Neutral Citation Number: [2023] EWHC 1992 (Admin)

Case No: CO/2451/2022

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

Thursday, 3 August 2023

Before:
MR JUSTICE FORDHAM

- -

Between:
LEEDS CITY COUNCIL

Appellant

-and-
PERSONS UNKNOWN

Respondents

- -
- -

Kuljit Bhogal KC (instructed by Leeds City Council) for the **Appellant**

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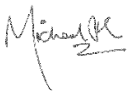
Judgment on Consequentials

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.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a sequel to my judgment [2023] EWHC 1504 (Admin) ("Judgment"), which I handed down on 21 June 2023. Having first circulated the Judgment in draft, no consequential matter was raised with me (Judgment §65). On 24 July 2023 I received an email from Ms Bhogal KC, asking me to grant an extension of time and permission to appeal to the Supreme Court, and contending as follows ("the Submission"):

> ***that the decision in this appeal constitutes a decision in a criminal cause or matter.***

Counsel has subsequently confirmed that she seeks a certificate of a point of law of general public importance (Administration of Justice Act 1960 s.1(2)). Although this is a paper determination, I am satisfied that it engages the open justice principle and I consider it appropriate that the reasons be promulgated as a judgment in the public domain. This judgment was issued, as a non-confidential determination with no embargo, on 1 August 2023, to be handed down on Thursday 3 August 2023.

2. What had happened between 21 June 2023 and 24 July 2023 was this. On 11 July 2023 the Council lodged a notice of appeal with the Court of Appeal (Civil Division), supported by grounds of appeal and a skeleton argument, seeking permission for a 'second appeal' to that Court. On 18 July 2023 the Civil Appeals Office wrote closing the book on that appeal, drawing the Council's attention to ss.28A(4) and 18(1)(c) of the Senior Courts Act 1981. By s.28A(4), a decision of the High Court on a case stated appeal is "final", "except as provided by the Administration of Justice Act 1960 (right of appeal to the Supreme Court in criminal cases)". By s.18(1)(c), no appeal lies to the Court of Appeal from any order, judgment or decision which by virtue of any provision is "final". The route of civil appeal being pursued was barred. Faced with this roadblock, the Council has changed tack and portrayed itself as "prosecutor" seeking to appeal to the Supreme Court from a "decision of the High Court in a criminal cause or matter" (1960 Act s.1(1)).

Adverse authority

3. Having received the email on 24 July 2023 I asked for confirmation that the Council had complied with the approach at Judgment §5 (where I discussed the perils of one-sided argument), identifying any case against the argument which it was advancing (ie. the Submission). In asking that question, I referred to R (McCann) v Manchester Crown Court [2002] UKHL 39 [2003] 1 AC 787 and In re McGuinness [2020] UKSC 6 [2021] AC 392. I did not receive the confirmation I sought. The response from Counsel recorded that she had been "aware" of McCann and McGuinness. She also acknowledged that the Submission "goes against what was said in McCann" and that McCann and McGuinness "are cases which suggest that this case should not be categorised as a criminal cause of matter". In my judgment, it is important that adverse authority should be identified and confronted at the time when applications (especially unilateral applications) and submissions are made to the Court.

Not a Criminal Cause or Matter

4. In McGuinness the Supreme Court addressed the uncertainty which had arisen (§15), provided the final coherence sought (§56), and explained the fixed and comprehensible effect of the statutory provisions (§63). The answer lay in the leading decision in Amand [1943] AC 147, which asked of "the proceeding itself" whether an individual was "put in jeopardy of criminal punishment", as "the direct outcome" (§§45, 77). This was the approach adopted on the jurisdictional issue in McCann, in the context of appeals against magistrates' court proceedings in which anti-social behaviour orders had been sought and obtained. In that case, hearsay evidence was held to be admissible; and there was a discussion about the standard of proof (now revisited in Jones v Birmingham City Council [2023] UKSC 27). There was also the jurisdictional point, because Mr Clingham's appeal had proceeded to the Supreme Court, with a s.1(2) certificate under the 1960 Act, as a putative "criminal cause or matter" ([2003] 1 AC 787, 790C). Examining that jurisdictional question (§5), having well in mind the statutory test and case-law (§21), the House of Lords decided that the anti-social behaviour order proceedings were not a "criminal cause or matter" (§§39, 95). Accepting the argument based on Amand (see [2003] 1 AC 787, 797E-F), and citing Amand itself (§§93, 95) – and thus applying the approach later endorsed in McGuiness – Lord Hutton explained (§95) that:

> ***[A]n application for an anti-social behaviour order, if carried to its conclusion, will not result in conviction and punishment, it will result in the making of an order which cannot be regarded as a punishment. A conviction and punishment will only be imposed if the defendant, by his own choice, subsequently breaches the order and separate and distinct proceedings are brought against him.***

5. The Submission – that the present case is a criminal cause or matter – rests on the following points. First, that the underlying proceedings were heard in the magistrates' court. But magistrates deal with civil proceedings as well as criminal proceedings. It is only the criminal subset which is appealable as a criminal cause or matter. Parliament has spelled that out in section 28A(1)(a) and (4) of the 1981 Act. Secondly, that there are criminal consequences if a Closure Notice or Closure Order are contravened. This is by virtue of section 86 of the Anti-Social Behaviour Crime and Policing Act 2014 (Judgment §12: Crime and Punishment). But the same was true of anti-social behaviour orders in McCann and this does not meet the Amand test of "direct" outcome, which was exactly the point made by Lord Hutton at §95 of McCann. Thirdly, that there are statutory definitions of "action", "cause" and "matter" in s.151 of the 1981 Act. In maintaining the Submission – notwithstanding her acceptance that McCann and McGuinness are against her – Ms Bhogal KC says "it seems that the Court in McCann (or McGuinness) was not referred to the[se] definitions", which she says "make a material difference" so that this is a criminal cause or matter "when one takes account of the s.151 definitions". In my judgment, there is nothing in these arguments based on the s.151 definitions. The Supreme Court in McGuinness was well aware of the s.151 definitions – and in particular "cause" and "matter" – having specifically heard argument about them ([2021] AC 392 at 396H). Lord Sales (for the Supreme Court) explained (§54) that the s.151 definitions were similar to those found in the 1873 Act (re-enacted in 1925) and the 1978 Act (as to which, see §§23, 29, 38). Those definitions did not, and do not, undermine the Amand approach to criminal cause or matter. Indeed, the analysis in Amand began with the statutory definition of "matter" from the relevant definitions section in the 1925 Act (s.225): see the second paragraph of Viscount Simon LC's speech at [1943] AC 147, 152. Nobody, in arguing or deciding McCann or McGuinness, missed these statutory definitions. The position is, in my judgment, clear.

The "criminal cause or matter" test is not met. The arguments being advanced are not viable ones. This is a clear-cut conclusion, based on House of Lords and recent Supreme Court authority.

Other Matters

6. The Council's position is that, depending on what it makes of this Court's reasoning on the "criminal cause or matter" issue, it may nevertheless wish to ask the Supreme Court for permission to appeal. That course is jurisdictionally barred if I am right about "criminal cause or matter". But that course is, independently, jurisdictionally barred unless I grant a certificate pursuant to s.1 of the 1960 Act of a point of law of general public importance. One course would be to treat certification as something which arises only if I am satisfied that there is a criminal cause or matter. Another course would be to refuse certification if I am confident that there is a clear-cut adverse answer to the question of criminal cause or matter. But I think the better course is to make clear – and embody in my Order – my conclusion that there is no criminal cause or matter and, having done so, address as a freestanding question whether the threshold is met of "a point of law of general public importance involved in the decision". I take that course, conscious that the Supreme Court can enquire into its own jurisdiction (McCann §5). And if the High Court were to refuse to certify a point of law, based on its conclusion that there is no "criminal cause or matter", a contrary view on that issue could never prevail. In McCann, the High Court had given a certificate in Clingham's case ([2003] 1 AC 787 at 790C). These are, in principle, distinct questions. And, if an application is pursued, the Supreme Court will be able readily to stop if satisfied – as I am – that this is clearly not a criminal cause or matter.

7. Approached as a freestanding question, I do think there are points involved in the Judgment which are points of "law" which cross the threshold of being points "of general public importance". They are these. For the purposes of the 2014 Act: (1) Do "premises" (a) include anywhere on a map where a line could be drawn and an area shaded or (b) require somewhere objectively identifiable on the ground as a distinctive property and/or (c) exclude a highway? (2) May a Closure Order prohibit specific things being done on premises?

8. Given my conclusion that this is not a criminal cause or matter, it could not be right to grant permission to appeal. But I should make clear that I would not have granted permission to appeal, even if I had been satisfied that this were a criminal cause or matter. That is because I could not say that "it appears to th[is] Court … that [any] point is one which ought to be considered by the Supreme Court" (s.1(2)). It will be rare that the High Court – even a Divisional Court – will take that position. As the Supreme Court explained in McGuinness at §66, we are in the realm of restrictive conditions which "reflect the need to ration access to the highest court, which has to deal with appeals across the whole range of cases in the three jurisdictions in the United Kingdom". The other question is the extension of time. I accept that the Council sought to pursue a civil appeal to the Court of Appeal, overlooking ss.18(1)(c) and 28A(4). Having been knocked back, it has come to this Court promptly. Its application to this Court is misconceived, as I have explained. But I would not have shut it out on grounds of delay. For that reason, I will formally grant the extension.

Order

9. I will make the following Order. I will record in recitals that the Court gave a judgment [2023] EWHC 1504 (Admin) ("the Decision") and that the Council made applications, for the purposes of s.1 of the 1960 Act, for: (a) an extension of time to seek permission to appeal to the Supreme Court; (b) permission to appeal to the Supreme Court; (c) certification of points of law of general public importance. I will order that: (1) The application for an extension of time is granted. (2) The application for permission to appeal is refused. (3) This Court declares that the Decision is not a decision of the High Court in a criminal cause or matter. (4) Notwithstanding and subject to paragraph (3), the Decision involved what are hereby certified to be the following points of law of general public importance: "For the purposes of Part 4 Chapter 3 of the Anti-Social Behaviour Crime and Policing Act 2014: (i) Do "premises" (a) include anywhere on a map where a line could be drawn and an area shaded or (b) require somewhere objectively identifiable on the ground as a distinctive property and/or (c) exclude a highway? (ii) May a Closure Order prohibit specific things being done on premises?"

1.8.23