of the application of the rather complicated statutory provisions referred to above. I intend to refuse relief in this judicial review on this ground alone. In case of a successful appeal on this issue however I will deal briefly with the substantive grounds of challenge.

16. **The Request to State a Case**

The request to state a case posed two questions:

1. *Was the adjournment of the trial necessary in order to safeguard the Applicant's right with reference to Articles 6 (1) and 8 ECHR , in particular in the light of the fact that:*

   *a) he was unrepresented;*

   *b) he had applied for legal aid so as to be represented; and*

   *c) that the application was outstanding at the date of trial.*

*2. If not , were we ( that is the magistrates) correct to refuse to adjourn the trial on the basis that it was in the interests of justice to proceed ?*

17. **The Refusal to State a Case**

Was expressed as follows:

> *" The reason for our refusal is that we are of the opinion that the application is frivolous as defined by the Court of Appeal in R v North West Suffolk ( Mildenhall) Magistrates Court ex parte Forest Health District Council [1997] EWCA Civ 1575 as being "futile , misconceived, hopeless or academic" in that the decision raises no valid question of law or jurisdiction or indicates a finding of fact was made for which there was no evidential basis.*
>
> *The Applicant appears to adopt the argument that the magistrates were not allowed to make a judgment within their lawful discretion to refuse an application to adjourn. Ultimately, we believe no question of law arises in terms of being allowed to make a judgment within our discretion which was duly exercised. For these reasons , we conclude that the application is futile , misconceived and hopeless within the meaning of the case"*

18. It is fair to state that prior to the reasons for refusal the Defendant set out the background to the case and the context in which the decision to refuse to adjourn had taken place. The Applicant had relied on seven statements which were served in good time for the hearing and three additional statements which had only been served the day before the hearing. It was accepted that Article 6 ECHR was engaged and the court had to balance the need to make progress with the need to grant the Claimant , a vulnerable person, reasonable time to seek legal representation. The court found that such a reasonable opportunity had been given and that legal aid at that stage had been refused. Whilst Article 8 ECHR was engaged the court was only making a partial premises closure order and the interests of the Claimant's neighbours had to be taken into account. The court said it found no exceptional circumstances to further extend the hearing and determined that it was in the interests of justice for the trial to proceed.

19. **The Grounds of Claim**

Essentially there is one ground of claim, namely that the Defendant was wrong to conclude that the application to state a case for the consideration of the High Court was frivolous. The Claimant must establish that his proposed appeal to the High Court is not *"futile , misconceived, hopeless or academic"* per Lord Bingham in ***R v North West Suffolk*** referenced above.

20. Counsel for the Claimant relies on three basic points. Firstly, the Defendant was aware that the Legal Aid Agency had undertook to reach their decision on the review of the Claimant's legal aid review that morning ( 12th February 2020). The only sensible decision available to the Defendant was to adjourn the trial briefly for that review to be completed and for the Claimant to have the benefit of legal representation if he was entitled to it.

21. Secondly, the fact that the Legal Aid Authority granted the Claimant's appeal demonstrated that they believed that the Claimant did require legal aid in order to safeguard his rights under Article 6 (1) and Article 8 ECHR. His rights were clearly engaged and the court was aware that he had a mental health disability in the form of paranoid schizophrenia and a practical difficulty caused by being illiterate. The challenges of dealing with a 114 page bundle , which included three witness statements served only the day before trial are obvious. The need to be able to cross-examine four witnesses and understand and address complex housing law points were likely to be beyond the Claimant. There was a significant inequality of arms in that the Interested Party was funded and represented. This was a case where the Claimant would have been advised to obtain expert medical evidence about his disability in case it had Equality Act 2010 or proportionality implications. [1]

22. Thirdly, the Defendant's reasons for refusing to state a case were flawed. The Defendant's suggestion that the need to make progress should be balanced against a party's Article 6 rights represents a mistake in law. The real issue was whether the Claimant could present his case effectively with no obvious unfairness. The Defendant's conclusion that a reasonable opportunity had been given to the Claimant to obtain legal aid was perverse, it is submitted by Counsel for the Claimant. The Claimant applied for legal aid on 28th January 2020 only two days after first being aware of the proceedings.

[1] R (Gudanaviciene) v Director of Legal Aid Casework &Anr [2014] EWCA Civ 1622

His application was refused on 7th February 2020 but reinstated on review on 12th February 2020 shortly after the hearing.

23. The Claimant submits that the decision to refuse an adjournment was plainly wrong in law and the appeal by way of case stated has a real prospect of success.

24. **Analysis**

The refusal to state a case for the opinion of the High Court appears, at least in part, to be based on an assertion that the Justices had jurisdiction to deal with an application to adjourn the trial and had the discretion whether to grant it or not, which they duly exercised. Whilst I would agree in general terms with this this proposition it does not necessarily mean that such a decision is not capable of challenge by way of case stated to the High Court. In *Commissioner of Police of the Metropolis v Hooper* [ 2005] EWHC 340 (Admin) Mr Justice Mitting dealt with a challenge to the decision of justices in the Magistrates to grant two separate applications for adjournment of an application for a Closure Order. The Magistrates Court had agreed to state a case which was mainly about the tension between the need to hear Closure Order applications within 48 hours of application or a further 14 days to adjourn and the general power to adjourn under s 54 Magistrates Court Act 1980. It did however include the following issue as part of the stated case:

> *" whether we came to a correct decision and determination in point of law"*

25. In that case Mr Justice Mitting found that the court did not take into account relevant factors and so the Magistrate's decision was flawed. Whilst a challenge to a decision of a Magistrate's Court whether to adjourn or refuse to adjourn a trial may be an uphill task the Justices are required to take all relevant matters into account and to exclude all irrelevant matters. The decision may also be open to challenge if no reasonable panel of justices properly directed would have reached the same decision.

26. In the present case I find that there is considerable force in the submissions made on behalf of the Claimant. The trial had already been listed one day outside the 14 day limit for adjournments under the Anti-Social Behaviour, Crime and Policing Act 2014. The appeal against refusal of legal aid was due to be determined later that day. A short adjournment to see whether this vulnerable litigant could have the benefit of legal representation would clearly have been reasonable.

27. On the merits the application for an adjournment was a strong one given the considerations I have set out in paragraph 19 above. The Legal Aid Agency eventually granted exceptional case funding and it was implicit in that decision that the risk of a breach of the Claimant's rights under the Human Rights Convention was so substantial without representation that funding should be granted. The real issue was whether the Claimant could , without legal representation, present his case properly and effectively. It should have been fairly obvious to the bench on 12th February 2020 that an illiterate Claimant only recently released from hospital having suffered from paranoid schizophrenia could not properly and effectively represent himself in this trial involving complex housing law rights to access to his home.

28. I also find that the conclusion reached by the Justices that the Claimant had been given "*a reasonable opportunity*" to obtain legal aid funding was not a conclusion that any bench, properly directed, could have reached on the facts of this case. The provisions surrounding legal aid for these cases are complex and the Claimant's solicitor had applied for legal aid promptly. Upon refusal he had appealed promptly and the result of the appeal was due later that day. It was proved he was right to appeal subsequently when the appeal was granted. This was an error of law which clearly had a material effect on the decision to dismiss the application for an adjournment.

29. Having found that the merits of the appeal are strong this leads me to the inevitable conclusion that the Defendant was wrong in law to categorise the request to state a case as "*frivolous*". It cannot be said that it was "*futile, misconceived, hopeless or academic*" for the reasons I have outlined above.

30. I intend to refuse relief in this case because the overall issue (namely the Claimant's security of tenure) has become academic due to the passage of time. The Claimant no longer has any practical need for a final remedy. Had this not been the case however it is clear that I would have granted relief.