CO/5209/2015; CO/2827/2016

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 27 July 2016

B e f o r e:

LORD JUSTICE BURNETT
MR JUSTICE COLLINS

Between:

THE QUEEN ON THE APPLICATION OF EMU

Claimant

v

WESTMINSTER MAGISTRATES' COURT

Defendant

GANGAR

Appellant

v

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Respondent

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(Official Shorthand Writers to the Court)

Miss Hannah Hinton (instructed by Janes Solicitors) appeared on behalf of the **Claimant Emu**
Mr N Rudolph (instructed by Janes Solicitors) appeared on behalf of the **Appellant Gangar**
Mr W Hays (instructed by the Government Legal Department) appeared on behalf of **Secretary of State for Justice in Emu**
Mr J Hall QC (instructed by the SFO) appeared on behalf of the **Respondent in Ganagar**

J U D G M E N T
(Approved)

1. MR JUSTICE COLLINS:

2. These two cases have been heard together because each raises a similar, if not identical, point which depends upon the construction of section 79(2) of the Magistrates' Court Act 1980. The cases involve consideration of the correct term of imprisonment or detention which is to be imposed by magistrates when a confiscation order has not been paid in full within the period which was allowed for its payment. The problem that arises is that interest accrues on such payments, and so albeit a payment of part of the amount may have been made, it may well not affect, and certainly will not affect to a complete extent, the amount that remains outstanding. The relevant section allows there to be a calculation of the amount which should be allowed in relation to any such payment. When I say the amount to be allowed, I mean that there should be a pro rata reduction in the term of imprisonment or detention which has been imposed.

3. The two cases involve in one an application for judicial review and in the other an appeal by way of case stated. Mr Peter Emu is challenging a decision made by a district judge to impose the relevant sentence of imprisonment in 2008. The reason why it has considerable importance for him is that if he is correct in his challenge, the release date from his sentence will be next month, whereas if the total period remained in being, it would be significantly longer than that. The amount in the other case, Mr Gangar, is somewhat less, but equally of course is of considerable importance for him.

4. So far as Mr Emu is concerned, he was stopped at Heathrow attempting to leave the United Kingdom in May 2002. He is a Nigerian national. When his bag was searched it was found to contain a significant sum of United States dollars and at his home when searched were found 11 kilograms of cocaine. It was clear from the evidence that he had been involved in drug trading. In December 2002 he was sentenced to a total of 22 years' imprisonment, which was reduced on appeal to 20 years. A confiscation order was imposed in the sum of £2 million with 2 years to pay being given and a default sentence of 10 years' imprisonment. That order was imposed on 6 August 2003.

5. After the 10 years, when the full amount had not been paid, the matter came before the magistrates' court in order to impose the appropriate sentence of imprisonment. That was done on 19 August 2008. He did not at the time appreciate that there could be any challenge to that order, and in the result nothing was done until his claim was lodged before this court. He was given permission to pursue judicial review out of time.

6. Mr Gangar was convicted of serious fraud. He was subject to a confiscation order in the sum of £2,750,000 in July 2010, but that was reduced by the Court of Appeal to a sum of £2,289,974.03, a somewhat detailed amount. So far as he is concerned, the matter came on for the purpose of imposition of the default sentence, which was 6 years' imprisonment, on 4 February 2016. By then, he had paid something over £67,500, but interest amounting to some £730,000 had accrued. Accordingly, the amount outstanding remained in fact in excess of the sum that had been ordered to be paid by the Court of Appeal. It was something approaching £3 million.

7. Going back to Mr Emu's case, he also had made payment in part. The payments that he had made again were subject to interest which had accrued of £408,497. He had paid some £394,000, but because of interest which had accrued the amount outstanding by the time the magistrates had to impose the default sentence was £2,408,497.

8. The relevant section is exceedingly badly drafted and is by no means easy to apply. But we have been, as will become apparent, assisted because the Court of Appeal has very recently in R (on the application of Gibson v Secretary) of State for Justice [2015] EWCA Civ 1148 decided how the exercise to be carried out under section 79(2) should be applied. The section as currently enacted provides as follows:

> "(2) Where, after a period of imprisonment or other detention has been imposed on any person in default of payment of any sum adjudged to be paid by the conviction or order of a magistrates' court or for want of sufficient distress to satisfy such a sum, payment is made in accordance with rules of court of part of the sum, the period of detention shall be reduced by such number of days as bears to the total number of days in that period less one day the same proportion as the amount so paid bears ..."

Having cited that, I do not doubt that it will be well understood that its construction is by no means easy.

9. There is what I can perhaps describe as a subissue, namely the reference to "less one day" and the approach that should be made to the deduction of that one day. I shall come to that in due course.

10. It must I think be clear that there are three possible approaches to that provision. First, the most unfavourable for any particular individual, is to look at the amount which was ordered by the Court and to see what is the result of any payment made, bearing in mind the increase caused by interest; and, if there is no reduction in the amount imposed by the Court, then there is no benefit to be obtained from those payments. That is the approach which was adopted by both the magistrates whose decisions are under attack in these cases.

11. That stems from a decision of the Divisional Court in Crown Prosecution Service v City of London Magistrates' Court [2007] EWHC 1924 (Admin). That case involved a person called Hartley. What the court there decided, dealing, as it happened, with a slightly different provision, was the approach which was said to be desirable. What Sedley LJ said in paragraph 7 was this:

> "What the enforcing justices have to work with, therefore, is something like a measuring jug. It has a fixed capacity which cannot be exceeded, but within it the amount of the debt may both fall as the capital sum is paid off and rise as interest accrues on the balance. When they come to activate a default term, the justices must activate the same proportion of it as the amount in the jug - that is principal and interest together - bears to its capacity."

12. That was not precisely the same provision in issue, but it is an approach which is certainly a possible approach having regard to the language of section 79(2). It is, as I have said, the most unfavourable for the individual in question.

13. The most favourable is that the starting point remains fixed at the amount imposed by the Crown Court and payments made will reduce pro rata, even if interest has meant that there has in effect been not only no reduction but still more outstanding.

14. The middle course, if I may describe it as such, is to take it to mean that the exercise to determine pro rata what deduction there should be is to look to see what is the amount outstanding at the date of the decision made to impose the default sentence and to measure against that sum the amount of payment that has been made by the individual, which means that he will get some benefit but by no means the same amount of benefit as would be obtained were what I have referred to as the first, least favourable, approach taken.

15. In Gibson, the Court of Appeal decided that the third approach which I have mentioned was the correct approach. The result of that is that, assuming it was applied as it should be, in each case the total amount of sentence should be reduced because, as I have said, the sentence imposed by the judges was simply the original which had been set to be the default sentence.

16. In Mr Emu's case, the order that had been made by the judge required that the full sentence should remain to be served and there was to be no reduction. The total period was 3,650 days. I will come as I said to the "one day" issue, but the exercise that the Gibson case requires to be carried out it is agreed would result in a reduction to 3,053 days. The result of that, as I have said, means that his release date is advanced to the middle of next month.

17. So far as Mr Gangar is concerned, the amount that was decided by the magistrate that should be served was again the total amount. Suffice it to say, without the need to go into the figures in detail, that the reduction would be a period of 49 days.

18. It is of course of considerable importance to the Prison Service, because the Prison Service has to assess the correct release date, that the approach should be made clear. It has, we have been told, effectively approached the matter in the way that Gibson ultimately decided, but apparently has decided that the sensible approach is effectively to freeze the date that the magistrate imposed whatever sentence was appropriate. Section 79(2) on the face of it will continue to apply, but it is not necessary for us, nor is it in my view desirable, to go into the issue which does not arise in either of these two cases as to how the further calculation should properly be made. It was dealt with in Gibson, but again not a matter which in Gibson was decisive or could be decisive as to the decision that was made. It is not necessary, nor as I say in my view desirable, for us to go into that issue.

19. I should say that I have not gone into the background statutory provisions which lead to section 79(2) being the relevant section. Obviously these two cases involve different confiscation provisions: one is drug trafficking and the other relates to other offences,

in this case fraud. But it is common ground that the provisions that are material lead to the same result, namely the application of section 79(2).

20. As I have said, there remains the "one day" point. It is not easy to follow why Parliament provided that the period should be less one day in the subsection, and counsel have not been able to inform us of what might be any reason for that. But it is necessary, in my view, clearly to look to the wording of the subsection. The first reference and the only reference to a period of imprisonment or other detention is the commencement of the subsection. That is a period which has been imposed in default of payment by, in these cases, the Crown Court. Then one goes on to see that the reference is made to "payment in accordance with rules of court of part of the sum", then "the period of detention..." (that clearly goes back to the original wording, "period of imprisonment or other detention") "... shall be reduced by such number of days as bears the total number of days in that period." Since that is the only period that is specifically referred to in the section, that must be a reference back, again, to the period imposed or set by the Crown Court. Then we have "the total number of days in that period less one day". The "less one day", as a matter of grammatical construction, clearly relates to that period, i.e. the original period set by the Crown Court. The fact that imprisonment is not mentioned and it only refers to detention is, in my view, immaterial; it is clear that "detention" covers imprisonment and it was not thought necessary to repeat "or imprisonment".

21. The result of that is that the exercise that has to be carried out is to look to the original period (and taking the case of Gangar it was 6 years) and reduce that by one day and then carry out the necessary exercise to deduct pro rata in accordance with the approach in Gibson the correct amount. It does not help the arithmetic, because normally it will mean that instead of a round figure one gets a figure which will need a calculator, I suspect, in order to ascertain. But that appears, in my view, to be the only reasonable construction of this obscure provision, which frankly needs consideration and needs clarity, if only to assist the unfortunate magistrates who have to impose and the Prison Service who have to give a correct assessment of the proper date for release. Obviously if they get it wrong and an individual is kept in custody for longer than he should be the imprisonment will be unlawful because there is no question of any intent in relation to false imprisonment.

22. The result, therefore, of these cases is that each must be allowed. So far as Mr Emu is concerned, this being as we say judicial review, it is open to us to direct that the correct figure be in the warrant which was issued by the magistrate and the amount should now be the figure that I have indicated, namely 3,053 days instead of the amount which at present exists. Similarly, so far as the case stated is concerned, we must answer the questions posed by the magistrate as follows:

> "(a) If as a result of interest accrued and notwithstanding any payments made towards the order by the defaulter the total amount owing to confiscation order imposed by the Crown Court is greater than the amount originally ordered by the Crown Court, should the period specified on the warrant have been reduced as a result of section 79(2) of the Magistrates' Courts Act 1980?"

The answer to that question is: yes, it should.

> "(b) If the answer to (a) in the affirmative by how much?"

23. We have given that, namely 49 days.

> "Accordingly, what was the proper term that should have been specified in the warrant of commitment?"

24. The answer is 49 days less than the sum that was imposed in the warrant.

25. Those are the results that I would reach in relation to each of the cases which are before us.

26. LORD JUSTICE BURNETT: I agree. The decision of the Court of Appeal in Gibson v Secretary of State for the Home Department [2015] EWCA Civ 118 determines the outcome of these two cases before us. It follows that the magistrates' courts making the orders of imprisonment in default failed appropriately to take account of the money paid towards the underlying confiscation orders. The interpretation of section 79(2) of the Magistrates' Courts Act 1980 favoured by the Court of Appeal states the law as it is at present. I say "at present", because the Supreme Court gave permission only last week for an appeal against the order of the Court of Appeal in Gibson, but that provides no warrant for us to take a different view.

27. It follows, as my Lord has indicated, that in Mr Gangar's appeal proceedings the effect of our order will be that 49 days will be deducted, resulting in a default period of 2,141 days rather than 2,190 days. In Mr Emu's judicial review claim, 597 days will be deducted, resulting in a default sentence of 3,053 days rather than 3,650 days.

28. I would be grateful if counsel in each case could draft a minute of order reflecting the outcome of the appeal in judicial review and submit it to the associate.

29. Are there any ancillary applications?

30. MR HAYS: Just one tiny correction in relation to my Lord's first judgment. There was reference to the default term as 2 years in Gangar's case; it was 6 years.

31. MR JUSTICE COLLINS: Yes, I will correct that.

32. LORD JUSTICE BURNETT: But there are no other orders?

33. MISS HINTON: Thank you, my Lord. I do make an application, please, for costs from central funds to be assessed pursuant to section 16 of the Prosecution of Offences Act 1985, subsection (5).

34. LORD JUSTICE BURNETT: There have been very significant changes to the powers of all courts to order costs from central funds. What is your funding position at the moment?

35. MISS HINTON: It is private. I do not know if you have seen a letter from the Westminster Magistrates' Court dated yesterday?

36. LORD JUSTICE BURNETT: Unless somebody has passed it up, no. What is it about?

37. MISS HINTON: Mr Hays circulated that yesterday evening.

38. LORD JUSTICE BURNETT: Yes. It was sitting on the bench and I have tidied it up. Let us just have a look. (Pause). This is presumably in dealing with a potential application for costs against the magistrates?

39. MISS HINTON: That is right.

40. LORD JUSTICE BURNETT: That is not going to run in this case.

41. MISS HINTON: That is not what I am seeking.

42. LORD JUSTICE BURNETT: No. I understand that, but my concern, Miss Hinton, is that on the few occasions that I personally have been round the track of the circumstances in which it is now possible to make an order from central funds, I have always found it very technical, and the effect of legislative changes, I think two years ago now, was to limit very substantially the circumstances in which someone could get costs from central funds, even when they were successful. We would need to be shown the latest iteration of the legislation and the underlying rules, because I recollect, forgive me if my recollection is entirely off-beam, but I recollect that we are left in a position where the primary legislation appears to say one thing but gives power for quite a lot to be dealt with in subordinate legislation and the subordinate legislation chops away quite a lot of what appeared to be in the primary legislation. Does any of that ring a bell with you?

43. MISS HINTON: I understand that in order for costs to be awarded in these circumstances, that is the judicial review brought by Mr Emu, that section 16 of the Prosecution of Offences Act 1985 provided the court is satisfied it relates to a criminal cause or matter. I have a copy of the legislation. I believe it is the one that is in force.

44. MR JUSTICE COLLINS: Is this a criminal cause or matter? I say that, because of course in Gibson, which dealt with this issue, the Court of Appeal assumed jurisdiction.

45. MISS HINTON: I know. That decision -- I was a little hesitant before making the application under this section.

46. MR JUSTICE COLLINS: I can see there might have been an argument that they should not have done, but again the rules about criminal cause or matter have been to some extent varied over the years. I say that because I remember being involved as counsel in one or two.

47. LORD JUSTICE BURNETT: I too have been involved in one or two cases, oddly enough in the Civil Division of the Court of Appeal recently refusing to accept jurisdiction because something was a criminal cause or matter. But, as my Lord says,

there is a slight oddity on the one hand in seeking to suggest this is a criminal cause or matter whilst on the other relying upon a judgment of the Civil Division of the Court of Appeal. Miss Hinton, what I am going to suggest should happen is that you reduce your submission that costs are available to this claimant out of central funds in these judicial review proceedings to a very short written submission. When I say very short, I am not limiting you, you will understand, but you will appreciate that my Lord and I would want to look at this very, very quickly. It is not a matter which Mr Hall has any interest in, I would imagine, so there will not be anybody else to make submissions against you.

48. MISS HINTON: No, my Lord. I think if I am, as a matter of law, entitled to it, then --

49. LORD JUSTICE BURNETT: Yes. We will decide.

50. MISS HINTON: Yes.

51. MR JUSTICE COLLINS: Looking at Gibson, the question of criminal cause or matter was dealt with there. The claim, I think, in Gibson related not to the decision of the magistrates but to a later decision concerning the time that he had to spend in prison because he had made a subsequent payment, I think. It was that which the court was able to decide took it out of being a criminal cause or matter. They deal with jurisdiction at paragraph 18 to 23. They say:

> "This case is not a challenge to a decision of a court exercising criminal jurisdiction. The challenge is to the way in which the Ministry of Justice has calculated the appellant's sentence, administratively, some time after the criminal proceedings concluded..."

The difference here is that this is an attack in both cases on the decision of the magistrate in criminal proceedings.

52. MISS HINTON: Yes.

53. MR JUSTICE COLLINS: Therefore I think, for my part, that it is almost certainly a criminal cause or matter.

54. LORD JUSTICE BURNETT: That sounds right. But nonetheless I think we need a short submission in writing drawing our attention to the statutory provisions, and, if I may say so, we need to check whether any of the underlying statutory instruments cut away or circumscribe the power to award costs from central funds.

55. MISS HINTON: I will do that. Thank you.

56. LORD JUSTICE BURNETT: Would you be able to do that today, Miss Hinton?

57. MISS HINTON: Yes, I will.

58. LORD JUSTICE BURNETT: Is that a terrible imposition?

59. MISS HINTON: I will do my best and I will submit it -- it is 3 pm now -- as quickly as I am able to do so.

60. LORD JUSTICE BURNETT: That would be very helpful.

61. MR JUSTICE COLLINS: It would help to liaise with your opponent, because it is just a question of looking at the relevant legislation and the rules.

62. MISS HINTON: I have the relevant legislation. I will check I have the up-to-date version.

63. LORD JUSTICE BURNETT: By all means, even though Mr Hall does not have an interest in this -- I am so sorry, I keep saying Mr Hall but I do not mean Mr Hall for these purposes -- you do not have an interest in it because there is no application for costs against you, as I understand it.

64. MR HAYS: No.

65. MR JUSTICE COLLINS: Be an amicus.

66. LORD JUSTICE BURNETT: At least cast your eye over it to assist Miss Hinton, that would be very helpful.

67. MR HAYS: Certainly.

68. LORD JUSTICE BURNETT: We should say that, if there is power, if we are satisfied there is power, we would be prepared to use it.

69. MISS HINTON: I am grateful.

70. MR JUSTICE COLLINS: But presumably we would be required to indicate that it is a matter for the authorities, any question of agreement or assessment in due course.

71. MISS HINTON: The application is for it to be assessed by the relevant authority.

72. LORD JUSTICE BURNETT: I think that is something else that needs to be checked in the subordinate legislation: whether that is possible or whether you need to at least ask for a figure.

73. MISS HINTON: I understand it is possible, but I will check and I will put it in writing as your Lordship suggests.

74. LORD JUSTICE BURNETT: That will be very helpful, Miss Hinton. I am sorry to appear to be difficult, but it is an area which has caused quite a lot of people to trip up since all the changes were made two years ago or whenever it was, and then they were changed, the changes were changed, and all sorts of problems have arisen.

75. MR JUSTICE COLLINS: It is all the costs saving.

76. LORD JUSTICE BURNETT: Thank you very much indeed, and thank you to all of you for your assistance and for the enormous amount of work that went into reaching what in essence was an agreed position on the main point. We are grateful for that.