Neutral Citation Number: [2023] EWHC 25 (Admin)

Case No: CO/1442/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

11 January 2023

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE SAINI

- -

Between :

BH	**Claimant**
- and -	
NORWICH YOUTH COURT	**Defendant**
- and -	
CROWN PROSECUTION SERVICE	**Interested Party**

- -
- -

Philip Rule (instructed by Imran Khan and Partners Solicitors) for the **Claimant**
Simon Ray (instructed by CPS) for the **Interested Party**

Hearing date: 15 December 2022

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 11 Januaray 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis and Mr Justice Saini:

1. This is the judgment of the court to which we both have contributed.

Introduction

2. The Claimant applies for judicial review of the decision of District Judge (Magistrates' Courts) Sheraton ("the judge") sitting on 20 January 2022 in the Norwich Youth Court to retain jurisdiction in relation to three charges of rape and to order summary trial of those charges. At the conclusion of the hearing on 15 December 2022 we announced our decision that the claim for judicial review was dismissed. We did so in order to prevent any further delay to the criminal proceedings. These are our reasons for that decision.

3. As is customary the Youth Court was not represented at the hearing. We had its acknowledgment of service setting out its case in relation to the way in which the decision was reached but no other evidence from the court. The Claimant was represented before us by Mr Philip Rule. The Crown Prosecution Service as interested party was represented by Mr Simon Ray. We had written and oral submissions from both Mr Rule and Mr Ray.

4. Criminal proceedings are active within the meaning of that term in the Contempt of Court Act 1981. Pursuant to Section 4(2) of the 1981 Act, we ordered that nothing should be published in relation to these proceedings which might identify the Claimant. This order will continue until the conclusion of the criminal proceedings or until further order of this court, whichever is the sooner. This judgment is anonymised accordingly with the Claimant being referred to as BH.

5. For reasons which will be apparent from the substance of this judgment, the Claimant will not have the normal statutory protection against publication of his identity in relation to the proceedings in the Youth Court. It is neither necessary nor appropriate for us to comment on what order will be appropriate in the continuing criminal proceedings. For instance, we do not know whether identification of BH in those proceedings might undermine the statutory protection against identification to be afforded to the complainant in the case.

The factual background

6. BH was born on 29 March 2004. He is charged with three offences of rape alleged to have been committed between April and August 2020 when he was aged 16. The complainant in the offences alleged against him was ten months younger than him i.e. aged 15 at the time of the offences.

7. BH and the complainant were friends. They lived near to each other. They attended the same school. In the course of their friendship they met regularly in person. From time to time during 2020 they met secretly at night both at the Claimant's home and at the home of the complainant.

8. The complainant alleges that on three occasions during the summer of 2020 BH raped her. The first occasion is said to have occurred when the complainant visited BH at his house. This was in the early hours of the morning. The two of them lay on BH's bed

with BH's arm around the complainant. This was consensual. The complainant alleges that BH went on to attempt to penetrate her vagina with his finger and to suggest that they had sex. She says that she said no more than once. BH began to masturbate. He then pushed her shorts to one side and inserted his penis into her vagina. He ejaculated. The next day the complainant told BH that what had happened the night before should not occur again.

9. The further allegations of rape relate to subsequent occasions when BH visited the complainant at her home. These visits were in the small hours of the morning when the complainant's parents were asleep. They took place on a number of occasions. On two of those occasions BH behaved in a similar fashion to the first incident alleged by the complainant. When they were together in the complainant's bedroom BH tried to touch the complainant's breasts and vaginal area. She moved his hands and told him to stop. He began to masturbate and then put his penis in her vagina. He ejaculated over her shorts or over the bed sheets.

10. The complainant told friends about what had happened. At the end of August 2020 she told her parents that she did not want to go back to school. When asked why, she told her parents that BH had raped her. The police were informed. On 6 September 2020 the complainant was the subject of a full ABE interview in which she set out her account of events. BH was interviewed in September and November 2020. He made no comment to all questions put to him. The complainant's pyjamas were subjected to scientific analysis. Traces of semen were found on the pyjamas. The DNA of the semen matched that of BH. This result was available in early December 2020. The mobile telephones of both the complainant and BH were examined by the police. The results of the examinations were available in early January 2021.

11. It was not until 6 December 2021 that criminal proceedings were commenced against BH by way of a written charge and requisition. We have no evidence about why there was such a delay. There was more than sufficient evidence available by the beginning of 2021 to justify charging BH. In a case involving a young defendant and an even younger complainant the need for expedition must have been obvious. We are well aware that delays of this kind are not uncommon in cases such as these. That does not make it any the more acceptable. Had the proceedings been commenced when they should have been, namely early in 2021, much of the basis for the claim for judicial review with which we are concerned would never have arisen. There is every prospect that the criminal proceedings would have been concluded by now rather than BH and the complainant still awaiting a trial.

12. The first appearance was listed on 7 January 2022 at Norwich Youth Court. The proceedings were adjourned because there was no District Judge (Magistrates' Courts) available to hear the case on that day. BH was notified in advance of the position. He did not attend court on that day.

13. The date for the adjourned hearing was 20 January 2022. BH attended. He was represented by a solicitor, Haroon Shah. The Crown Prosecution Service was represented by a Mr Crimp. We had evidence from Mr Shah in the form of two witness statements made by him. We had no evidence from Mr Crimp or from the Youth Court (other than what was set out in the court's acknowledgment of service). The precise course of events at the hearing on 20 January 2022 was not clear from the evidence. However, we concluded that it was appropriate to proceed on the basis that the hearing

began with the judge deciding whether the Youth Court should retain jurisdiction in relation to the charges of rape. Both Mr Crimp and Mr Shah argued that the case should be sent to the Crown Court. Mr Crimp referred to the Sentencing Council Definitive Guideline in relation to offences of rape. He submitted that the offending fell into Category 2B in that guideline. An adult convicted of a Category 2B offence would be subject to a starting point of eight years' custody with a range of seven to nine years' custody. Even allowing for BH's age, the likely sentence was such that he should be sent to the Crown Court for trial. Mr Shah agreed with that submission. He further argued that the case was too complex to be tried in the Youth Court. There were issues of third party disclosure and complex scientific and electronic evidence. The judge disagreed. He considered the adult guideline but in the context of the Sentencing Council Sentencing Children and Young Persons guideline. In any event, the judge considered that the case fell into Category 3B with a category range of four to seven years' custody for an adult offender. The judge decided that the case should remain in the Youth Court. This is the decision challenged by BH. The record sheet completed by Mr Crimp recorded that BH pleaded not guilty to the charges. Mr Khan's evidence is that no plea was tendered or indicated. However, the judge gave directions for trial and completed the Preparation for Effective Trial (PET) form, the trial estimate being two days. Consent was identified as the issue in the case. It is unrealistic to suggest that these steps occurred in a vacuum. BH must have indicated a plea of not guilty. A trial date in early April 2022 was available. The judge did not fix the trial for that date because BH was due to take public examinations in June 2022 and, on his behalf, it was submitted that the trial should be delayed until after those examinations. In consequence, the trial was fixed for two days commencing on 7 July 2022.

14. On 30 March 2022 BH's solicitors wrote a letter before claim to the Norwich Youth Court. In the letter they repeated the arguments put before the judge on 20 January 2020. They invited the judge to reverse his decision. The judge considered that suggestion. By an e-mail dated 4 April 2022 from the court the invitation was rejected. It was said that "in the absence of any new information (the judge) declined" to re-visit the issue of jurisdiction. The claim for judicial review was made on 20 April 2022.

15. In due course BH was given permission to apply for judicial review on three separate grounds. These were grounds one, three and four in the claim. We shall use the same numbering. The decision under challenge remained that made on 20 January 2022. We shall deal with each of the grounds in turn. We do so in what appears to us to be the logical order. It is not the order in which they were argued by Mr Rule.

Ground One

16. As we already have set out in our review of the factual background, the judge on 20 January 2022 commenced his consideration of BH's case with a determination of whether the Youth Court should retain jurisdiction for the purposes of trial. Prior to that, no indication was sought of BH's plea. Mr Rule argued that the judge failed to follow the procedure set out in Section 24A of the Magistrates' Courts Act 1980. That procedure was mandatory. It should have preceded the determination of venue for trial. Since it did not, the judge had no jurisdiction to make the decision in relation to retaining the trial in the Youth Court. Thus, the decision should be quashed and the case returned to the lower court. Since BH is now aged 18, he will have to be dealt with as an adult. His case will be sent to the Crown Court for trial. Mr Rule relied on the mandatory language of Section 24A. He submitted that there is authority in relation

to the comparable provision relating to adults (Section 17A of the 1980 Act) which supports his argument.

17. Mr Ray argued that Section 24A is a procedural provision. It does not confer jurisdiction on the Youth Court to try offences which in relation to an adult can only be tried on indictment. That jurisdiction is created by Section 24 of the 1980 Act. Failure to follow a procedural provision cannot render a subsequent decision invalid.

18. We agree that the jurisdiction of the Youth Court is established by Section 24(1) of the 1980 Act. It reads:

> *Where a person under the age of 18 years appears or is brought before a magistrates' court on an information charging him with an indictable offence he shall, subject to sections 51 and 51A of the Crime and Disorder Act 1998 and to sections 24A and 24B below, be tried summarily.*

As its numbering suggests, Section 24A was a later addition to the 1980 Act. It was added because the Criminal Justice Act 2003 gave the Youth Court a power to commit for sentence a person under the age of 18. That power was available to be exercised where the Youth Court was of the opinion that the Crown Court should have the power to sentence the person to a period of detention exceeding two years. It could only be exercised when the person "appears or is brought before" the court and an indication of a plea of guilty is given. Therefore, a scheme was required to establish a means by which such an indication could be given.

19. Section 24A of the 1980 Act (so far as is relevant) reads as follows:

> *(1) This section applies where—*
> *(a) a person under the age of 18 years appears or is brought before a magistrates' court on an information charging him with an offence other than one falling within section 51A(12) of the Crime and Disorder Act 1998 ("the 1998 Act"); and*
> *(b) but for the application of the following provisions of this section, the court would be required at that stage, by virtue of section 51(7) or (8) or 51A(3)(b), (4) or (5) of the 1998 Act to determine, in relation to the offence, whether to send the person to the Crown Court for trial (or to determine any matter, the effect of which would be to determine whether he is sent to the Crown Court for trial).*
> *(2) Where this section applies, the court shall, before proceeding to make any such determination as is referred to in subsection (1)(b) above (the "relevant determination"), follow the procedure set out in this section.*
> *(3) Everything that the court is required to do under the following provisions of this section must be done with the accused person in court.*
> *(4) The court shall cause the charge to be written down, if this has not already been done, and to be read to the accused.*
> *(5) The court shall then explain to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty—*
> *(a) the court must proceed as mentioned in subsection (7) below; and*
> *(b) (in cases where the offence is one mentioned in [section 249(1)(a) or (b) of the Sentencing Code] he may be sent to the Crown Court for sentencing*

> *[under [section 16, 16A or 17]4 of that Act if the court is of such opinion as is mentioned in [section 16(1)(c), 16A(1)(c)]5 or (if applicable) section 17(1)(b)].*
>
> *(6) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.*
>
> *(7) If the accused indicates that he would plead guilty, the court shall proceed as if—*
>
> *(a) the proceedings constituted from the beginning the summary trial of the information; and*
>
> *(b) section 9(1) above was complied with and he pleaded guilty under it, and, accordingly, the court shall not (and shall not be required to) proceed to make the relevant determination or to proceed further under section 51 or (as the case may be) section 51A of the 1998 Act in relation to the offence.*
>
> *(8) If the accused indicates that he would plead not guilty, the court shall proceed to make the relevant determination and this section shall cease to apply….*

The wording of Section 24A is substantially the same as Section 17A i.e. the provision by which an adult may indicate a plea of guilty in an either way offence before the court considers whether the case is suitable for summary trial and, where it arises, permits the adult to elect trial by jury.

20. There is considerable jurisprudence in relation to the distinction between a procedural and a jurisdictional requirement. Mr Rule began his review of the authorities with *R v Cockshott and others* [1898] 1 Q.B. 582 and moved forward from there. We do not need engage in any historical analysis of the position. The issue we have to address is helpfully summarised in *R v Lalchan* [2022] EWCA Crim 736 at [39]:

> *The question thus reverts to what the Parliamentary intention is to be taken as having been in the event of non-compliance, having regard to the language, purpose and (where applicable) history of the legislative provisions in question. Consideration of the fairness of proceedings or prejudice to the defendant will only arise if, on construction of the statutory provision in hand, the conclusion reached is that the purpose was not that an act done in breach of the statutory requirement should be invalid.*

The language of a provision will provide some indication of whether it was intended to set out a procedure or to create a jurisdiction. It often will give only limited assistance since Parliament can and will use mandatory language when setting out procedural requirements. The purpose and history of the provision will be critical.

21. Section 17A of the 1980 Act is jurisdictional. A magistrates' court is only entitled to try an either way offence where the relevant statutory requirements have been complied with since a magistrates' court is purely a creature of statute. Before submitting to the jurisdiction of the magistrates' court in relation to an either way offence, a defendant must be told that his case involves an offence which could be tried in the Crown Court. Further, he must be told that, were he to indicate a plea of guilty, this would be treated as a guilty plea and that he then could be committed for sentence. Without those steps, the magistrates' court has no jurisdiction in relation to an either way offence. All of that is clear from *R(Rahmdezfoul) v Crown Court at Wood Green* [2014] 1 WLR 1793. The same applies if an indication of plea pursuant to Section 17A is given by a defendant's representative on their behalf. Since such an indication is to be treated as

a plea of guilty, it can only be given by a defendant personally. If it is not, there is no basis upon which the defendant can be committed for sentence. Any purported committal for sentence will be invalid: see *R(Owadally and another) v Westminster Magistrates' Court* [2017] 1 WLR 4350.

22. Mr Rule argued that the same considerations applied mutatis mutandis to Section 24A. This submission fails to grapple with the legislative purpose and history of Section 24A. As we have indicated, it was introduced to provide a mechanism by which the Youth Court could commit for sentence a child or young person where a sentence in excess of 2 years' detention ought to be available. Such committal could only occur if the indication were given at the first appearance when allocation for trial was to be considered, that being the meaning of the term "appears or is brought before the court". This limited power to commit for sentence was introduced in the Criminal Justice Act 2003 by adding Section 3B to the Powers of Criminal Courts (Sentencing) Act 2000. That section referred to Section 24A as providing a procedure for indication of plea. Section 24A cannot affect the jurisdiction of the Youth Court to try indictable offences summarily. Rather, it provides the jurisdiction to commit for sentence rather than deal with the case summarily. Were the Youth Court to purport to commit a defendant for sentence when he appears or is brought before the court without engaging in the plea before venue procedure, it would be acting without jurisdiction. Beyond that, Section 24A does not serve to protect any right of the defendant. A defendant in the Youth Court has no right to elect trial. Save where the court declines jurisdiction, a defendant in the Youth Court will be tried summarily. The validity of any decision to retain jurisdiction will not be affected by a failure to follow the plea before venue procedure.

23. It is also the case that the legislative purpose of Section 24A to a significant degree no longer holds good. Section 53 of the Criminal Justice and Courts Act 2015 amended the provision first introduced by the Criminal Justice Act 2003. The power of the Youth Court to commit for sentence now can be exercised "where on the summary trial of an offence mentioned in section 91(1) of this Act a person aged under 18 is convicted of the offence". Given the terms of Section 24A(7)(b) this will include an indication of plea. However, the power to commit for sentence is now much wider. Prior to 2015 Section 24A had the jurisdictional element to which we have already referred in that a Youth Court only had the power to commit for sentence pursuant to that provision. The Youth Court now has jurisdiction to commit for sentence for an indictable offence whenever a child or young person is convicted whether after trial or upon a plea of guilty. Section 24A is no longer the only route by which the Youth Court can commit for sentence.

24. We are satisfied that Parliament at no stage intended that a failure to comply with the procedure set out in Section 24A should remove the jurisdiction of the Youth Court to try indictable offences summarily. Thus, the judge in this case was entitled to consider the appropriate venue for trial irrespective of any procedural failing. In reaching this conclusion we note the reasoning in *R(D) v Sheffield Youth Court* (2008) 172 JP 576. The legislative framework being considered by the court in that case was not precisely the same as the one with which we are concerned. However, the approach taken by the court was the same as that we have adopted. It supports our conclusion.

25. Since the statutory provision with which we are concerned was procedural, failure to comply with it could only be a basis for a challenge to the allocation if it were to affect the fairness of the proceedings or prejudiced BH. The failure in this case did not begin

to do that. BH would have indicated a plea of not guilty had he been asked the question. The judge then would have moved on to consider venue precisely as he did in fact. We do not suggest that failing to provide the defendant with the opportunity to indicate a plea of guilty is a course to be approved. It is a procedure designed to improve efficiency. However, on the facts of this case, the failure was of no practical effect.

Ground Three

26. The jurisdiction of the Youth Court to try indictable offences is subject to Section 51A of the Crime and Disorder Act 1998. Where "….the court considers that if (the defendant) is found guilty of the offence it ought to be possible to sentence him…" to a period of detention exceeding two years, the defendant shall be sent for trial. That was the statutory context in which the judge considered whether the Youth Court should retain jurisdiction of BH's case. Mr Rule submits that the judge should not have retained jurisdiction for BH's trial. Rather, he ought to have sent him for trial at the Crown Court.

27. For the challenge to the judge's decision to retain jurisdiction to succeed, BH must persuade us that the decision was "wrong" within the meaning of that term as set out in *R(D) v Sheffield Youth Court* [2003] EWHC 35 (Admin); (2003) 167 JP 159. The test requires us to act as a review court rather than the one making the original decision.

28. The proper approach to Section 51A of the 1998 Act is set out in *R(DPP) v South Tyneside Youth Court* [2015] 2 Cr App R (S) 59 as confirmed in *R(BB) v West Glamorgan Youth Court* [2021] 1 Cr App R (S) 62. The introduction of the extended power to commit for sentence introduced in 2015 to which we already have referred changed the approach to be taken by a Youth Court when deciding whether to retain jurisdiction. The principles now to be applied are as set out at [13] of *R(BB) v West Glamorgan Youth Court* citing the relevant paragraphs of *R (DPP) v South Tyneside Youth Court*:

> *….The test set out in Southampton Youth Court, (whether there was a "real prospect" that the defendant might require a sentence in excess of the powers of the youth court) has been recognised and followed as a sensible interpretation of the requirements of s. 51A of the 1998 Act. When formulated, however, it had to be applied in the context of an irrevocable allocation decision. If the youth court retained jurisdiction for trial and it emerged in the course of the trial that the circumstances were more serious than had been understood at the allocation hearing, the court remained restricted in its sentencing powers. That factor justified the requirement in Oldham Youth Court to take the prosecution case at its highest.*
>
> *30 In practical terms, however, the youth court often would have only limited material at the allocation hearing with the result that the "real prospect" test would be met for want of information and in the knowledge that further material emerging later in the proceedings could not permit any change in venue. For my part, I have no doubt in recognising that this will have resulted in an understandable caution in respect of allocation decisions by youth Courts and I am aware that it has been the experience of Resident and other judges in Crown Courts in different parts of England and Wales that cases have been sent from the youth court for trial where, after fuller investigation, it has become apparent that the sentencing powers of the youth court were sufficient to meet the justice of the case. This case is a good*

> *example. Without considerably more information, it is quite impossible to determine whether B requires condign punishment, education or psychological therapy.*
> *31 Because s. 3B (as amended) of the 2000 Act means that the youth court is not making a once and for all decision at the point of allocation, the "real prospect" assessment requires a different emphasis and taking the prosecution case at its highest is no longer necessary; to that extent, the observations of Langstaff J in Oldham Youth Court no longer apply. For the future, there will, of course, be cases in which the alleged offending is so grave that a sentence of or excess of two years will be a "real prospect" irrespective of particular considerations in relation either to the offence or the offender's role in it: such cases are, however, likely to be rare. At the time of allocation and determination of venue, the court will doubtless take the views of the prosecution and defence into account; these views could include representations as the value of privacy of the proceedings or, alternatively, the desire for a jury trial. Subject to such submissions, however, in most cases whether there is such a "real prospect" will generally be apparent only when the court has determined the full circumstances of the offence and has a far greater understanding of the position of the offender. Since the youth court now has the option of committing a defendant for sentence after conviction if the court considers that the Crown Court should have the power to impose a sentence of detention pursuant to s. 91(3) of the 2000 Act, it will generally be at that point when the assessment can and should be made. In that way, the observations in Southampton Youth Court (at para. 33) that Crown Court trial for a youth "should be reserved for the most serious cases" remain entirely apposite. It is worth observing that this approach is entirely consistent with the intended purpose of the amendment as explained by the Parliamentary Under-Secretary of State for Justice during the Report and Third Reading of the Bill: see Hansard, Vol 580, Col 464.*

Principles set out in any earlier authority no longer have any validity. That much is clear from the passage of the judgment of Sir Brian Leveson P set out above.

29. There were four strands to Mr Rule's argument in relation to the judge' decision to retain jurisdiction. He began by placing considerable emphasis on what was said in *Billam* [1986] 1 WLR 349, the first guideline judgment delivered by the Court of Appeal Criminal Division in relation to the offence of rape:

> *In the case of a juvenile, the Court will in most cases exercise the power to order detention under the Children and Young Persons Act 1933, section 53(2) . In view of the procedural limitations to which the power is subject, it is important that a Magistrates' Court dealing with a juvenile charged with rape should never accept jurisdiction to deal with the case itself, but should invariably commit the case to the Crown Court for trial to ensure that the power is available.*

Mr Rule referred to this passage as the rule in *Billam*. He submitted that it remained valid. With respect to Mr Rule, this proposition is wholly misconceived. First, it is apparent on the fact of the judgment that *Billam* was decided when the juvenile court (as it was then) had "procedural limitations" which no longer apply. Second, it was a case which long pre-dated the current approach to young offenders as exemplified in the Sentencing Children and Young People guideline. Third, the approach advised in *Billam* was not repeated in the later guideline case of *Milberry* [2002] EWCA Crim 2891 where the court's view in relation to young offenders was expressed in

significantly less dogmatic terms. *Billam* is not an authority which can be of any assistance to a Youth Court considering venue in today's climate.

30. The next limb of the submission in relation to the decision to retain BH's case in the Youth Court was that the judge erred when he rejected the submission made by Mr Crimp on behalf of the Crown Prosecution Service that BH's alleged offending would fall within Category 2B in the Sexual Offences Definitive Guideline in relation to rape, a submission supported by Mr Haroon on behalf of BH. Mr Crimp argued that the case fell into Category 2 harm because the complainant had suffered severe psychological harm and because she was particularly vulnerable due to personal circumstances. Mr Rule developed the submission that the judge erred in his categorisation of the offence by reference to "uninvited entry in victim's home" as a relevant factor. He also argued that the judge failed to reflect aggravating factors that would further increase the adult sentence.

31. The acknowledgment of service from the court indicates that this approach was rejected by the judge. He began with a consideration of the guideline on Sentencing Children and Young People rather than the adult sentencing guideline in relation to rape. That involved an individualistic approach. It also reflected the approach to jurisdiction as set out in *R(DPP) v South Tyneside Youth Court*. Paragraph 2.10 of the Children guideline is as follows:

> *.....In most cases it is likely to be impossible to decide whether there is a real prospect that a sentence in excess of two years' detention will be imposed without knowing more about the facts of the case and the circumstances of the child or young person. In those circumstances the youth court should retain jurisdiction and commit for sentence if it is of the view, having heard more about the facts and the circumstances of the child or young person, that its powers of sentence are insufficient.*

The judge did consider the adult guideline. He determined that, on the material available to him at the time of making his decision, he could not find that any harm factor within Category 2 was present. Whether the evidence in due course would establish severe psychological harm was impossible to say. Given the age of the complainant and in view of the apparent circumstances in which BH had come to be in her home, the other harm factors urged on him were not made out. In those circumstances, the adult sentence (for a Category 3B case) had a category range of 4 to 7 years' custody. Taking into account the approach to sentencing young people mandated by the Children guideline, the judge could not decide that there was a real prospect of a sentence in excess of two years' detention.

32. We consider that the approach taken by the judge was entirely appropriate. He was right to avoid the mechanistic approach adopted by the parties. He applied the guidance in the Children guideline and in *R(DPP) v South Tyneside Youth Court* in a conventional fashion. He rightly concluded that, on the information available to him, the case fell into Category 3B in the adult guideline. We do not consider that it can properly be said that he was wrong either in his analysis or in his final decision. It is not necessary for us to conclude that we would have made the same decision although, as a matter of fact, we would have done so. This was precisely the type of case which Sir Brian Leveson P considered in his judgment. It certainly was not one of the rare cases requiring the Youth Court to decline jurisdiction because the offending was so grave. This is not to

say that the court might not in due course conclude that the offending merits a sentence in excess of two years' detention. That is a judgment to be reached once the court is fully seized of all of the facts and circumstances.

33. The third point relied on by Mr Rule is that the judge failed to have proper regard to BH's desire to be tried by a jury. He pointed to the reference to "the desire for a jury trial" at [31] of the judgment in *R(DPP) v South Tyneside Youth Court.* Mr Haroon's witness statement dealt with this issue as follows:

> *I agreed with the prosecution that (BH's) trial should be heard before a jury at the Crown Court. I argued that the Crown Court was the appropriate jurisdiction for the case as it would involve issues of third party disclosure, of forensic evidence and electronic evidence. I stated that the complainant's phone had been returned to her and relayed my instructions that there were hidden files within that phone that would contradict her allegations.*

The prosecution's submissions were restricted to the effect of the adult guidelines on the appropriate sentence. There was no argument from the prosecution that the Crown Court was inherently the appropriate venue for BH's trial. Mr Haroon's argument was based on the proposition that the case was too complex for a trial in the Youth Court. This was not and is not a sustainable proposition. Although there were three allegations of rape, they all related to the same complainant. As the entry on the PET form indicated, there were no complex issues of fact or law involved in the trial. This was a case well within the compass of a District Judge (Magistrates' Courts). Such judges are well used to trying cases of rape. They frequently will try cases of greater complexity than this one. The judge was fully justified in concluding that the reasons put forward by Mr Haroon were insufficient to require the case to be sent to the Crown Court.

34. The final submission made by Mr Rule under this ground was that the judge failed to take into account the fact that BH inevitably would have passed his 18th birthday by the time of any conviction. Therefore, the Sentencing Children and Young People guideline would not apply in his case. The judge fell into error because he ignored the fact that any sentencing court would be free to sentence BH as an adult. Mr Rule referred to what was said in *R v Bowker* [2008] 1 Cr App R (S) 72 as being of particular relevance.

35. We accept that the crossing of the age boundary at BH's 18th birthday was a relevant consideration. However, we do not agree that *Bowker* is of assistance to us. First, the appellant in that case (who appeared with a number of other young adults aged 19 and 20) was 2 days shy of his 18th birthday when he committed an offence of violent disorder. The court said this about the effect of his age:

> *The part played by this appellant in the events of that night placed him in the highest category of culpability. The judge considered, in our view quite rightly that a deterrent sentence was required. He was only two days short of his 18th birthday at the time he committed the offence. This is not a case where delays in investigation or trial resulted in the relevant age watershed being passed. Is it just that he should be treated significantly different from those who were over 18 years at the time of the offence?*

Thus, the case involved joint offending by the appellant with people a little older than him but where he was a leading light and he was very close indeed to his 18th birthday. The issue was whether a deterrent sentence could be imposed in his case. Even then, although the court concluded that deterrence was a factor, the sentence imposed by the court below was reduced to take account of age.

36. Second, *Bowker* was decided some years before the Sentencing Children and Young People guideline was introduced. Any judge is required to follow a relevant guideline: Section 59(1) Sentencing Act 2020. The Children guideline was relevant in BH's case.

The critical paragraphs are as follows:

> *Crossing a significant age threshold between commission of offence and sentence*
> *6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).*
> *6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:*
> *the punishment of offenders;*
> *the reduction of crime (including its reduction by deterrence);*
> *the reform and rehabilitation of offenders;*
> *the protection of the public; and*
> *the making of reparation by offenders to persons affected by their offences.*
> *6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.*

The guideline acknowledges that a person convicted at the age of 18 will be subject to the purposes of sentencing applicable to adults but stresses the relevance of the age of the offender on the date of the offence. In this case BH was only 16 at the time of the alleged offending. Had his case progressed as it should have done, the proceedings would have concluded when he was well short of his 18th birthday. In those circumstances, the strictures in paragraph 6.3 of the guideline are of particular importance.

37. We reject the proposition that any sentencing court would be free to sentence BH as an adult. In the event of conviction, any custodial sentence would be of a type appropriate to someone aged 18 or over. But the length of that sentence would be largely dictated by his age at the time of the offence. The judge properly considered the Children guideline. We accept that there may be cases where a more nuanced approach is necessary. If a young person very close to their 18th birthday makes their first appearance in the Youth Court in relation to an offence allegedly committed only shortly before that first appearance, the court will give consideration to the likely sentence with those features in mind. They might allow the court more easily to conclude that there is a real prospect of a sentence in excess of 2 years. That will be a matter of judgment in each case i.e. as to whether the facts put the case so near to the boundary that a nuanced approach is required. We are sure that this is not such a case.

It follows that we are satisfied that the judge did not err when he took into account the Children guideline.

Ground Four

38. In his skeleton argument Mr Rule summarised this ground as "Right of 18 year old to trial by jury (and Convention protections)". The first part of his argument is that proper construction of the domestic statutory provisions allows for someone in BH's position who achieves his 18th birthday after the Youth Court has retained jurisdiction to obtain a trial in the Crown Court. We use the word "obtain" since, in a case such as this where the offence is indictable only, the court will be obliged to send him for trial. In oral submissions Mr Rule submitted that the correct statutory construction would also lead to a person in the position of BH vis-à-vis age being given a right to elect trial were they charged with an either way offence. The second part of the argument under this ground relates to Article 14 of the ECHR. We shall deal with the submissions relating to domestic law first.

39. Mr Rule argued that the authorities establish that a right to trial by jury exists for any accused person whose trial has not yet commenced with evidence being called. He relied particularly on *R v St Albans Juvenile Court ex parte Godman* [1981] Q.B. 964. This was a case concerning the right of a young defendant who had passed the age of 17 (then the age at which the offender was to be treated as an adult) to elect trial in relation to the either way offence of theft. The defendant (then aged 16) previously had pleaded not guilty and the case had been adjourned for summary trial. The court was concerned with the provisions of the Criminal Law Act 1977 in relation to election for trial. Beyond that, the facts are irrelevant. The simple point for the purposes of Mr Rule's argument is that the court found that the point of no return was when evidence began to be called. Since he had passed his relevant birthday prior to that point, the defendant had the right to elect trial.

40. The first objection to this authority providing any support for Mr Rule's argument is that it was concerned with an either way offence and the right to elect trial. In addition, it was concerned with different statutory provisions to those with which we are concerned. The second and more fundamental objection is that *Godman* was considered by the House of Lords in *R v Islington North Juvenile Court ex parte Daley* [1983] AC 347. The House of Lords in that case had to consider conflicting authorities (of which *Godman* was one) relating to the point at which venue for trial was made final in relation to either way offences. Lord Diplock gave the only speech. He emphasised that the right to elect trial required the accused actually to appear in court in person. He noted the practice whereby a magistrates' court could inform an accused that, if they intended to plead not guilty, they could indicate that in writing in which event the case would be adjourned for trial in their absence. In those circumstances, the first point at which an accused could elect trial would be at the start of the trial. However, that did not mean that the right to elect persisted until that point. Lord Diplock stated the principle at p364E:

> *My Lords, it seems to me that reason and justice combine to indicate that the only appropriate date at which to determine whether an accused person has attained an age which entitles him to elect to be tried by jury for offences which under section 18 or section 22 are triable either way is the date of his appearance before the court on the occasion when the court makes its decision as to the mode of trial.*

That unequivocal statement of the law means that any argument to the contrary based on *Godman* cannot be sustainable. Although the House of Lords purported to approve *Godman*, it did so in the context of choosing between two approaches to the phrase "where a person…appears or is brought before a magistrates' court". Lord Diplock said this at p362D/G:

> *The key phrase in sections 18 (1) and 24 (1)* [of the Magistrates' Courts Act] *alike is "where a person ... appears or is brought before a magistrates' court on an information charging him with an offence." This must bear the same meaning in both subsections and if, as is frequently the case, there are several occasions on which the accused appears before the court, it must be the date of one of these occasions only that is decisive in determining the age of the accused for the purpose of seeing whether it is, on the one hand, section 24, or on the other, sections 18 to 23, that apply for the purpose of deciding on his mode of trial for an offence in the category of those that are triable either way under sections 18 to 23. The draftsman, however, does not state expressly which that occasion is.*
> *The choice would appear to lie between (1) the occasion when the accused first appears or is brought before the court, whether on that occasion a decision is reached as to the mode of his trial or he is merely remanded to appear before the court upon a later date without any such decision having been reached; and (2) the occasion on which the accused appears or is brought before the court when the court makes its decision as to the mode of trial. Meaning (1) was adopted by the Divisional Court in the instant case, ante, p. 349G, preferring the opinion expressed in Reg. v. Amersham Juvenile Court, Ex parte Wilson [1981] Q.B. 969 to that expressed in Reg. v. St. Albans Juvenile Court, Ex parte Godman [1981] Q.B. 964.*

As is apparent from the passage previously cited, Lord Diplock preferred the second option. Whether that was truly the ratio in *Godman* is doubtful. What is clear is that venue is determined on the occasion on which mode of trial is determined.

41. The application of these principles to a person in BH's position was specifically considered in *R v Nottingham Justices ex parte Taylor* [1992] 1 Q.B. 557. A submission was made to the court not dissimilar to that made to us by Mr Rule, namely that *Godman* permitted a person who became an adult before the start of a summary trial to elect trial by jury. The court said that *Godman* should be disregarded insofar as it was inconsistent with the ratio in *ex parte Daley*. The conclusion at p132E was as follows:

> *Thus the position in law is that if before he becomes 17 a juvenile appears before the court, whether it be for the first time or on remand charged with an indictable offence or an offence triable either way, and (1) he pleads not guilty when the charge is put directly to him and (2) the mode of his trial is discussed with him or his legal representative, and decided upon and the decision thereupon recorded in clear terms, then, whether evidence is called on that occasion or not, his becoming 17 before trial can have no effect upon the already determined mode of trial. In other words he must be tried as though he were still 16 years of age. It is only if the mode of trial has not before then been determined that his becoming 17 years of age can have any material effect whatsoever.*

This is a clear statement of principle which is in accordance with *ex parte Daley*. It demonstrates that there is no sensible support in the authorities for the argument raised by Mr Rule that the critical date is the date of trial.

42. Mr Rule's argument did not provide any mechanism for sending BH to the Crown Court. He suggested that Section 47(1) of the Crime and Disorder Act 1998 was a route which could be adopted. This reads:

> *(1) Where a person who appears or is brought before a youth court charged with an offence subsequently attains the age of 18, the youth court may, at any time—*
> *(a) before the start of the trial;*
> *[...] remit the person for trial or, as the case may be, for sentence to a magistrates' court (other than a youth court).*

That does not provide a mechanism for sending an indictable only offence to the Crown Court. The statute gives the Youth Court the power to remit the person for trial or sentence to the magistrates' court. A magistrates' court has no jurisdiction to try or to sentence an indictable only offence. Therefore, offences of rape could not remitted pursuant to Section 47(1) of the 1998 Act. That provision will be amended by Section 12 of the Judicial Review and Courts Act 2022 when it comes into force. A new subsection 1A will be added which will read as follows:

> *In the case of an indictable offence, the youth court may, at any time before the start of the trial, send the person for trial to the Crown Court.*

That such a provision is required is a further demonstration that Section 47(1) of the 1998 Act does not assist Mr Rule's argument. A Youth Court can only send someone to the Crown Court if it has statutory jurisdiction to do so. There is no inherent jurisdiction available. In the absence of any statutory jurisdiction, any purported sending would be invalid and would be rejected by the Crown Court.

43. We also observe that this argument is not strictly a challenge to the decision of 20 January 2022. It seeks to provide BH with a route to the Crown Court by some later decision. It is not immediately apparent how that arises from the claim for judicial review as it has been formulated. We turn then to the Convention argument.

44. For the reasons we have given above, thus far we have concluded as follows:

- That the District Judge's decision of 20 January 2022 to retain jurisdiction in the Youth Court was valid even though an indication of plea was not taken.
- The District Judge's decision was not "wrong", applying the approach to that question in R(D).
- That under well-established domestic law principles and under the legislative regime governing children and young persons, the appropriate date on which a court determines whether a person has attained an age which entitles him to elect for trial by jury is the date of his appearance before the court making the decision on allocation.

45. Accordingly, under domestic law, BH, aged 17 at the allocation date, had no right to a jury trial in the Crown Court in respect of the rape charges even though it was known he would be 18 years of age at the start of his trial in the Youth Court.

46. It is in the context of those conclusions that the European Convention on Human Rights ("ECHR") issues are to be considered. However, it was not altogether clear to us how Mr Rule put his Article 14 ECHR case and the form of the argument appeared to change between the Claim Form, the written submissions, and during his oral submissions. We will summarise the position, as we understood it, below.

47. In the Statement of Facts and Grounds the argument was put as follows: "The Claimant is properly entitled to elect trial by jury now that he is 18 and in the circumstances of these proceedings and/or a denial of the right to elect jury trial to this 18 year old Claimant is unlawful and prohibited by section 6 of the Human Rights Act 1998, giving effect to the protection of Article 14 in the ambit of Article 6 of the European Convention on Human Rights".

48. The obvious problem with that formulation is that the decision under challenge in the Claim Form was only the decision of 20 January 2022 made when BH was aged 17 and not any later decision when he was 18 years of age. Further, the Statement of Facts and Grounds did not identify any specific provision of domestic legislation which BH argued had to be given an ECHR compliant interpretation.

49. In Mr Rule's skeleton argument for the substantive hearing, again it was not clearly identified which specific provision of domestic legislation he argued was potentially ECHR non-compliant. His argument appeared to be that if the overall effect of domestic law was to put BH in a position where he could not elect for a jury trial in the Crown Court that result in itself was contrary to the ECHR.

50. In oral argument, Mr Rule first appeared to suggest that in all cases where a young person who is charged with an indictable offence turns 18 before trial in the Youth Court, they must be sent for jury trial in the Crown Court. However, during later oral submissions, he clarified that his argument was that if the effect of domestic law is that BH (a person who was 17 at the time of the decision but who it was known would be 18 by the date of the proposed Youth Court summary trial) will be tried in the Youth Court without an option for a jury trial, that is a violation of Article 14 read together with Article 6.

51. As we understood that final form of the argument, Mr Rule submitted that BH (a 17 year old who would be 18 by the time of the summary trial) is a victim of discrimination when compared to any other 18 year old who has a right to trial by jury in the Crown Court on a charge of rape. He argued that to avoid this discriminatory outcome the final allocation decision for someone in his client's position has to be made at the start of a trial not an earlier allocation hearing (thereby giving him a right to jury trial).

52. As to how this would be achieved, in his reply submissions, Mr Rule referred for the first time to section 142(1) of the Magistrates' Courts Act 1980 as providing a power to a court to revisit a decision on venue to avoid the claimed discriminatory outcome. It is not clear to us how and when it is said that the District Judge in this case was meant to invoke this power (presumably when the summary trial came on before him, something which is yet to occur and which has been held up by the present judicial review).

53. Section 142(1) provides as follows:

> "(1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make".

54. We do not accept that section 142(1) can be deployed for this purpose: it has a much more limited corrective function, as its language makes clear. We do not however need to express any concluded view on the scope of this provision because in our judgment the Article 14/Article 6 complaint has no merit.

55. In answering the ECHR case, Counsel for the Interested Party understandably went in his skeleton argument straight to the question of the justification for different treatment of 17 and 18 year olds. However, that is the end point of any consideration of a violation of Article 14. There are a number of important hurdles which the Claimant must overcome before that stage.

56. It is well-established that to establish differential treatment amounts to a violation of Article 14, it is necessary to consider four elements: *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; [2020] AC 51 at [8]. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 (the issue of status). Thirdly, the claimant must demonstrate a comparator who is in an analogous position. Fourthly, if BH has proven the first three matters, the state must establish an objective justification for the different treatment. We will take each of the four elements in turn and apply them to the final form of Mr Rule's argument as we understand it.

Does a right to jury trial fall within the ambit of a Convention right?

57. The ECHR provision relied upon by Mr Rule is Article 6. He argues that the circumstances of differential access to a jury trial fall within the ambit of Article 6. In particular, he submitted that there has been discrimination against BH in denial of access to what he described as the "Rolls Royce" benefits of a jury trial as compared to summary process before the Youth Court.

58. Although the Article 14 complaint fails for a number of other reasons which we set out below, as a threshold issue we do not consider the ambit requirement is met. It is well-established that Article 6 is concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law. Under domestic law a person in BH's position as at the 20 January 2022 (the date of the decision under challenge) had no right to a trial by jury. Rather, domestic law created a system where the default of Youth Court trial might not be applied in certain circumstances of grave offences. There is no right to jury trial under substantive domestic law for a 17 year old. The effect of BH's argument is that such a right must be provided to him (and indeed to anyone retained in the Youth Court for summary trial on indictable/either way matters which have not come on for hearing until after they have reached 18 years).

59. However, as long as access to an Article 6 compliant process overall is provided to a litigant, no ECHR complaint lies under Article 6 that domestic law provides claimed additional beneficial aspects to a claimed comparator. It is significant in this regard that it was conceded by Mr Rule that trial in the Youth Court for his client would comply with Article 6 in all respects.

60. We have not overlooked Mr Rule's reliance upon certain obiter observations of Sedley LJ in *R (W) v Thetford Youth Court* [2003] 1 Cr. App. R (S) 323 at [43]. That case was the opposite of that before us. There, children made complaints about their cases being sent for trial in the Crown Court (as opposed to being retained in the Youth Court). Sedley LJ said no more than that situation might raise an issue under Article 5 (rights to personal liberty) rather than Article 6 (fair trial rights). Notably, Sedley LJ was clearly not impressed by the Article 6 submission. In short, that case does not assist BH. No other authority was drawn to our attention which even arguably supported the submission that the form of Article 6 complaint made by BH in this case satisfies the ambit requirement of Article 14.

61. In our judgment, BH fails on the ambit element. We will however consider the remaining three elements if we are wrong on this matter.

Status

62. We accept that age is a relevant status.

Less favourable treatment than a comparator

63. BH must demonstrate that he has been treated less favourably than an appropriate comparator, a person in a relevantly similar position. Mr Rule argues that the person in an analogous position is an 18 year old facing rape charges. We do not accept that is an appropriate comparator because at the time of the only decision challenged in the Claim Form (20 January 2022), BH was not 18 years of age – he was 17. It is only by deeming himself an 18 year old for the purpose of the argument (contrary to the known facts at the time of the decision under challenge), BH creates a situation of comparison where he can then argue there is no difference between his position and that of another 18 year old yet to be tried.

64. He fails on the comparator issue but he would also have failed on the "less favourable" treatment question, because we do not consider BH has demonstrated a summary trial before the Youth Court is in fact less favourable than a formal jury trial in the Crown Court.

65. However, as explained by Lady Black in *Stott*, it is not always easy to keep the third (comparator) and the fourth (justification) elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. We turn therefore to that fourth element, justification.

Justification

66. A difference of treatment is discriminatory if it has no objective and reasonable justification. In our judgment, BH fails on this element for the following reasons:

67. First, it is a legitimate aim to try cases involving children and young people in the Youth Court. That court allows trials to be conducted in private, in a manner specifically adapted to the needs of young people. It is also relevant that Youth Court trials allow the proceedings to be expedited and avoid the delays that are frequently encountered in Crown Court listing. This expedition is in itself, a legitimate aim when considering the needs of children and young people. BH, charged with rape, will be properly represented by counsel and will be tried by a specialist and professional judge who will give full reasons for his decision. It is not suggested that a defendant in the Youth Court will not have a fair hearing (it is not sub Rolls Royce) and indeed is in many respects much more beneficial to a defendant.

68. Second, as the Interested Party rightly submits it is inevitable that there must be a threshold at which to determine mode of trial and Parliament has determined that this is when "a person under the age of 18 appears or is brought before a magistrates' court" (sections 24 and 24A of the MCA), not the point at which evidence is called. That is a sound and justifiable policy choice based on considerations of certainty and speed.

69. Third, any threshold must be applied consistently, even for defendants at the margin of the threshold. This consistency would be difficult to achieve if the relevant threshold was the start of the trial. Again, that is a matter of legislative choice.

70. Fourth, the existence of a cut-off age for Youth Court proceedings, and the need to apply this cut-off consistently, is a proportionate means of achieving the legitimate aim of protecting the interests of children in the criminal justice system. Again, this a legitimate policy choice made by the legislature.

71. In our judgment, the operation of the domestic law creates no ECHR non-compliance on the facts of the Claimant's case.

Conclusion

72. It was for all of these reasons that we dismissed the claim for judicial review. BH has yet to be tried. The complainant is still waiting for her evidence to be heard in court. The case involves events which occurred in the summer of 2020. As a matter of urgency a trial date must be fixed. Fortunately we anticipate that Norwich Youth Court will be able to accommodate the trial within a relatively short time. That certainly would not be the position had the case been sent to the Crown Court.