



Neutral Citation Number: [2020] EWHC 2838 (Admin)

Case No: CO/2017/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
ADMINISTRATIVE COURT

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol, BS1 6GR

Date: 28/10/2020

Before :

LORD JUSTICE DINGEMANS,
VICE-PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE GRIFFITHS

Between :

KAYLEIGH CROCKER	<u>Appellant</u>
-v-	
DEVON AND CORNWALL POLICE	<u>Respondent</u>
- and -	
PLYMOUTH CITY COUNCIL	<u>Interested</u>
	<u>Party</u>

Katie Churcher (instructed by **Rundlewalker Solicitors**) for the **Appellant**
Chris Cuddihee (instructed by **Plymouth City Council Legal**) for the **Respondent and**
Interested Party

Hearing date: 16 October 2020

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 o'clock on 28 October 2020.

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This appeal by way of case stated from the Crown Court at Plymouth raises a point about the proper construction of the joint effect of section 84(5) of the Anti-Social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”) and the Crown Court Rules SI 1982 No 1109 as amended (“the 1982 Crown Court Rules”). The issue is whether the Crown Court has any power to extend the time for service of the notice of appeal on the other party to the appeal after the appeal notice had been sent in time to the Court office. HHJ Townsend considered that the effect of *Hampshire Police Authority v Smith* [2009] EWHC 174 (Admin); [2010] 1 WLR 40, which had considered time limits for appeals against closure orders made under the Anti-Social Behaviour Act 2003 (“the 2003 Act”), meant that there was no power to extend time.
2. The 2003 Act provided Magistrates with the power to make closure orders in respect of dwelling-houses where drug dealing was occurring. The 2003 Act provided strict time limits for the making and determination of applications for closure orders. The 2003 Act was replaced by the 2014 Act, which expanded the grounds on which closure orders could be made to include serious nuisance at the dwelling-house, and which retained the strict time limits. This was because closure orders are intended to provide a swift means of dealing with very disruptive behaviour affecting neighbouring occupiers of houses. It is common ground that closure orders are, however, draconian in effect because they prevent people living in their own homes.

Relevant background

3. The appellant Kayleigh Crocker became a tenant of Flat 15, 156 Woodville Road, Plymouth (“the flat”) in August 2019. The occupiers of neighbouring flats made serious complaints about the behaviour of Ms Crocker and the criminal behaviour of visitors to the flat. Plymouth City Council, the interested party, became involved because of its powers relating to anti-social behaviour.

The proceedings in the Courts below

4. On 11 February 2020 the police issued a closure notice in respect of the flat, commencing proceedings under the 2014 Act. The effect of issuing that notice was to prevent anyone other than the occupier or someone habitually resident at the flat from entering the property. An application to the Magistrates’ Court for a closure order must be made within 48 hours after the issue of the closure notice pursuant to section 80 of the 2014 Act. The police applied for a closure order against Ms Crocker at the Plymouth Magistrates’ Court.
5. On 13 February 2020 there was a hearing of the application made by the police. Ms Crocker was represented and indicated that she intended to contest the application for a closure order. The police served a bundle of statements and documents on which they intended to rely. The hearing of the application was adjourned to 19 February 2020 for a final contested hearing.
6. Ms Crocker alleges that on 19 February 2020 she had been told by her former legal representatives that the hearing before the Magistrates had been adjourned. Neither Ms

Crocker nor her legal representatives attended the hearing. The hearing had not been adjourned and on that date Plymouth Magistrates' Court made a closure order for three months.

7. Ms Crocker states that she made unsuccessful attempts to contact her former legal representatives. On 4 March 2020 Ms Crocker instructed her current solicitors to pursue the appeal against the closure order.
8. On 6 March 2020 Ms Crocker's solicitors were granted legal aid. An appeal notice was sent to the email address for Plymouth Magistrates' Court. The covering email asked for the email address of Plymouth City Council so that the appeal could be served.
9. On 11 March 2020 the 21 day period for appealing set out in the 2014 Act expired.
10. On 26 March 2020 Plymouth Crown Court listed the appeal for hearing. On 27 March 2020 a copy of the appeal notice was served by Ms Crocker's solicitors on the police (through Plymouth City Council, acting as its legal agents), with an apology for the delay.
11. On 1 April 2020 written submissions were filed on behalf of the police to the effect that the appeal was out of time and that there was no power under the 1982 Crown Court Rules to extend time. On the same day the appeal came before His Honour Judge Townsend at Plymouth Crown Court by Skype for Business video link. He gave case management directions for the legal argument about his jurisdiction to hear the appeal. The legal argument was listed for 3 April 2020.
12. On 3 April 2020 written submissions were filed on behalf of Ms Crocker arguing that she had done all that was required by the statute. Her failure to serve the police was an error of procedure which could be cured by paragraph 7(5) of the 1982 Crown Court Rules.

The judgment of HHJ Townsend

13. On 3 April 2020 HHJ Townsend heard the legal argument. In a careful judgment the judge set out the relevant background, before finding that the appeal had not been "made" within 21 days of the order below. This was because there had been no service on the other party within the 21 day period. HHJ Townsend held that the effect of the judgment in *Hampshire Police Authority v Smith* was that there was no power under the 1982 Crown Court Rules to extend time because paragraph 7(5) did not apply on its terms. He therefore dismissed Ms Crocker's appeal as it was out of time.

The stated questions

14. HHJ Townsend agreed to state a case for the consideration of this Court. The stated questions are:
 - (i) Is the requirement for an appeal to be 'made' within 21 days under the Anti-Social Behaviour, Crime and Policing Act 2014 s84(5) satisfied by the giving of notice of appeal to the appropriate Court within that period, or does it also require that the notice be given to any other party to the appeal within that period?

(ii) Does Rule 7(5) of the Crown Court Rules 1982 Part III apply to appeals against Closure Orders so as to allow the Crown Court a discretion to extend the time for appeal after the expiry of the 21 day period prescribed in the Anti-Social Behaviour, Crime and Policing Act 2014 s84(5)?

Relevant statutory provisions

15. Section 84 of the 2014 Act provides:

“(1) An appeal against a decision to make or extend a closure order may be made by—

(a) a person on whom the closure notice was served under section 79;

(b) anyone else who has an interest in the premises but on whom the closure notice was not served.

[.....]

(4) An appeal under this section is to the Crown Court.

(5) An appeal under this section must be made within the period of 21 days beginning with the date of the decision to which it relates.

(6) On an appeal under this section the Crown Court may make whatever order it thinks appropriate.”

16. Paragraph 7 of the 1982 Crown Court Rules provides:

“7 Notice of Appeal

(1) An appeal shall be commenced by the appellant's giving notice of appeal in accordance with the following provisions of this Rule.

(2) The notice required by the preceding paragraph shall be in writing and shall be given—

(a) in a case where the appeal is against a decision of a magistrates' court, to the designated officer for the magistrates' court;

(b) in the case of an appeal under section 67B or 81B of the Licensing Act 1964 against a decision of licensing justices, to the designated officer for the justices;

(c) in any other case, to the appropriate officer of the Crown Court;

(d) in the case of an appeal against a decision of a youth court in proceedings to which Part III of the Magistrates' Courts (Children and Young Persons) Rules 1988 applies (care proceedings and proceedings relating to care or supervision orders), to any person (other than the appellant) to whom notice of the proceedings in the youth court was given in pursuance of Rule 14(3) of the said Rules and to any other person who made representations to the youth court in those proceedings in pursuance of Rule 19(1) of those Rules; and

(e) in any case, to any other party to the appeal.

(3) Notice of appeal shall be given not later than 21 days after the day on which the decision appealed against is given and, for this purpose, where the court has adjourned the trial of an information after conviction, that day shall be the day on which the court sentences or otherwise deals with the offender:

[...]

(5) The time for giving notice of appeal (whether prescribed under paragraph (3), or under an enactment listed in Part I of Schedule 3) may be extended, either before or after it expires, by the Crown Court, on an application made in accordance with paragraph (6).

(6) An application for an extension of time shall be made in writing, specifying the grounds of the application and sent to the appropriate officer of the Crown Court.

...”

17. It was common ground that the Criminal Procedure Rules were not applicable in this case. This is because proceedings for a closure order are civil in nature. The Criminal Procedure Rules do not apply to civil proceedings but only to criminal cases in the Magistrates’ and Crown Courts, appeals to the Court of Appeal Criminal Division, and extradition proceedings. The Civil Procedure Rules do not apply because they apply only to proceedings in the County Court, High Court and Court of Appeal Civil Division.

Relevant legal principles

18. As noted above the 2014 Act was preceded by the 2003 Act. There were a number of cases where the strict time limits set out in the 2003 Act were considered. It was established that the legislative intention of the 2003 Act was that applications for closure orders should be dealt with speedily. This did not exclude the power of Magistrates to adjourn proceedings, but it was held that the power to adjourn should not be exercised so as to frustrate the statutory purpose: see *Metropolitan Police v Hooper* [2005] EWHC 340 (Admin); [2005] 1 WLR 1995 and *R (Turner) v Highbury Corner Magistrates’ Court* [2005] EWHC 2568 (Admin); [2006] 1 WLR 220. It was recognised that the eviction of an occupier from their house under a closure order engaged civil rights as well as rights protected by article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR”). This meant that common law rights to a fair hearing, as well as rights under article 6 of the ECHR, needed to be respected: see paragraph 22 of *R (Cleary) v Highbury Corner Magistrates’ Court* [2006] EWHC 1869 (Admin); [2007] 1 WLR 1272.
19. In *Hampshire Police Authority v Smith* the Court considered the time limits for appeals under the 2003 Act. Section 6(2) of the 2003 Act provided: “*an appeal against an order or decision to which this section applies must be brought to the Crown Court before the end of 21 days beginning with the day on which the order or decision is made*”. In that case the notice of appeal was issued and served 39 days after a closure order had been made. The Crown Court Judge held that there was power to grant an extension of time for appealing and allowed the extension. The police authority

appealed. At the hearing before the Divisional Court the occupier did not appear and was not represented. The police authority submitted that the appeal did not have to be *heard* within the 21 day period after the order was made in the Magistrates' Court and the Court accepted this submission. However the Court held that the appeal had to be *issued* within the 21 day time limit, and that there was no power to extend time under the Crown Court Rules 1982. This was because rule 7(5) of the Crown Court Rules 1982 did not apply to appeals brought under the 2003 Act.

20. In *Hampshire Police Authority v Smith* Wynn Williams J, who gave the main judgment, referred to the decision in *Mucelli v Albania* [2009] UKHL 2; [2009] 1 WLR 276 in which the majority of the House of Lords held that the provisions of section 26(4) of the Extradition Act 2003, which provided that: "*Notice of appeal ... must be given in accordance with rules of court before the end of ... seven days starting with the day on which the order is made*", did not permit the court to extend time. This was because the wording of the statute made it clear that Parliament had decided not only on the time limit for the appeal, but also made provision for matters of procedure: see paragraph 59 of the judgment of Lord Neuberger, and paragraph 38 of the judgment of Lord Brown. However it was not disputed that, as Lord Rodger (who dissented on the issue of construction of the statutory provision) put it at paragraphs 5 and 7 of the judgment, "Parliament rarely gets involved in matters of procedure" and "The question is whether Parliament considered that, exceptionally, the matter of service had to be taken out of the hands of the courts and subjected to the same immovable time-limit ...".
21. The effect of the judgment in *Mucelli* was that any slip in procedure, such as failing to serve the appeal notice on the other side within 7 days even though that party had been told that the appeal notice had been issued, resulted in appeals being struck out regardless of the underlying merits, as appears from the judgment of the Supreme Court in *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20; [2012] 1 WLR 1604. In *Pomiechowski* the Supreme Court rejected an invitation to overrule *Mucelli*, and this was because of the clear statutory wording of the statute relating to appeals in the Extradition Act 2003. However the Supreme Court did hold that where civil rights were the subject of adjudication, as was the case in one of those extradition appeals, then the strict time limits with no possibility of extension infringed the very essence of the right of appeal. This meant that in order to vindicate the rights under article 6 of the ECHR the Court had to have a discretion in exceptional circumstances to extend the time for filing and serving the notice of appeal. This approach was subsequently applied to other statutes.
22. In my judgment the following propositions are established. First, Parliament may specify the time limit in a statute for the issuing of the appeal, as appears from the 2003 Act and the 2014 Act. Secondly, although Parliament generally leaves matters of procedure for the Courts (see *Mucelli* at paragraphs 5 and 7), Parliament may provide for time limits for matters of procedure, such as service of notices of appeal. Thirdly, where Parliament has made specific provision for issues of procedure (such as service of notices of appeal), if the appeal is to determine issues of civil rights, article 6 of the ECHR may require the Court to retain a discretion, to be exercised in exceptional cases, to ensure that the essence of the right of appeal is not negated: see *Pomiechowski* at paragraphs 33, 34 and 39.

The construction of section 84(5) of the 2014 Act and section 7 of the Crown Court Rules

23. I am very grateful to Ms Churcher and Mr Cuddihee for their helpful written and oral submissions. Ms Churcher submitted that all section 84(5) required was that the appeal be “made” within 21 days, and that in this case it had been made in time because the appeal notice was lodged at the Magistrates Court within that period so that it was issued. It was said that the requirement to give the other party to the appeal notice within 21 days derived from paragraphs 7(2) and 7(3) of the Crown Court Rules 1982, meaning that paragraph 7(5) applied and there was therefore power to extend time. Ms Churcher submitted that the decision in *Hampshire Police Authority v Smith* applied to a different statutory regime and there was nothing in the wording of the 2014 Act to suggest that Parliament had intended to intervene in matters of procedure to remove a discretion from the Court.
24. Mr Cuddihee on behalf of the police and Plymouth City Council submitted that section 84(5) of the 2014 Act required the appeal to be made within 21 days and this had not been done. To make the appeal it was necessary to give notice pursuant to paragraph 7(2) of the Crown Court Rules 1982. As this had not been done the appeal was not valid. Paragraph 7(5) of the Crown Court Rules 1982 did not apply, and there was therefore no power to extend time for the reasons given in *Hampshire Police Authority v Smith*.
25. I should start by saying that I agree with both the parties and HHJ Townsend that there was no requirement for the appeal to be heard in the Crown Court within 21 days of the decision of the Magistrates’ Court. There is nothing in the wording of section 84(5) of the 2014 Act which would support such a requirement. The statute requires the appeal to be made within 21 days of the decision in the Magistrates’ Court.
26. In relation to what is required to make an appeal from a closure order in time, in my judgment the conjoint effect of section 84(5) of the 2014 Act and paragraph 7(2) of the 1982 Crown Court Rules is that it is necessary to give notice of the appeal in writing to the designated officer for the Magistrates’ Court (paragraph 7(2)(a) of the Rules) and to the “other party to the appeal” (paragraph 7(2)(e) of the Rules) within the period of 21 days beginning with the date of the decision (section 84(5) of the 2014 Act) to make an appeal.
27. In my judgment it is clear that Parliament did not in the 2014 Act become involved with issues of procedure relating to service of the notice of appeal, which was in contrast to the situation under section 26(4) of the Extradition Act 2003 (“*notice of appeal must be given ...*”) and in contrast to the position under the 2003 Act (“*an appeal ... must be brought to the Crown Court within 21 days*”). The position under the 2014 Act is therefore consistent with the presumption that Parliament “rarely gets involved in matters of procedure”, see paragraph 5 of *Mucelli*, and may reflect Parliament’s understanding of the difficulties that can be created when it does, as appears from *Pomiczowski*. In my judgment the decision in *Hampshire Police Authority v Smith* was a decision on different provisions of the 2003 Act, before Parliament changed the wording of the section providing for appeals in the 2014 Act.
28. This leaves the question whether paragraph 7(5) of the 1982 Crown Court Rules can, as a matter of construction of the 1982 Crown Court Rules, apply to the 21 day period

set out in the 2014 Act in circumstances where the time period derives from the 2014 Act rather than paragraph 7(3) of the Crown Court Rules 1982 and the 2014 Act is not listed in Part 1 of Schedule 3. In my judgment the whole of paragraph 7, including paragraph 7(5) of the Crown Court Rules applies to the civil appeal under the 2014 Act. This is because the power to extend time is an integral part of rule 7, and because it is rule 7 which is the basis of the requirement for giving notice to the other party to the appeal within a set period. Further, paragraph 7(5) does not provide that the time for giving notice of appeal may *only* be extended where the time for giving notice is prescribed under paragraph (3) or under an enactment listed in Part 1 of Schedule 3, and although I accept that this is a possible interpretation of paragraph 7(5) I do not accept it is the correct one. This is because it would be surprising to find that there was no procedure under which time might be extended for all of the reasons given in *Pomiechowski*.

29. It is necessary to say two more things. First, this conclusion about the applicability of paragraph 7(5) of the 1982 Crown Court Rules means that it is not necessary to fashion a *Pomiechowski* type discretion under article 6 of the ECHR and the Human Rights Act 1998. Secondly, when the Court considers whether to exercise its powers to extend time under paragraph 7(5) of the 1982 Crown Court Rules it should have regard, among other matters, to the need not to frustrate the statutory purpose of the 2014 Act: compare *Metropolitan Police v Hooper*.
30. I would therefore answer the questions set out in paragraph 14 above as follows: (1) the conjoint effect of section 84(5) of the 2014 Act and paragraph 7(2) of the 1982 Crown Court Rules is that it is necessary to give notice of the appeal in writing to the designated officer for the Magistrates' Court (paragraph 7(2)(a)) and to the other party to the appeal (paragraph 7(2)(e)) not later than, being within the period of, 21 days beginning with the date of the decision (section 84(5) of the 2014 Act) to make an appeal. (2) Yes, paragraph 7(5) of the 1982 Crown Court Rules applies to appeals against closure orders.

Disposal of the appeal

31. The effect of this judgment is that the Crown Court should have considered whether to extend time for giving notice of the appeal to the other party. In fact, the closure order lasted for three months and has now expired. The Court was told that the closure order was extended by Exeter Magistrates' Court on 15 May 2020 for a further three month period. That further period has also expired and we were told that Ms Crocker was back in possession of the flat. This suggests that it would be academic to remit the appeal against the closure order to the Crown Court.
32. The Court was, however, told that possession proceedings in respect of the flat had been commenced against Ms Crocker by the housing association which owned the flat. Section 97 of the 2014 Act added as a mandatory ground for possession, the fact that a closure order had been made in respect of a dwelling house. It was not known: whether reliance had been placed on that ground in the possession proceedings; whether the possession proceedings were being pursued; or what had been the effect of the stay of possession proceedings under the Practice Direction 51Z. There might be a point in hearing the appeal against the closure order if the mandatory ground of possession is being relied upon in the possession proceedings, and if the possession proceedings are being pursued. I say "might be a point" in hearing the appeal because it was not clear whether the making of the extension order in the Exeter Magistrates' Court would also

be a mandatory ground for possession. In that respect previous decisions on the 2003 Act made it clear that the making of an extension order should not be considered to follow on simply from the making of the original order.

33. In the event the parties agreed that if this Court found that there was a discretion to extend time under the 2014 Act when read with the 1982 Crown Court Rules, then the matter should be remitted to the Crown Court at Plymouth. The Crown Court can then obtain information about whether there is any need to hear the appeal. If the appeal needs to be heard, the Court can then decide whether to grant an extension of time for appealing and, if an extension is granted, determine the appeal.
34. I would therefore allow the appeal, answer the questions as set out in paragraph 30 above, and remit the appeal to the Crown Court at Plymouth.

Mr Justice Griffiths

35. I agree.