IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01547/B4
[2023] EWCA Crim 928

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 18th July 2023

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GOOSE

SIR ROBIN SPENCER

R E X

- v -

KAWSOR MIAH

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Mr C Sekar appeared on behalf of the Applicant

Mr L Seelig appeared on behalf of the Respondent

J U D G M E N T
(Approved)

Tuesday 18th July 2023

LORD JUSTICE HOLROYDE:

1. The applicant's name has been anonymised in the listing of this application because reporting restrictions may apply in this case. We shall address that issue at the conclusion of this judgment.

2. The applicant is charged with offences of encouragement of terrorism, contrary to section 1(2)(b) of the Terrorism Act 2006, and support for a proscribed organisation, contrary to section 12(1A) of the Terrorism Act 2000. He awaits his trial by a jury. He seeks leave to appeal against a ruling as to admissibility of evidence which the trial judge made on 28th April 2023. His application for leave to appeal against conviction has been referred to the full court by the Registrar.

3. The respondent opposes the application on its merits, but also raises an issue as to the jurisdiction of this court. We must address that issue first. In order to do so, we must summarise the chronology of the proceedings thus far.

4. The charges against the applicant relate to messages which he posted on social media between 29th January 2020 and 12th April 2021. On 18th August 2022, in accordance with the standard procedure in terrorism cases, he was brought before the Central Criminal Court for a preliminary hearing before Sweeney J. By his own choice, the applicant was not legally represented. Sweeney J made a number of orders, including an order that the trial be fixed for 24th April 2023 in the Crown Court at Kingston Upon Thames, and an order that there be a plea and case management hearing and preparatory hearing before the trial judge on a date in November 2022. It should be noted that the order made by Sweeney J also included a timetable of steps to be taken, with a view to making that plea and case management hearing

and preparatory hearing effective.

5. The plea and case management hearing and preparatory hearing were listed on 30th November 2022 before the trial judge. The applicant was again unrepresented. He had not filed a defence statement, as he had been ordered to do by Sweeney J. The judge adjourned the hearing to a date in December.

6. On 22nd December 2022, the judge identified the hearing as a preparatory hearing. The applicant, again unrepresented, was arraigned and pleaded not guilty to all charges. The judge directed that there be a further case management hearing on 3rd April 2023. It does not appear that the judge said or did anything to suggest that he was adjourning the preparatory hearing, either to that date or to any other date.

7. By the time of the further case management hearing, the applicant was represented by his present counsel and solicitors. The court was informed that the legal representatives would be applying to break the fixed trial date. No directions were given, and the case was adjourned to 5th April 2023.

8. On 5th April 2023, the application to break the fixture was refused, and the case was adjourned to 24th April 2023 for the jury trial. Neither of those hearings was ordered to be, or identified as, a preparatory hearing. Nor was anything said or done by the judge to suggest that on either occasion he was adjourning a preparatory hearing.

9. On 23rd April 2023, the applicant's counsel served a document entitled "Legal Applications on Evidence", in which he said:

"There has not been a preparatory hearing involving defence

> legal representatives. The defence ask that there is one specifically to address the issue of whether or not the case is in violation of articles 10, 9, 6 and 7. It is submitted that this may be better dealt with after the legal argument on what is admissible or excludable evidence. …"

Later sections of that document dealt with aspects of the evidence, including issues of admissibility.

10. On the following day, and again on 25th April 2023, legal argument was adjourned because the applicant's counsel was unwell.

11. On 28th April 2023, submissions were heard on the applicant's application to dismiss most of the charges on the ground that they were incompatible with his Convention rights, and on an application by the respondent to adduce evidence of bad character. No further application was made for an order that the hearing that day be a preparatory hearing, and no order to that effect was made. Nor was anything said or done by the judge to suggest that he was treating the hearing as a resumption of a preparatory hearing which had been adjourned on an earlier occasion.

12. The judge refused the applicant's application. The judge granted the application of the respondent. That is the order against which the applicant now seeks leave to appeal. The judge also fixed a date for the jury trial.

13. The respondent submits that the ruling made by the judge on 28th April 2023 was not made in the course of a preparatory hearing, and that accordingly the applicant has no right to bring an interlocutory appeal against it, and this court has no jurisdiction to hear an interlocutory appeal. It is submitted that the only preparatory hearing in this case was that which was heard on 22nd December 2022 and that the decision now under appeal was not

made at such a hearing.

14. The applicant submits that the hearing on 28th April 2023 was a preparatory hearing: primarily, because an application for such a hearing had been made and had not been explicitly refused by the judge; or alternatively, because the hearing on 22nd December 2022 had been adjourned and was being resumed or continued in April 2023. The applicant contends that because he was unrepresented in December 2022, the purposes of a preparatory hearing were not achieved on that occasion, and the hearing on 28th April 2023 was in effect the first "proper" preparatory hearing. The applicant contests the respondent's submission that his written application had sought a preparatory hearing only in relation to the issue concerning the applicant's Convention rights, and not in relation to the evidential issues. He submits that all the matters raised in that application were intended to be the subject of a preparatory hearing, that they were suitable for determination at such a hearing, and that it would be an inappropriate use of the court's time and resources for them not to have been addressed in a preparatory hearing.

15. We have summarised those submissions very briefly, but we have considered all the points made on each side.

16. Specific provision for a preparatory hearing in serious fraud cases is made by sections 7 to 11 of the Criminal Justice Act 1987. More generally, section 29(1) of the Criminal Procedure and Investigations 1996 ("CPIA 1996") gives a judge of the Crown Court power to order a preparatory hearing where it appears that the case is of such complexity or seriousness, or is likely to involve a trial of such length that "substantial benefits are likely to accrue from a hearing before the time when the jury are sworn and for any of the purposes mentioned in section 29(2)".

17. Section 29(1A) confers a similar power to order a preparatory hearing in cases where an application is made for trial without a jury. However, section 29(1B) provides:

> "(1B) An order that a preparatory hearing shall be held must be made by a judge of the Crown Court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence."

18. In the present case, accordingly, an order for a preparatory hearing was required by law and, as we have said, was duly made at the preliminary hearing.

19. By section 30 of CPIA 1996:

> "30. **Start of trial and arraignment**
>
> If a judge orders a preparatory hearing —
>
> (a) the trial shall start with that hearing, and
>
> (b) arraignment shall take place at the start of that hearing, unless it has taken place before then."

20. Section 31 of CPIA 1996 sets out the powers which a judge may exercise at a preparatory hearing. By section 31(2) the judge may adjourn the preparatory hearing from time to time. By section 31(3) the court's powers include the power to make a ruling as to any question as to the admissibility of evidence and any other question of law relating to the case. Any order or ruling made pursuant to section 31(3) has effect throughout the trial, unless varied or discharged by the judge. Where a judge has ordered a preparatory hearing, and decides that an order which could be made at the hearing, pursuant to section 31(4) to (7), should be made before the hearing, section 32 gives the judge the power to do so

21. A key feature of a preparatory hearing is that rulings and orders made at such a hearing may be the subject of an interlocutory appeal. By section 35, an appeal lies to the Court of Appeal Criminal Division from any ruling of a judge under section 31(3), but only with the leave of the judge or of the Court of Appeal. By section 35(3), this court may confirm, reverse or vary the decision appealed against.

22. We note at this stage that, subject to limited exceptions, section 37 of CPIA 1996 prohibits the reporting of a preparatory hearing or an application for leave to appeal or appeal in relation to such a hearing.

23. Those statutory provisions are supplemented by rules 3.22 to 3.26 of the Criminal Procedure Rules. For present purposes, it is relevant to note two rules in particular. By rule 3.23(1) a party who wants the court to order a preparatory hearing must apply in writing as soon as reasonably practicable, and in any event not more than ten business days after the defendant pleads not guilty. We observe in passing that the time limit there specified is subject to the court's power under rule 3.15 to extend a time limit.

24. By rule 3.26, at the beginning of a preparatory hearing the court must announce that it is such a hearing and must take the defendant's plea if that has not already been done.

25. We have referred to the statutory framework at some length in order to demonstrate that it requires compliance with important procedural steps and formalities. Even where, as in this case, section 29(1B) requires that there be a preparatory hearing, it does so by requiring that a judge of the Crown Court must order that a preparatory hearing shall be held: the statute does not simply designate any interlocutory order made in proceedings relating to a terrorist offence as an order made, or deemed to be made, at a preparatory hearing. Where a

preparatory hearing is held, rule 3.26 requires that the court must at the outset announce that it is such a hearing. We would add that the court's announcement to that effect should be recorded in the court's order, as was correctly done in the record of the hearing in this case on 22nd December 2022. The preparatory hearing may, by section 31(2) be adjourned from time to time. But in our view any such adjournment must be formally announced as such. So, too, there must be formal identification of the status of an order made by a judge in exercise of the power conferred by section 32 after a preparatory hearing has been ordered, but before that hearing takes place.

26. A party may apply for a preparatory hearing, and we are satisfied that an application for a further preparatory hearing may be made, even when such a hearing has been held and concluded earlier in the proceedings. Rule 23 sets out the formal procedure which must be followed. Similarly, where a preparatory hearing has been held and concluded earlier in the proceedings, the court may of its own initiative order a further such hearing. But again, there must be clear identification of the status of such hearing. Once again, it is important that the status of any order made should be accurately recorded in the order of the court.

27. The reasons why such procedural steps and formalities must be observed are, we think, obvious. By section 30 of CPIA 1996 the trial is deemed to start when a preparatory hearing is held, and the defendant must be arraigned at the start of that hearing, with the consequences that an application to dismiss a charge may no longer be made, and that the provisions of Part 4 of the Act, relating to pre-trial hearings, are no longer applicable. Further, an order or direction made at a preparatory hearing may be the subject of an interlocutory appeal by a defendant, whereas a defendant has no general right of interlocutory appeal against an order or ruling, for example as to the admissibility of evidence, made after a trial has commenced.

28. There must, therefore, be clarity about whether the court has ordered that a particular hearing be a preparatory hearing and whether a particular order or direction is or is not made at a preparatory hearing.

29. Returning to the present case, the effect of the statutory provisions we have mentioned is clear. The preparatory hearing which was held on 22nd December 2022 was not adjourned. It concluded on that day. At no point thereafter did the judge say or do anything to suggest that he had adjourned the preparatory hearing. No application for a further preparatory hearing was made by the applicant, until he served his document on 23rd April 2023. That document expressly limited the application for a preparatory hearing to the issue relating to the applicant's Convention rights, and cannot be treated as if it extended the application to other issues. In any event, the hearing on 28th April 2023 was not declared by the judge to be a preparatory hearing. The application relating to the applicant's Convention rights was refused, and that decision by the judge is not the subject of an appeal. It is, accordingly, clear that the order against which the applicant does seek to appeal was not an order made under section 31(3) of the Act, and the applicant has no right of appeal against it. This court therefore has no jurisdiction to hear it.

30. In those circumstances it is unnecessary, and would be inappropriate, to say anything more about the facts and issues in the case generally, or to make any observation about the merits of the grounds of appeal. The appeal must be dismissed for want of jurisdiction.

(There followed submission on the question of reporting restrictions)

LORD JUSTICE HOLROYDE:

31. Finally, we return to the issue of reporting restrictions. This judgment has dealt with matters which are of general importance to judges and practitioners in cases in which a

preparator hearing is or may be held, and has emphasised the need to comply with the statutory provisions relating to the hearings to which that status is given.

32. The reporting restrictions imposed by section 37 of CPIA 1996 apply, as we have said, to a preparatory hearing. Such a hearing was held in this case on 22nd December 2022, but references in this judgment to that hearing contain no more than the basic details permitted by section 37(9). The reporting restrictions also apply to an application for leave to appeal in relation to a preparatory hearing. But for the reasons we have given, the order which is the subject of this appeal was not made at a preparatory hearing, and the restrictions accordingly do not bite.

33. It follows that this judgment may be reported and that the applicant may be named in any report. We have considered an application that we should exercise the court's power under section 4(2) of the Contempt of Court Act 1981 to order that any reporting of this application be postponed until after the conclusion of the trial. We are not persuaded that anything said in this judgment is capable of causing any prejudice to the fair trial of the applicant at a future date. We therefore decline to exercise that power.
