Neutral Citation Number: [2023] EWHC 466 Admin

Case No: CO4982022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2023

Before :

MRS JUSTICE CUTTS DBE

- -

Between :

JUNIOR LAWAL	**Claimant**
- and -	
THE CROWN COURT AT CAMBRIDGE	**Defendant**
- and –	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Interested Party**

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- -

Junior Lawal (a Litigant in Person) for the **Claimant**
Louis Mably KC and Lucy Organ (instructed by **The CPS**) for the **Interested Party**

Hearing date: 21st February 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 14:00 on Friday 3rd March 2023.

MRS JUSTICE CUTTS DBE :

1. The Claimant in this case applies for judicial review of the decision of the Crown Court at Cambridge dated 15 November 2021 to proceed in his absence and dismiss his appeal against conviction without hearing evidence. He appeared in person at the hearing to determine this application.

2. The appeal was listed in the Crown Court at Cambridge (sitting at Peterborough) on 15 November 2021 before HHJ Enright sitting with two magistrates. The Claimant was not present when the case was called on at 10 AM as he was running late. He was unrepresented. Having allowed some further time the court decided to proceed with the appeal in the Claimant's absence rather than adjourn for him to arrive and dismissed the appeal without hearing evidence.

3. The Claimant sought legal representation and asked for the case to be re-listed for an application to re-open his appeal. The hearing was listed on 13 December 2021 before HHJ Enright. The Claimant through his counsel applied for the case to be re-opened under the slip rule provided for in s.142 of the Magistrates Courts Act 1980.. Although there is no transcript of that hearing it is understood that the judge considered that there was no power under the this provision to re-open the case and did not so order.

The issues

4. It is common ground that this claim raises three issues:

    i) The first concerns the power of the Crown Court on an appeal against conviction from the Magistrates Court when the appellant fails to attend and is unrepresented. The question is whether the court has power to dismiss the appeal or, put differently, strike it from the list or whether the court, if it decides not to adjourn, must hear evidence and decide the substantive appeal;

    ii) If it does have such power, secondly whether the Crown Court in this case exercised its power to dismiss the appeal reasonably or whether the only reasonable course of action was for the court to adjourn the hearing; and

    iii) Thirdly, it being conceded by the Interested Party that the court has the jurisdiction following the dismissal of an appeal to restore it to the list, whether any such application would fail on its merits.

The facts

5. It is necessary briefly to refer to the background although the facts are not themselves of major importance.

6. The Claimant was said to have been involved in a driving incident at approximately 9.00 AM on 23 December 2019. It was a damage only collision which occurred on the A1198 at the roundabout junction with the A14. Three vehicles were involved. One, a hired black Hyundai, was said to have been driven by the Claimant. The driver of the Hyundai failed to stop and failed to report the incident. The Claimant returned the 172 notice admitting he was the driver. He was summoned to the Magistrates Court in relation to offences of driving without due care and attention, failing to stop and failing to report to which he entered not guilty pleas on 2 November 2020.

Chronology

7. As the dates reveal the listing of the Claimant's trial at the Magistrates Court was during the time of the pandemic which caused considerable delay. The Claimant has said that the trial was listed eight times and adjourned before it was finally heard on 24 May 2021. It should be noted that the Memorandum of Conviction records the conviction on 7 May 2021. Whichever the date, the offences were proved in absence as the Claimant did not attend the hearing. In summary, in total he was fined, disqualified from driving for nine months and ordered to pay costs. The Claimant has said that he was confused about the hearing date and attended at the court the day after he was convicted of the offences.

8. On 25 May 2021 the Claimant submitted a notice of appeal to the Crown Court.

9. By a Notice of Hearing dated 8 November 2021 the Claimant was told that his appeal would be heard at the Crown Court at Peterborough, with the address provided, on 15 November 2021. After notification of the date, the Notice contains bullet pointed paragraphs under the heading "Important information". The first of these reads as follows:

> *"If you are not legally represented, you are advised to telephone the court on [number given] during the afternoon before the hearing of the appeal for the confirmation of the time your case will be heard."*

The hearing on 15 November 2021

10. The case was listed at Cambridge Crown Court sitting at Peterborough at 10 AM on Monday 15 November and called on at that time. The Claimant was not present. A transcript of the hearing reveals that the clerk of the court contacted the claimant by telephone. She told the judge that the Claimant was being brought to the court by a friend. They were travelling from London and were currently in Royston. The Claimant told her that he had received the hearing notice for ten o'clock that morning but said that, following the bulleted paragraph to which I have already referred at [9], he had tried to call the number thereon on the Friday afternoon. The clerk told the judge that she believed that there had been problems with the telephones at Cambridge on Friday so that nobody answered his calls. She told the judge that the Claimant had tried to call the County Court number at Peterborough on the morning of the 15 November but did not get through which would be correct as that automatically went through to a call centre.

11. The judge asked counsel for the prosecution what he wanted to say. Counsel confirmed that the appeal had last had a directions hearing on 9 July 2021. He asked that the appeal be dismissed at that stage as he had two witnesses, one at court and the other attending by live link from Worcester Crown Court. Counsel pointed out to the judge that the Claimant had failed to attend on two occasions at the Magistrates Court, on 26 February 2021 and again on the day of his trial. The judge retired with the magistrates to consider the matter.

12. The court reconvened at 11.40. The Claimant was still not at court. On enquiry by the judge the clerk said that there had been no further information from the Claimant but also observed that there was nowhere that he could give that information as he could not ring anyone. At the request of the court the clerk contacted the Claimant again. He informed her that he was at Alconbury.

13. After a short adjournment the court reconvened at 11.46. The judge said:

> *"We're not prepared to adjourn further. It seems to us the appropriate course of action is to dismiss the appeal and we do so. We make no order as to costs."*

14. Paragraph 21 of the Acknowledgment of Service from the Interested Party sets out the prosecution advocate's note from the 15 November 2021. It records that after the first telephone call from the clerk of the court to the Claimant further enquiries revealed that the listing office had spoken to the Claimant on 3 November 2021 when there was the possibility of the matter being removed from the list. He had indicated that he wished it to remain in the list and so it did. The note further records that when the clerk made contact with the

Claimant for the second time at 11.40 he indicated that he was about half an hour away.

15. In oral submissions the Claimant said that he arrived at the court at 12.50. He did not get past security at the door as a member of staff told him that his appeal had been heard and dismissed.

The hearing on 13 December 2021

16. As indicated above the Claimant sought legal advice. On 13 December 2021 his legal representative applied to the court to re-open the appeal by reference to the slip rule in s.142 Magistrates Courts Act 1980. At the hearing on that date the judge concluded that this section, which is directed to the correction of errors in sentences, gave no jurisdiction for the reinstatement of the appeal. Regrettably there is no transcript of this hearing. The Claimant in oral submissions said that the hearing was solely concerned with the jurisdictional point. At no time was he asked to explain why he was not present when his appeal was called on. In the Claimant's Grounds for Permission at paragraph 9 is stated:

> *"At a mention on 13 December 2021 HHJ Enright confirmed to this counsel that the appeal had been heard and not treated as abandoned."*

Issue 1 – the power of the court.

The Interested Party's submissions

17. Mr Mably KC, on behalf of the Interested Party, submits that when an appellant does not attend for his hearing at the Crown Court the court has three options. First it can adjourn the appeal. Second the court can decide to determine the appeal by way of a re-hearing and thereby come to a conclusion having applied the criminal burden and standard of proof. Lastly, if the appellant is absent and unrepresented, the court can strike the case from the list. If the court takes the last course, Mr Mably submits that it may then restore the case to the list if there is a very strong and satisfactory explanation for the appellant's absence.

18. In support of the final option Mr Mably relies on *R v Croydon Crown Court, Ex p. Clair [1986] 1 WLR 746.* The facts of that case were very different in that one of three appellants did not feel able to attend his appeal rather than go to work. He was however represented. The court dismissed that appellant's appeal but proceeded to hear and allowed the appeals of the other two. The Divisional Court concluded that, pursuant to s.122 of the Magistrates Courts Act 1980, the appellant was deemed to be present as he was represented by counsel. The refusal of the court to hear his appeal was therefore wrong. In the

course of his judgment Croom-Johnson LJ reviewed s.79(3) of the Supreme Court Act 1981 and s.9(6) of the Courts Act 1971, each of which preserved the customary practice and procedure with respect to appeals before the Crown Court, in particular that they should proceed by way of re-hearing. He identified the customary practice and procedure before those statutes in the last edition of *Archbold's Quarter Sessions* (6th edition 1908) at page 255:

> *"If the parties to an appeal do not appear, by themselves or by counsel, when it is thus called on, the court will order the appeal to be struck out of the list, and they will not usually allow it to be restored to it without the consent of the opposite party, or a very strong and satisfactory statement on the part of the appellant, supported by affidavit, or the oath of witnesses present, accounting for his absence."*

19. Mr Mably has taken me to other cases where the power to strike from the list set out in *Clair* has been acknowledged to exist. In *R v Guildford Crown Court Ex p. Brewer (1988) 87 Cr App R 265* the court so acknowledged but concluded that this power did not mandate the approach where the appellant was absent and unrepresented. The court could, if it thought fit, conduct the re-hearing and hear the evidence. *Podmore v Director of Public Prosecutions CO/3429/95* heard in July 1996 is another case in which the decision in *Clair* was cited with approval although not applicable on the facts of that case as the appellant, though absent, was represented by counsel.

20. In *R (on the application of Hayes) v Chelmsford Crown Court [2003] EWHC Admin 73* the appellant, who had been sentenced to a term of imprisonment after his trial at the Magistrates Court, was released on bail pending appeal. He thereafter repeatedly failed to attend his appeal. At the final hearing the appellant was absent but represented by counsel who stated that that he wished to pursue his appeal. The judge dismissed the appeal without hearing evidence. Henriques J found that the decisions in *ex parte Clair, Brewer* and *Podmore* should have been followed and in that case it was not open to the court to conclude that the appellant was wilfully frustrating the course of the proceedings and thereafter dismiss an appeal by reason of an appellant's repeated absence from the Crown Court. He said at [18]

> *"It is easy to understand the frustration that the Crown Court must have felt by reason of the cynical way in which the applicant persistently failed to attend without apparent cause, save of course to evade justice or avoid his incarceration. Nevertheless the court had available to it a perfectly straightforward remedy: to hear the appeal in the absence of the applicant. Having reviewed the authorities and the appropriate sections of the Magistrates Courts Act and the Supreme Court*

> *Act, it seems to me that in any subsequent case, whenever it appears to a Crown Court in its appellate capacity that an appellant obliged to attend has deliberately absented himself, the appropriate course is to hear the appeal in the absence of the appellant."*

Mr Mably acknowledges that the court in *Hayes* did not go into the circumstances when a court could strike out an appeal but submits that would not have been applicable in that case as the appellant was represented. *Ex p. Clair* was cited with approval and there is nothing in the judgment in *Hayes* seeking to overrule the Divisional Court's judgment in *Ex p. Clair.*

21. In summary therefore Mr Mably submits there was a clear power available to the court in the appellant's absence and where he was unrepresented to take the course that it did – to dismiss or strike out the appeal without hearing evidence. He further submits that there are good case management reasons for the Crown Court to have the power to dismiss or strike out the appeal. An appeal from the Magistrates Court to the Crown Court is as of right, there is no requirement for leave, and the Crown Court must have the ability to control its own list and court time and save the time of witnesses where an appellant is not represented and does not attend for his appeal. This residual power is tempered by the ability of the Crown Court to restore the appeal to its list in certain circumstances.

The Claimant's submissions

22. The Claimant represents himself and his submissions on the law were succinct. They were nonetheless clear and well argued. In summary he submits that none of the authorities cited by the Interested Party were factually similar to his case and could not therefore be relied upon to support the approach taken by the judge on 15 September 2021. It is his submission that the judge had no power to dismiss his case without hearing evidence.

Discussion and conclusion on issue 1.

23. In my view the decision in *Ex p. Clair* applies and ought to be followed in this case. I accept the Claimant's submissions that none of the authorities cited by the Interested Party are factually identical or similar to his case but the principle is clear. Croom-Johnson LJ in *Ex p. Clair* reviewed in general the law and powers open to a court when an unrepresented appellant does not attend his appeal hearing at the Crown Court before he then applied those principles to the case he had to decide. His judgment, cited at [18] above, is to the effect that the court in those circumstances, has the power to strike the case from the list. The decision in *Ex p. Brewer* makes clear that this is a power rather than a requirement.

24. I have considered the judgment in *Hayes*, particularly that cited at [20] above, and whether it is authority for the proposition that, as the Claimant contends, a court must always hear evidence before dismissing an appeal. In my view it is not. The court in *Hayes* was considering the position of an appellant on bail and whether, by reason of his obligation to attend the hearing, this afforded the court the power to dismiss the appeal when he failed to appear even when legally represented. The court decided it did not. As previous authority made clear, by s.122 of the Magistrates Courts Act an appellant is deemed present when represented and in those circumstances the court has no power to strike the case out of the list. It can only adjourn or hear the evidence and decide the appeal. In *Hayes* the appellant was represented. I agree with the Interested Party that there is nothing in this judgment which overrules the decision in *Ex p. Clair* as to the court's powers for an unrepresented and absent appellant. I note in this regard that the court in *Hayes* cited *Ex p. Clair* with approval.

25. It follows that my conclusion on issue 1 is that the court in this case did have the power to strike the Claimant's case from the list. As *Ex p. Clair* goes on to say it also had the power to restore the case to the list but a court will not usually allow that to happen without the consent of the opposite party or a very strong and satisfactory explanation from the appellant accounting for his absence.

Issue 2 – Did the court exercise its power to strike the Claimant's case from the list unreasonably.

26. In order to succeed on his challenge that the decision of the court to strike his case from the list was unreasonable the Claimant must establish that the only reasonable course of action was for it to adjourn the hearing or to substantively determine the appeal by way of re-hearing.

27. It is common ground that in determining the issue of whether to dismiss or adjourn the hearing the court had to apply the interests of justice test.

28. The case law is of limited assistance on this issue as each case must turn on its own facts. However, I have derived some assistance from the following decisions.

29. In *R v Doncaster Magistrates Court Ex p. Blick [2008] EWCA 2698* the Divisional Court considered a judicial review of a Magistrates' Court decision not to re-open the Appellant's case pursuant to s.142 of the Magistrates Courts Act 1980 where the Magistrates' Court had proceeded to hear the trial in her absence. The court has to consider the interests of justice when such an application is made. The Court held that the Magistrates' Court had not applied the interests of justice test and had considered irrelevant

considerations and not considered relevant considerations and so quashed the appellant's conviction. In giving judgment Aikens J at [19] said:

> *"Lastly I accept the submission of [counsel] that the District Judge apparently failed to take account of the interests of the claimant. These reasons do not figure in the reasons of the District Judge at all. As [counsel] pointed out it is clear from the decision of this court in ex parte K that the inconvenience of the court can never outweigh the interests of justice. A defendant should have the opportunity of defending a serious charge of the sort in the present case."*

30. In *R v Khan [2021] EWCA Crim 1526,* a decision of the Court of Appeal Criminal Division, the court considered the decision of the Crown Court judge to proceed to hear an application by the prosecution for a restraining order upon acquittal in the absence of the unrepresented appellant. The appellant had advised the court by email that his train was delayed at 09.56. He then telephoned the court. The hearing was adjourned to 11 AM. The appellant had still not arrived at that time and there had been no further communication from him as to his likely arrival time. The court found 70 minutes was not a slight delay and decided to proceed in absence. During the proceedings the clerk of the court told the judge that the appellant had telephoned again and said he had arrived at a nearby station and estimated that he would arrive at 12.15. The judge said they would carry on without him. The Court of Appeal found that the hearing was procedurally unfair and that a decision to proceed in a defendant's absence must be taken cautiously. Frustrating though the delay was, the appellant had communicated to the court that he was on his way. He was unrepresented. When he did arrive the judge did not give him a fair opportunity to be told what had happened or tell him that he could apply to re-open the application for a restraining order or afford him the chance to do so. The Court of Appeal set the order aside.

Submissions of the interested party

31. Mr Mably submits that the interests of justice required the judge to balance and consider the interests of the Claimant in having his appeal heard with the interests of the prosecution and its witnesses and indeed the interests of the court and its need to manage its case load.

32. Mr Mably submits that when considering whether to strike a case out of the list the court should ask itself why the appellant was not present; if there is an explanation, whether it is a good one and also consider the position of the prosecution and its witnesses. He submits that a wide array of factors play into

the interests of justice test and these include the interests of the court in being able to control its own lists.

33. In this case he submits that the decision to strike the Claimant's case out of the list was not unreasonable and in the interests of justice for the following reasons:

i) The Crown Court was entitled, having waited an hour and forty five minutes since the time the appeal was supposed to have started, to decide it was not going to adjourn the appeal any further. Although the Claimant indicated that he was on his way, it was not reasonable for him to be so late when he knew that the hearing was fixed for 10 AM. He gave no likely time of arrival to the court.

ii) The Claimant knew the time and date of the hearing and there was no acceptable reason for his failure to appear. It appears that he tried to call the court to confirm the time of the hearing on the Friday before (the appeal being listed on the Monday) but he knew that the hearing was at 10 AM on 15 November 2021 from the written notice dated 8 November 2021. There was no acceptable reason why the Claimant was late for court. It should be noted that the Claimant told the court at 10 AM that he was in Royston which is about 45 minutes away from Peterborough by car. No explanation was given as to why he was so far away at 10 AM nor why it took him a further 2 hours to arrive at the court building. The Claimant also had a history of failing to appear at the Magistrates Court and had failed to attend his trial which had then proceeded in his absence.

iii) It is clear from the transcript of the hearing on 15 November 2021 that the court had other cases in the list for that day. This is something that the judge was entitled to take into account in applying the interests of justice test.

Submissions of the Claimant

34. The Claimant submits that in his absence the only reasonable course of action for the court was to adjourn the appeal. He submits that it at least should have been adjourned until 2 PM. If the list did not allow for the appeal to be adjourned to be heard later on the same day it should have been adjourned to another day. In this regard the Claimant relies on the case of *Ex p. Blick* to the effect that the convenience of the court can never outweigh the interests of justice. He submits that the interests of justice required an adjournment of his case for the following reasons:

i) There were good reasons for his non attendance at 10 AM on 15 November. This was not the first time that his appeal had been listed. On three previous occasions it had been vacated by the court which informed him by telephone. He had indicated his wish for the appeal to remain listed on 15 November 2021 when asked on 3 November whether it could again be vacated. The court therefore knew that he was interested in pursuing the appeal.

ii) The Claimant knew that his appeal was to be listed at 10 AM on 15 November. He had been notified of that before he received the Notification dated 8 November which arrived in the post on Friday 12 November. The first bullet point under the heading "Important information" confused him. He was unrepresented and was advised to contact the court to confirm the timing of the appeal. He sought to do so on 10 occasions on the afternoon of the 12 November (and produced screenshots of his phone in confirmation of that fact) but no call was answered.

iii) The Claimant thought that this Notice was saying that his appeal hearing may be vacated again. He lived in Croydon, over 100 miles from Peterborough. He had taken a day off work before only to find that his hearing had been adjourned. He was reluctant to set off if his appeal was not to be heard. He therefore waited and tried to call the court again on 15 occasions on the morning of 15 November to clarify the position (again confirmed by the screen shot on his phone). By 8.30 AM he decided to set off. He was driven by a friend in case he lost his appeal and his disqualification, which had been suspended pending appeal, was reinstated. He tried further to call the court and indeed the County Court en route but no call was answered. Traffic was bad and he was late. He tried to explain to the clerk of the court why he was late when she called him. The calls caused his driver to become stressed and he missed some turnings as they made their way to court.

iv) The Claimant wished to proceed with his appeal. He was denied the chance to do so. The hearing was procedurally unfair.

Discussion and conclusion on issue 2

35. I have some sympathy for the judge in this case who plainly had other matters in his list. He and the magistrates were ready to hear the appeal at 10 AM on 15 November. The prosecution had their witnesses present, either at court or at the end of a live link. I have however reached the conclusion that his decision to strike the appellant's case out of the list at 11.46 rather than to further adjourn was unreasonable. This was the first time that the Claimant's appeal had been listed at the Crown Court. Frustrating though the delay was the

Claimant had told the court when the clerk contacted him that he was on his way. It is clear that for whatever reason the court was unable to answer any call from him. The judge had heard no full explanation for why the Claimant was late and gave no reasons why it was in the interests of justice for him to adopt the course which he took. Striking his appeal from the list at that point meant that the Claimant's appeal would not be heard subject to any application to restore it.

36. This unfairness was compounded in my view by the failure of the judge to direct that he would hear from the Claimant if and when he arrived at the court. Instead the Claimant was turned away from the court with the explanation that his appeal had been dismissed.

37. In my view the only reasonable course was for the court in the interests of justice to further adjourn, at the very least until that afternoon, to allow the Claimant time to arrive at the court and explain his reason for being late. The judge could then properly evaluate the interests of justice and consider how to proceed, including whether to further adjourn if the prosecution witnesses could not wait until then or the list did not allow time to hear the appeal that day.

38. Even had I concluded that the decision of the court to strike the appeal out of the list was reasonable, the court should in my view have heard from the Claimant upon his arrival at court and told him that he could apply to have the case restored. The court could then have heard the reasons for the Claimant's late arrival at court and considered whether to restore his appeal. The failure to do so was in my view unreasonable.

39. The unfairness was further compounded by the hearing on 13 December 2021. It may be that counsel instructed by the appellant brought his application under the wrong statutory provision. However, the Claimant had the right to apply for restoration of his case to the list following the principle set out in *Ex p. Clair*. The application on 13 December may have been wrong in form but that was the substance of it. Again, the court did not hear any explanation for the late arrival of the Claimant on 15 November nor did it tell the Claimant that he could apply to restore his appeal and then consider the test set out in *Clair*.

Issue 3 – the merits of an application to restore the case to the list.

40. As I have concluded that the failure of the court to adjourn was unreasonable there is no need for me to consider the merits of an application to restore the case to the list. Had I been called upon to consider the merits I would have concluded that there was a very strong and satisfactory reason to restore the appeal to the list in this case.

41. I accept that the Claimant had received the Notification of Hearing dated 8 November 2021 which told him that his appeal was to be listed at 10 AM on 15 November 2021. At first sight the Claimant's decision not to leave Croydon until 8.30 AM, which would inevitably make him late for the hearing, appears unreasonable. However in my view the Claimant's decision must be considered in the context of the listing of his case and recognition that he was a litigant in person. His case, both in the Magistrates Court and in the Crown Court, had been listed many times and vacated by reason of difficulties caused by the pandemic. It was not in my view unreasonable for him to have thought that in November this may happen again. Further, the Claimant, as a litigant in person, was advised by the Notice of Hearing to contact the court on the 12 November to confirm the timing of his appeal. As lawyers with experience and understanding of the way cases are listed in the Crown Court it is clear that this relates to the time as opposed to the date of the appeal. However a litigant in person does not have such knowledge or experience. I accept the Claimant's account, supported by the many attempts he made to contact the court that afternoon, that this caused him genuine confusion against the backdrop of previous attempts to list the appeal. His wish to continue with the appeal had also been stated to the court on 3 November 2021.

42. None of the Claimant's calls were answered. In those circumstances I readily accept that the Claimant would have been wise to make his way to court for 10 AM, especially given that he missed the hearing of his trial in the Magistrates Court. I am not however prepared to accept that, on the first listing of his appeal and where he was on his way to the court, his failure to do so should have led to his appeal being struck from the list. That having happened, I consider that the Claimant had a very strong and satisfactory reason for his absence and his appeal should have been restored.

Conclusion

43. It follows that the decision of the court to strike the Claimant's appeal from the list was one to which in my view it should not have come and accordingly I order that the decision of the Crown Court be quashed. I direct the Crown Court to hear the appellant's appeal.