Neutral Citation Number: [2019] EWCA Crim 2101

Case No: 201604268 C2 & 201704794 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM PRESTON CROWN COURT
HHJ PARRY
T20160641 & T201676261
AND
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HHJ McCREATH
T20110610, T20120531 & T20137121

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RIGHT HONOURABLE LORD JUSTICE FULFORD
VICE-PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
and
SIR HENRY GLOBE

Between:

Christopher Cunningham	**Applicant (1)**
Giovanni Di Stefano	**Applicant (2)**
- and -	
The Queen	**Respondent**

Mr Richard Wormald QC (instructed by **Olliers for Applicant (1) and Karen Todner for Applicant (2)**) for the **Applicants**
Mr Duncan Penny QC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 6 November 2019
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Approved Judgment

The Lord Burnett of Maldon CJ :

The procedural issue

1. This case involves consideration of two procedural issues, namely:

   i) whether the Registrar of Criminal Appeals has the power, in certain circumstances, to determine the merits of an application to re-open a decision of the Court of Appeal (Criminal Division); and

   ii) depending, in part, on the answer to i), the role of the single judge and the full court in determining these applications.

The relevant facts

Cunningham

2. On 13 January 2017, the applicant Cunningham was convicted in the Crown Court at Preston on four counts of rape, a single count of controlling or coercive behaviour in an intimate or family relationship, a count of making a threat to kill and six counts of common assault. He was sentenced on 3 March 2017 on each count of rape to an extended sentence, comprising a custodial term of 16 years and an extended licence period of 4 years (there were concurrent determinate terms in relation to all the other offences).

3. On 22 November 2018 [2018] EWCA Crim 2704) the full court refused the applicant's renewed application for an extension of time for leave to appeal against conviction (leave having originally been refused by the single judge, Sir Peter Openshaw), but the court reduced the custodial term of the extended sentence to 14 years, leave having been granted by Sir Peter to appeal against the applicant's sentence.

4. On 14 March 2019 the applicant made a written application, under Criminal Procedure Rule ("Crim PR") 36.15 (see [34] below), to re-open his renewed application for an extension of time for leave to appeal against conviction. As set out above, he had been tried and convicted in the Crown Court at Preston, where the single judge, Sir Peter, had sat as a circuit judge and held the position of the Recorder of Preston prior to his appointment to the High Court bench. Indeed, he had been sitting at that Crown Court at around the time he dealt with the application for leave to appeal and he had been conducting a trial arising out of the Hillsborough disaster at that court when the present application was first made. In those circumstances, it was submitted there had been a defect in procedure, namely that in performing the role of single judge Sir Peter was in breach of section 56(2) of the Senior Courts Act 1981.

5. Section 56(2) provides:

> "No judge shall sit as a member of the criminal division of the Court of Appeal on the hearing of, or shall determine any application in proceedings incidental or preliminary to, an appeal against –

> (a) a conviction before himself or a court of which he was a member; or
>
> (b) a sentence passed by himself or such a court."

6. The application was considered by the Registrar, which she refused applying the relevant limb of the test governing applications to re-open a decision of the Court of Appeal (set out at [31] below), on the basis that no defect in procedure which may have led to a real injustice had been identified. The Registrar additionally considered the substantive merits of the argument raised by the applicant and concluded that Sir Peter's determination of the application for leave to appeal was not incidental or preliminary to an appeal against a conviction "before himself or a court of which he was a member" and, thus, there had been no breach of section 56.

7. The applicant was informed of that decision by letter dated 26 March 2019. In a letter dated 28 March 2019 he requested that the Registrar's decision be reviewed by a judge. In the event of the case being referred to the full court, he indicated "…. (his) previous applications will need to be amended. Additional grounds have been identified …".

8. Sweeney J was asked to consider the application, with a view either to referring it to the full court or refusing it. On 30 May 2019, he concluded that the application wholly lacked merit. However, he determined there were issues in relation to the Registrar's role in dealing with such applications, and any appellate process in the event of a refusal by the Registrar, which needed to be addressed. In the result, he recommended the Registrar refer the instant application to the full court.

Di Stefano

9. The applicant Di Stefano was extradited from Spain and convicted at Southwark Crown Court on 27 March 2013 on a 25-count indictment alleging dishonesty, which included offences of obtaining a money transfer by deception, theft, acquiring criminal property by deception, using criminal property, and fraud. After his conviction he pleaded guilty to two further offences and was sentenced to a total of 14 years' imprisonment. In essence, the applicant had assumed the role of a qualified lawyer between 2004 and 2009, obtaining in excess of £3 million from those he falsely represented. The victims were often defendants accused of criminal offences, or the families of defendants, who believed he was a genuine lawyer. At trial, the prosecution relied on bad character evidence to establish the applicant's propensity to act dishonestly and be untruthful. This evidence was reduced to Admissions, incorporating three sets of previous convictions in the United Kingdom and Italy: (i) five offences of dishonesty reflecting the applicant's use of worthless cheques to pay for goods and services, in relation to which he pleaded guilty and was sentenced at the Middlesex Guildhall in 1976; (ii) three offences of dishonesty stemming from the applicant's involvement in two sham companies with which he had induced others to do business, along with his use of additional worthless cheques, in respect of which he was convicted in the Central Criminal Court in 1986; and (iii) two offences of dishonesty arising out of the applicant's pretended role as an "avvocato" and his failure to transfer money and shares to a company which had instructed him, and in respect of which he had been convicted in the Court of First Instance in Rome in 2009. At trial the offences in (i) were not contested, but he did not accept (ii) and (iii).

As to (ii), he disputed he had acted dishonestly, and alleged he had been assured by the Security Services in 1998 that the relevant convictions had been quashed (the prosecution called various officials who disputed this). As to (iii), he alleged that although he was innocent of those offences, he had not disputed them as they did not "count" under Italian law.

10. During the confiscation proceedings after his conviction, whilst the parties agreed the applicant's benefit was £3,417,000, there was an issue as to the "available amount", which was determined by the judge on 20 March 2014 as £2,058,000 million. The default sentence of imprisonment was set at 8 ½ years. This was activated pursuant to section 38 of the Proceeds of Crime Act 2002 on 11 April 2014.

11. On 19 April 2016, the Full Court, having granted leave to appeal the confiscation order, quashed the default period of 8 ½ years' imprisonment and substituted 6 years. In September 2016, the applicant applied for an extension of time of over 3 years to appeal against his conviction and sentence. These were refused by the single judge. Thereafter, the Full Court, on 9 March 2017, refused the applicant's renewed applications for an extension of time to seek leave to appeal his conviction and sentence, and the court ordered that 56 days of time spent in custody would not count towards his sentence.

12. In the present proceedings the applicant seeks to re-open his application for an extension of time for leave to appeal sentence pursuant to rule 36.15 Crim PR. In a written application dated 19 December 2018 he submits that evidence has come to light which appears to suggest that the PNC record (dated 8 March 2011) of his previous convictions as used in the Crown Court and Court of Appeal was inaccurate. It listed five convictions for twenty offences between 1975 and 1986, whereas (as the applicant submits) he only has a single conviction for two offences in 1976 (this contention allegedly accords with a PNC printout he had been provided with by the Prison Service on 17 July 2018).

13. The application was considered by the Registrar, who refused to refer it to the Full Court on the basis that even if a procedural irregularity was established, the applicant had an alternative effective remedy through the Criminal Cases Review Commission ("CCRC"). This decision was communicated by letter dated 18 Februry 2019 to the applicant via his solicitor. The applicant responded by letter dated 20 February 2019, submitting that the issue was not one of "procedural irregularity", and instead involved the falsification of the relevant PNC record which had resulted in a significantly excessive sentence. He submitted that the route of approaching the CCRC with a view to a possible referral to this court would result in "serious injustice" on account of the inevitable delay.

14. The applicant submitted a second written application on 21 March 2019, in which he advanced a further ground for re-opening the decision of the Court of Appeal. He maintained that before conviction he had been on bail for 731 days with a curfew condition, to which the judge did not refer, and the court had failed to obtain the relevant records. The applicant claimed that he had secured documentation from Westminster Magistrates' Court and Southwark Crown Court, which showed that he was entitled to credit for all the days on curfew, or at least for 60 days between 21 October 2011 and 19 December 2011.

15. The applications were referred to Sweeney J. On 30 May 2019 he determined the submissions were wholly without merit but he again cited the need for procedural clarification, and recommended that the Registrar refer the matter for consideration by the full court.

16. These two applications have been heard together because they raise the same procedural issue.

The role of the Registrar, the Single Judge and the Full Court

17. The Registrar is concerned that the full court may have to spend significant time considering meritless applications to re-open concluded appeals. In order to ease this potential burden, she has helpfully framed the following questions on which she seeks our guidance:

> *(i) Whether either/both the Registrar of Criminal Appeals or a single judge has a role to play in filtering applications received under Rule 36.15 before referring them to the full court?*
> *(ii) Whether the Registrar or a single judge retains an inherent jurisdiction to refuse to refer an application under Rule 36.15?*
> *(iii) If so, what test should be used to determine whether the application is effective?*
> *(a) An application which, whatever its merit, provided on its face the required reasons under the Criminal Procedure Rules, or*
> *(b) Only such applications which did that and were (in the Registrar or the single judge's view) arguable.*
> *(iv) If the Registrar refuses to refer the application to the full court, is the decision open to challenge and if so to what tribunal?*
> *(v) Alternatively, is the decision of the single judge, to refuse to refer the application to the full court, open to challenge?*
> *(vi) Would you recommend that the Rules Committee contemplate any further changes to the Criminal Appeal Rules?*

18. The jurisdiction and powers of the Court of Appeal (Criminal Division) ("CACD") are entirely statutory (see *R. v Yasain* [2015] EWCA Crim 1277; [2015] 2 Cr. App. R. 28; [2016] Q.B. 146 and *R v Gohil* [2018] EWCA Crim 140; [2018] 1 Cr.App.R 30).

19. Part I of the Criminal Appeal Act 1968 ("the Act") (sections 1 to 32) concerns appeals to the CACD in criminal cases and part II (sections 33 to 44A) appeals to the Supreme Court.

20. The powers of the CACD in respect of Part I which may be exercised by one judge of the court ("the single judge") or by the Registrar are set out in sections 31, 31A, 31B and 31C of the Act. Section 31 contains the powers of the full court which are exerciseable by the single judge (for example, the power to give leave to appeal (section 31(2)(a)) or to extend the time within which a notice of appeal or an application for leave may be given (section 31(2)(b)). If the single judge refuses an application as regards any of these powers, the appellant is entitled to have the matter determined by the full court (section 31(3)).

21. Section 31A identifies the powers of the CACD under Part I of the 1968 Act which are exerciseable by the Registrar (for example, the power to extend the time within which a notice of appeal or application for leave to appeal may be given (section 31A(2)(a)), or the power to order a witness to attend for examination (section 31A(2)(b)). If the Registrar refuses an application to exercise his or her powers in favour of appellant, the appellant is entitled to have the application determined by a single judge (section 31A(4)).

22. Section 31B identifies the power to determine applications for procedural directions which may be exercised by a single judge or the Registrar. "Procedural directions" are defined as directions for the efficient and effective preparation of an application for leave to appeal or an appeal under Part I of the Act (against conviction or sentence) or interlocutory appeals (under section 9 of the Criminal Justice Act 1987 or section 35 of the Criminal Procedure and Investigations Act 1996). Where a procedural direction has been given by the Registrar (or the Registrar has refused to give such a direction) under section 31B, section 31C provides that both applicant/appellant and respondent can apply to the the single judge for the matter to be reconsidered.

23. Section 44 identifies the powers of the CACD which may be exercised by the single judge in respect of Part II (for example, the power to extend time for making an application for leave to appeal, to make an order in relation to bail or to give leave for a person to be present at the hearing of an incidental hearing to the appeal (section 44 (1)(a)(i)-(iii)).

24. Finally, section 20 of the Act provides:

> "Disposal of groundless appeal or application for leave to appeal
>
> If it appears to the registrar that a notice of appeal or application for leave to appeal does not show any substantial ground of appeal, (she) may refer the appeal or application for leave to the Court for summary determination; and where the case is so referred the Court may, if they consider that the appeal or application for leave is frivolous or vexatious, and can be determined without adjourning it for a full hearing, dismiss the appeal or application for leave summarily, without calling on anyone to attend the hearing or to appear for the Crown thereon."

25. Within the Act, there are no circumstances in which the Registrar has a power to determine the substantive merits of an application for leave to appeal. At most, as just rehearsed, by section 20 she is able to refer the appeal or application to the court for summary determination. In the usual case in which an applicant applies for leave – having submitted Grounds to the Registrar – the court alone (in the form of a single judge) considers the merits and whether to give leave. The Registrar assists the single judge and the full court by providing a summary of the facts and the issues and, on occasion, a suggested approach to the merits, but the court alone (the single judge or the full court) determines whether to grant leave, and only the full court makes a final determination on the merits of the application.

26. As described above at [1], the first procedural issue before this court is whether, notwithstanding the clear statutory description of the authority of the Registrar, she has the power, in particular circumstances, to determine the merits of an application to re-open a decision of the CACD. However, before we address that issue, it is convenient to describe the circumstances in which a concluded appeal can be re-opened.

27. Section 2 of the Act provides the sole test for allowing or dismissing an appeal against conviction:

> "(1) Subject to the provisions of this Act, the Court of Appeal—
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case."

28. The CACD has the inherent power, as with other courts, to revise any order before it is recorded in the relevant record of the court (see *Yasain* [19]). That aside, the general rule is that when the decision of the court has been recorded in the relevant records, there is no jurisdiction to re-open the appeal and the order is final (see *Yasain* [22]). As Lord Thomas of Cwmgiedd CJ, giving the judgment of the court in *Yasain*, said:

> "The general position is that the court is at this point functus officio and will not re-hear an appeal, as it has no general jurisdiction to do so … ."

29. In *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] Q.B. 528 the Court of Appeal (Civil Division) described the general "implicit jurisdiction" to re-open proceedings which it had already heard and determined. The decision in that case led to a change of the Civil Procedure Rules as set out at CPR r.52.30(1), which provides:

> "The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."

30. The CACD, in *Yasain*, concluded ([38]) that there was no basis for any distinction between the Civil Division and the CACD as to the principles applicable to the jurisdiction to reopen concluded proceedings. The appellate jurisdiction in each case was statutory and they equally have the same implicit jurisdiction. However, the court emphasised ([38] – [40]), as Lord Woolf CJ had done in *Taylor v Lawrence*, the distinction between the existence of the implied or implicit jurisdiction and the way in which it was exercised.

31. The court in *Gohil* comprehensively summarised the ambit of this jurisdiction in the CACD, so as significantly to reduce the need in this judgment to rehearse the various authorities in which this issue has been considered. Gross LJ set out:

> "(viii) Pulling the threads together
>
> 129. We venture to pull the threads together as follows:
>
> i) the CACD has jurisdiction to re-open concluded proceedings in two situations. First, in cases of *nullity* , strictly so-called and distinguished from "mere" irregularities. Secondly, where the principles of *Taylor v Lawrence* , as adopted in *Yasain* are applicable, thus where the *necessary conditions* are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to re-open the appeal, and the absence of any alternative effective remedy. It is to be emphasised that these are almost invariably *cumulative* requirements—though not necessarily *sufficient* for the exercise of the jurisdiction, in that the court retains a residual discretion to decline to re-open concluded proceedings even where the necessary conditions are satisfied;
>
> ii) though the principles of *Taylor v Lawrence* apply in both the Court of Appeal (Civil Division) and the CACD, as underlined in *Yasain* the jurisdiction need not necessarily be exercised in the same way, bearing in mind both the triangulation of interests in criminal proceedings (the state, the defendant and the complainant/victim) and the general availability of the CCRC to remedy the injustice of wrongful convictions;
>
> iii) in exercising the jurisdiction to re-open concluded proceedings, the test applied by the CACD will be the same, regardless of whether the application is made by the Crown or on behalf of the defendant;
>
> iv) we respectfully agree with the observation of the court in *Yasain* that the jurisdiction of the CACD to re-open concluded proceedings is probably best confined to "procedural errors". Indeed, at least generally, we see the *Yasain* jurisdiction as directed towards exceptional circumstances involving (as submitted by the amicus) the correction of clear and undisputed procedural errors "where it is simpler and more expedient for the court itself to re-open the appeal and correct a manifest injustice without the need for further litigation". Such an approach is healthy as it does not altogether exclude room for pragmatism in practice, while confining its scope to appropriately very limited circumstances, where, even if recourse to the CCRC was otherwise available, it would be a

> wholly unnecessary exercise. As it seems to us, fashioning the jurisdiction in this manner accords with authority, principle, practicality and policy—not least the great importance of finality in criminal proceedings;
>
> v) […]
>
> vi) […]"

32. We entirely agree with the approach of this court in *Yasain* and *Gohil* that, save for decisions that are a nullity, the usual exercise of this jurisdiction is to be confined to correcting "procedural errors" that are clear and undisputed and when there is no alternative effective remedy (albeit we do not wish to close the door entirely on exceptional circumstances, when the lack of an alternative effective remedy, or some other reason, may lead the court to re-open a decision in order to avoid a manifest injustice). As Gross LJ observed in *Gohil*, although the jurisdiction to re-open concluded proceedings has not been removed by the availability of recourse to the CCRC, that will almost invariably be the proper route ([128]).

33. In *Hockey* [2017] EWCA Crim 742; [2017] 2 Cr App R 23, the court dealt with the procedure to be followed in advance of the Criminal Procedure Rules Committee providing a framework. At paragraph 16 of the Court's judgment Sir Brian Leveson P stated:

> "16. Thus, a foundation for practical procedural requirements (and the procedure which must be followed until Criminal Procedure Rules which provide for a different framework) is as follows:
>
> If a party (whether prosecutor or defendant) wishes the Court of Appeal (Criminal Division) to reopen a final determination of the court based on the implicit jurisdiction identifed in R v Yasain it must:
>
> apply in writing for permission to reopen the decision, as soon as practicable after becoming aware of the grounds for doing so; and
>
> serve the application on the Registrar and all other parties to the proceedings.
>
> (ii) The application must specify the decision which the applicant wishes to reopen and provide reasons identifying:
>
> the circumstances which make it necessary for the court to reopen that decision in order to avoid real injustice;
>
> what makes those circumstances exceptional and thus appropriate for the decision to be reopened notwithstanding the

> interests of other parties to the proceedings and the importance of finality;
>
> an explanation and reasons for the absence of any alternative effective remedy and for any lapse of time in making the application having discovered the facts which form the grounds for so doing.
>
> (iii) On receipt of an effective application, the Registrar will refer the application to the full court for determination on paper. There is no right to an oral hearing unless the full court so directs.
>
> (iv) The court must not give permission to reopen a final determination unless each other party to the proceedings has had an opportunity to make representations."

34. Since that decision, the following Rule within the Crim PR has been issued:

> "Reopening the determination of an appeal
>
> 36.15.
>
> (1) This rule applies where-
>
> (a) a party wants the court to reopen a decision which determines an appeal or reference to which this Part applies (including a decision on an application for permission to appeal or refer);
>
> (b) the Registrar refers such a decision to the court for the court to consider reopening it.
>
> (2) Such a party must-
>
> (a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and
>
> (b) serve the application on the Registrar.
>
> (3) The application must-
>
> (a) specify the decision which the applicant wants the court to reopen; and
>
> (b) explain-
>
> (i) why it is necessary for the court to reopen that decision in order to avoid real injustice,

> (ii) how the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality,
>
> why there is no alternative effective remedy among any potentially available, and
>
> (iv) any delay in making the application.
>
> (4) The Registrar
>
> (a) may invite a party's representations on-
>
> (i) an application to reopen a decision, or
>
> (ii) a decision that the Registrar has referred, or intends to refer, to the court; and
>
> (b) must do so if the court so directs.
>
> (5) A party invited to make representations must serve them on the Registrar within such period as the Registrar directs.
>
> (6) The court must not reopen a decision to which this rule applies unless each other party has had an opportunity to make representations.
>
> [Note. The Court of Appeal has power only in exceptional circumstances to reopen a decision to which this rule applies.]"

35. Rule 36.15 (1) clearly contemplates two separate situations: first, when a party wants the court to re-open a decision and, second, when the Registrar refers a decision for the court to consider reopening it. The lack of the word "and" between Rule 36.15 (1) (a) and (b) means they are to read disjunctively, thereby setting out alternatives.

36. As to procedure, Rule 36.6 (5) stipulates:

> "Where a party wants the court to reopen the determination of an appeal—
>
> (a) the court—
>
> (i) must decide the application without a hearing, as a general rule, but
>
> (ii) may decide the application at a hearing; and
>
> (b) need not announce its decision on such an application at a hearing in public."

37. The first of the procedural questions, therefore, is whether the Registrar correctly decided that she has the power to filter these applications on the basis of their merits, relying on the passage cited above ([33]) from the judgment in *Hockey* at [16 (iii)]:

> "On receipt of an **effective** application, the Registrar will refer the application to the full court for determination on paper. There is no right to an oral hearing unless the full court so directs." (emphasis added)

38. Is an "effective" application one in which the procedural requirements have been addressed **and** is (in the Registrar's view) arguable, or is it simply one that complies with the procedural requirements?

39. Neither the applicant nor the Crown contend that the Registrar can decline to refer applications she considers unmeritorious. We have concluded they were right not to do so. As set out above, the Act has extensively described the extent of the Registrar's authority, which does not include a role in these circumstances which would be akin to that of the single judge when refusing leave to appeal. Had the court in *Hockey* intended to recognise an authority on the part of the Registrar to determine the substance of applications of this sort, it would have given such a development detailed consideration rather than leaving it to the use of a single word – "effective" – without any accompanying discussion. The scheme of the Act is that decisions on the merits of applications or appeals are made in all instances by the full court, with applications for leave being considered (in the first instance) by the single judge. Consistent with this approach, we have no doubt that if the procedural requirements are met in the present context, the Registrar must refer the application to the court.

40. We turn next to the respective roles of the single judge and the full court. The expression "the court" is defined by Rule 36.1 (2) (which addresses appeals to the Court of Appeal):

> "[…] unless the context makes it clear that something different is meant 'court' means the Court of Appeal or any judge of that court."

41. However, in this particular context "court" means the full court. What is required is a streamlined process that will provide an expeditious and final determination of these applications, at an appropriate judicial level. If an application is sent to the single judge, this will either create a two-stage process, with the applicant having the right to renew or appeal a refusal or dismissal, or the full court will be entirely excluded. Although there is no right of appeal or review from the decision of the judge on an application for permission to reopen a final appeal under the Civil Procedure Rules (Rule 52.30 (7)), the Divisions of the Court of Appeal have diverged in this respect, and given the Criminal Division is dealing with convictions and "the liberty of the subject", it would be wrong to establish a procedure which, amongst other things, denies the full court the opportunity of determining the merits of an application. These applications should be sent by the Registar straight to the full court (constituted of three judges), and they will be resolved on paper, without a hearing, unless the court orders otherwise. In those circumstances, there is no reason to amend the Criminal Procedure Rules.

42. This approach reflects the guidance given in *Hockey* (at [16 (iii)]) for the period prior to the relevant change to the Criminal Procedure Rules: "the Registrar will refer the application to the **full court** for determination on paper. There is no right to an oral hearing unless the **full court** so directs". (emphasis added)

43. Finally, in this context we stress that the court has power to decide upon the procedure it wishes to adopt, as described by Lord Woolf CJ in *Taylor v Lawrence* ([17]) when addressing the nature of the "inherent" jurisdiction vested in the Court of Appeal:

> "We here emphasise that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it is undoubtedly given by statute. So, for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such a power is implicit in it being required to determine appeals. It is also important when considering authorities which, it is suggested, are laying down principles as to the jurisdiction of a court, to ascertain whether they are doing more than setting out statements of the current practice of the court, which can be changed as the requirements of practice change. These powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term "inherent jurisdiction" is used in this sense (as to which see The Inherent Jurisdiction of the Court by Master Sir Jack Jacob, Current Legal Problems (1970) 23 at p.32 et seq.), the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction."

44. We are grateful to Mr Penny Q.C. and Mr Wormold Q.C., on behalf of the Crown and the applicants respectively, for their research and skeleton arguments on these two procedural issues. In the event they focussed helpfully on the role of the Registrar, the single judge and the full court, agreeing that the Registrar does not have a role in determining the merits. Mr Wormold supported the proposal that these applications should be resolved by the single judge whilst Mr Penny argued that, whilst the CACD has the power to determine its own procedure, these applications should be referred to the full court.

Unmeritorious applications risk a loss of time order

44. Section 29 of the Act provides:

> "Effect of appeal on sentence.
>
> (1) The time during which an appellant is in custody pending the determination of his appeal shall, subject to any direction which the Court of Appeal may give to the contrary, be reckoned as part of the term of any sentence to which he is for the time being subject.
>
> (2) Where the Court of Appeal give a contrary direction under subsection (1) above, they shall state their reasons for doing so; and they shall not give any such direction where—
>
> (a) leave to appeal has been granted; or

> (b) a certificate has been given by the judge of the court of trial under—
>
> (i) section 1 or 11(1A) of this Act; or
>
> (ii) section 81(1B) of the Senior Courts Act 1981
>
> (c) the case has been referred to them under section 9 of the Criminal Appeal Act 1995."

45. In our judgment, an application to re-open an appeal comes within the words of section 29 "pending the determination of his appeal", in that it is part of the process of attempting to appeal the applicant's conviction and/or sentence in the Court of Appeal, whether by way of applying for leave to appeal conviction and/or sentence or (as here) applying to re-open an appeal to the court on conviction and/or sentence.

46. Subsection 2 empowers the court, therefore, to direct that time spent in custody shall not count towards sentence but such an order may not be made in certain circumstances.

47. In *R v James (Wayne George)* [2018] EWCA Crim 285; [2018] 1 Cr App R 33, the Vice-President of the CACD indicated that the full court should consider using their power to order loss of time or costs, even when the single judge had not indicated that in his view the court should consider such an order if the application is renewed or when an advocate has advised and advanced an application ([5]). By analogy, on an application to re-open, the full court will consider making a loss of time order or a costs order if it is totally unmeritorious. Accordingly, we stress that the absence of a warning from the single judge (who does not have a role in this process, as set out above), or the fact that a renewal is supported by an advocate, does not preclude the court from making an order for loss of time or costs.

48. When an applicant seeks to re-open a decision in these circumstances, he or she should be warned in suitably neutral terms as part of the communications from the Registrar that totally unmeritorious applications may result in an adverse order of this kind. It follows that we do not accept Mr Wormold's submission that a loss of time order can only be made if there has been an earlier warning by the single judge of this potential eventuality.

The two applications

49. These applications, which are now before the full court for consideration, fail to satisfy the criteria for re-opening a decision, namely there is a procedural error that is clear and undisputed, and there is no other effective remedy. For Di Stefano, the alleged forgery of the PNC record and the dispute as to the qualifying days on curfew are complicated and they are not procedural matters which are uncontested, in the sense of being the subject of agreement with the Crown. The complaint by Di Stefano that consideration of his case by the CCRC will take time is not a justification for seeking to re-open a decision of the Court of Appeal, not least because that argument, if correct, would potentially apply to all cases. As regards Cunningham, his complaint about the position of the single judge, based on his connection with the court where he was tried, is equally not a procedural error that is "clear and undisputed".

50. Cunningham's submission that the position of Sir Peter as the single judge renders the proceedings a nullity because he presided over the court which convicted him, or he had sentenced him, or he had been a member of the court which convicted or sentenced him, for the purposes of section 56 (2) Senior Courts Act 1981 (see [5] above), is totally without merit. This provision is directed, not at the court building, but at the tribunal that dealt with the case. Sir Peter had not presided over the proceedings resulting in the applicant's conviction or sentence, nor had he been a member of that court in some other way, and his regular sittings at Preston Crown Court, including as Recorder, are irrelevant. Sweeney J observed:

> "8. […] A Circuit Judge is assigned to the Court where he or she sits. They are not a member of it. The prohibition in s.56(2) is clearly intended to ensure that the trial and/or sentencing judge, whether sitting alone or with one or more others (which, in the Crown Court, would be with one or more Magistrates) is not involved in any appeal process. Nor, on any view, was the applicant convicted and sentenced when Sir Peter was a member of the court."

51. In El-Tawil v. Comptroller General of Patents [2016] EWCA Civ 646 Floyd LJ at [12] similarly noted, in a different context, that:

> "Section 56 […] is concerned with judges being concerned in any way with appeals from their own judgments."

52. Given these applications do not come within the criteria of procedural errors that are clear and undisputed when there is no alternative effective remedy, and since they do not arguably reveal any other exceptional basis for re-opening an earlier decision of this court, we need not consider the suggested underlying merits of the various submissions (save as to the issue of nullity raised by Cunningham, which we have addressed above).

53. In the circumstances, these applications are refused.

54. In future the court will investigate whether an application to re-open is totally unmeritorious and if it is, consideration will be given to a loss of time order or an order for costs.