Neutral Citation Number: [2024] EWCA Crim 306

Case No: 202303035 A4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

**Before :**

**LORD JUSTICE WILLIAM DAVIS**
**MR JUSTICE MORRIS**
and
**HER HONOUR JUDGE DE BERTODANO**

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**Between :**

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| **REX** | **Appellant** |
| **- and -** | |
| **SYED MINHAZ AHMED** | **Respondent** |

**Reference by the Attorney General under s.36 Criminal Justice Act 1988**

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**Miss K Broome** for the **His Majesty's Attorney General**
**Mr P Kazantzis** for the **Respondent**

Written Submissions: 8 January 2024;
25 January 2024;
19 February 2024.

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Note - include here the details of any specific reporting restrictions that have been made by the court. This will have been identified in the Criminal Appeal Office Summary under the Reporting Restrictions heading or from the Court Order. The wording of any reporting restriction must appear in RED TEXT.

**LORD JUSTICE WILLIAM DAVIS :**

1. On 4 August 2023 HM Solicitor General applied pursuant to section 36 of the Criminal Justice Act 1988 for leave to refer a sentence of 4 years' imprisonment imposed on Syed Minhaz Ahmed in the Crown Court at Snaresbrook as unduly lenient. On 27 October 2023 we considered the application. We gave leave to refer the sentence. We quashed the sentence imposed at the Crown Court. We substituted it with a sentence of 8 years' imprisonment.

2. On 21 November 2023 Ahmed lodged an application pursuant to section 36(5) of the 1988 Act whereby he invited the court to refer a point of law to the Supreme Court for their opinion. The Registrar refused to accept the application. She considered that the application was ineffective because it was out of time. She concluded that the court had no power to extend time. Ahmed now applies to the court for an extension of time.

3. We received detailed written submissions on the issue of the court's power to extend time both on behalf of Ahmed and from HM Solicitor General. We did not consider it necessary to hear oral submissions.

4. Section 36(5) of the 1988 Act reads as follows:

   *Where the Court of Appeal have concluded their review of a case referred to them under this section the Attorney General or the person to whose sentencing the reference relates may refer a point of law involved in any sentence passed on that person in the proceeding to the Supreme Court for its opinion , and the Supreme Court shall consider the point and give its opinion on it accordingly, and either remit the case to the Court of Appeal to be dealt with or itself deal with the case.*

   A reference pursuant to section 36(5) can only be made with the leave of the Court of Appeal or the Supreme Court. Leave only will be granted if the Court of Appeal certifies that the point of law is of general public importance.

5. Provisions supplementary to section 36 appear in Schedule 3 of the 1988 Act. Paragraph 1 of that schedule stipulates that notice of an application by one of the law officers to refer a sentence as unduly lenient "shall be given" within 28 days of when the sentence was passed. The relevant part of paragraph 4 of the schedule is in these terms:

   *An application to the Court of Appeal for leave to refer a case to the Supreme Court under section 36(5) above shall be made within the period of 14 days beginning with the date on which the Court of Appeal conclude their review of the case….*

   Nothing is said in the schedule about any power to extend time.

6. The Criminal Procedure Rules deal with applications to refer a sentence under section 36 of the 1988 Act and for leave to appeal to the Supreme Court. CPR 41.2(4) sets out the time limit for the law officer to apply to refer any sentence. The note to the rule is as follows:

*[Note. The time limit for serving an application for permission to refer a sentencing case is prescribed by paragraph 1 of Schedule 3 to the Criminal Justice Act 1988. It may be neither extended nor shortened.]*

CPR 43.2(1)(b) sets out the time limit for applying to refer a point of law to the Supreme Court. The note to the rule is in these terms:

*For the power of the court or the Registrar to shorten or extend a time limit, see rule 36.3. The time limit in this rule—*

*……for applying for permission to refer a case under section 36(5) of the Criminal Justice Act 1988 (Attorney General's reference of sentencing decision: 14 days) is prescribed by paragraph 4 of Schedule 3 to that Act. That time limit may be neither extended nor shortened.*

The relevant part of CPR 36.3 reads:

*The court or the Registrar may—*

*shorten a time limit or extend it (even after it has expired) unless that is inconsistent with other legislation….*

The notes to that rule refer to the notes to rules 41 and 43 and indicate that this general power to extend time does not apply to the time limits in Schedule 3 of the 1988 Act.

7. The strict rules as to time limits in relation to applications under section 36 of the 1988 Act are readily understandable in relation to any application made by a law officer. When an offender is sentenced at a Crown Court, the offender will know that in many cases a law officer has the option of referring the sentence. But it would be unfair were the offender at risk of the sentence being reviewed other than within a strict time limit. That is why any application by the law officer must be made within 28 days. The same applies in the event of the Court of Appeal refusing to review the sentence imposed on an offender. If the law officer wishes to put the offender at further risk of the sentence being reviewed as a result of a reference to the Supreme Court, an application to refer the case to the Supreme Court will be subject to a strict time limit. Until 2014 a similar rationale applied to applications for leave to appeal against orders for extradition. Inflexible time limits applied both to those subject to the order for extradition and to the state requesting extradition. This was justified by the need for speed and certainty in extradition proceedings. Only statutory intervention via section 160 of the Anti-social Behaviour, Crime and Policing Act 2014 relaxed the strict rule. It was relaxed only in relation to persons subject to an order for extradition i.e. where it could be shown that the person concerned had done everything reasonable to make the application promptly.

8. On behalf of Ahmed it is argued that overall fairness requires a purposive interpretation to be given to the provisions of Schedule 3 of the 1988 Act. It is said that Parliament cannot have intended to remove any power to extend time simply by silence in the relevant provisions. Reliance is placed on what was said in *R (on the application of Legal Aid Casework) v Crown Court at Southwark* [2021] EWHC 397 (Admin) in relation to time limits set out in statutory regulations relating to

remuneration. Some regulations of that type allowed for extensions of time. The regulation in issue in the *Southwark* case did not have any such provision. The court concluded that Parliament cannot have intended "total invalidity" in the event of a failure to adhere to a time limit. It is submitted that a parallel can be drawn with an application for leave to appeal to the Supreme Court in what may be termed an ordinary case. Section 34(2) of the Criminal Appeal Act 1968 permits either a defendant or a prosecutor to apply to extend the time (28 days) within which the application is to be made.

9. HM Solicitor General submits that the intention of Parliament is clear. The 1988 Act does not provide for any extension of time in relation to an application pursuant to section 36 of that Act. It could have done so. Section 34 of the 1968 Act demonstrates that, when Parliament wishes to allow for an extension of time, it can and will do so in clear terms. The provisions relating to referring unduly lenient sentences post-date the 1968 Act by some 20 years. In this context the need for strict time limits is paramount. In relation to an offender, it is essential that there is no delay in the relevant sentence being reviewed. Once a sentence has been found to be unduly lenient and it has been increased, the interests of victim(s) require certainty in any further consideration of the sentence.

10. We consider that the time limits in relation to applications pursuant to section 36 of the 1988 Act are to be applied strictly. The language of Schedule 3 is unequivocal. There is no provision for any extension of time unlike the provisions of the 1968 Act relating to applications for leave to appeal. Whilst the notes to the Criminal Procedure Rules are not part of the Rules and do not have the force of law, they are persuasive. The notes appear in the Rules after consideration thereof by the Criminal Procedure Rule Committee. The rationale for strict time limits being applied to the law officers is readily understood. We have set it out above. In relation to an application for leave to appeal to the Supreme Court by an offender, this will have an impact on the victim(s) of the relevant offences. Their interests dictate a need for speed and certainty.

11. Any offender whose sentence has been increased as a result of an application pursuant to section 36 of the 1988 Act has a right to be represented. It is our experience that this right invariably is exercised. Thus, an offender will have access to legal advice at the conclusion of any hearing at which a sentence has been increased. The offender will be deemed to know of the time limits applicable to making an application for leave to appeal. An offender in that position will have had their sentence increased which is an unusual outcome. We do not consider that there is injustice in requiring a person in that position to make any further application within 14 days.

12. It follows that we conclude that the application made in this case is out of time. The Registrar was correct to determine that it was invalid. However, for the sake of completeness, we shall consider the substantive merits of the application.

13. Our decision in relation to the application to refer the sentence as unduly lenient is reported at [2023] EWCA Crim 1537. The offender had been convicted in March 2023 of causing death by dangerous driving. That offence had been committed in July 2020. The sentencing judge sentenced the offender by reference to guidelines issued by the Sentencing Guidelines Council in 2008. By the date of sentence in August 2023, the applicable guidelines were those issued by the Sentencing Council

in July 2023. We concluded that the judge fell into error when she used guidelines not in force at the time of sentence.

14. One argument deployed on behalf of the offender was that he had a legitimate expectation that he would be sentenced by reference to the earlier guidelines. This was because his sentence originally had been fixed for a date in June 2023 when the 2008 guidelines remained in force. The date of sentence had been delayed, in part because of the unavailability of the trial judge. The offender submitted that this chronology gave rise to the legitimate expectation as set out above. We concluded that the offender's only legitimate expectation was that he would be sentenced by reference to the guidelines in force at the date of his sentence. We drew a parallel with changes in release provisions between conviction and sentence as discussed in *Patel and others* [2021] EWCA Crim 231.

15. The offender now wishes to argue that the sentencing judge followed the general duty imposed on the court by section 59 of the Sentencing Act 2020 i.e. she was satisfied that it would be contrary to the interests of justice to follow sentencing guidelines relevant to the offender's case. It is said that we fell into error in drawing a parallel with statutory changes to release provisions. In doing so, we ignored the judge's exercise of her discretion pursuant to section 59 of the 2020 Act. This is said to be a point of general public importance.

16. We are satisfied that no such point arises. In our decision we referred expressly to the power of any judge not to follow guidelines where it would be contrary to the interests of justice to do so. We accepted that any judge may do so where the circumstances of the offence and/or the offender are sufficiently unusual to allow that course to be adopted. The judge in this case did not refer to that power. Rather, she simply said that the offender had been due to be sentenced when the old guidelines applied. In that event it was correct to sentence by reference to those guidelines. It was the use of guidelines no longer in force which constituted the error made by the judge.

17. It follows that, even if we had power to extend time, we would have refused to certify a point of law of general public importance.