Case No: AC-2024-BHM-000089

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT (KBD)
SITTING AT BIRMINGHAM

Neutral Citation Number: [2024] EWCC 24

33 Bull Street
Birmingham
B4 6DS

Date: 4 December 2024
Start Time: **11.15** Finish Time: **11.57**

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY

- -

Between:

FARAIZI MADZIKANDA	**Claimant**
- and -	
COUNTY COURT AT WARWICK	**Defendant**

- -
- -

The **Claimant** appeared **in Person**
MR FOREST for the **Defendant**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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THE HONOURABLE MR JUSTICE CHOUDHURY:

1. The claimant, Mr Faraizi Madzikanda, seeks judicial review of the decision of the defendant court on 12 January 2024 to dismiss his appeal against conviction and sentence by reason of his non-attendance at court. He contends that that decision was unlawful and in breach of natural justice and Article 6 of the European Convention on Human Rights, as he was not given due notice of the hearing, instead being informed that the hearing of his appeal was due to take place on 29 January 2024. Permission to proceed to a full hearing was granted by Eyre J on 10 July 2024. Ordinarily that would give rise to a fairly straightforward issue, namely, whether the claimant was given effective notice of the hearing and, if not, whether it was open to the defendant to proceed to determine the matter in his absence, as it did.

2. Unfortunately, the matter has been somewhat complicated by the claimant's insistence that not only was he not given due notice of the hearing, but that court staff have engaged in a deliberate fraud, aided and abetted it seems by his ex-wife Ms Beauty Madzikanda, to engineer his absence as part of an ongoing campaign by Ms Madzikanda to persecute him.

3. The claimant represents himself. He has done so, if I may say, respectfully and clearly, although he was not to be dissuaded from pursuing the allegation of fraud. The defendant court is represented by Mr Forest of counsel. I have had a helpful skeleton argument from him. As is the usual approach of courts when named in proceedings such as these the defendant takes a neutral position. The interested party has not taken any part in the proceedings, as is also customary in such disputes. Mr Forest makes it clear that he has been instructed to make submissions and attend the hearing today to assist the court, bearing in mind that the claimant is currently

unrepresented and owing to the serious allegations of fraud which are made against the defendant and its employees and/or office holders.

4. The claimant also alleges fraud against Coventry Magistrates Court, but they are not party to these proceedings.

5. Mr Forest informs me that the defendant has reviewed its systems, and it has, perhaps unsurprisingly, not found any evidence of fraud.

6. The defendant has provided a witness statement from Mr Oliver Hadland on behalf of the defendant which, in compliance with the defendant's duty of candour, sets out the underlying facts and the procedural history of the claim.

Background

7. The history of this matter goes back over 20 years to when the claimant's wife entered the UK on what the claimant describes as a corruptly obtained visa. The claimant complains that thereafter Ms Madzikanda was engaged in a litany of alleged fraudulent activity. I need not make any findings about such matters, although I would comment that the basis of such allegations against Ms Madzikanda seems flimsy at best and acts only to confirm that the claimant is not one to allow a lack of evidence to preclude allegations of fraud being made.

8. The claimant arrived in the UK in 2010, his two children with Ms Madzikanda having arrived a year earlier. The claimant claims that Ms Madzikanda sought thereafter to "use all means to have the claimant deported to Africa". The relationship between the pair appears to have deteriorated further, with the claimant's behaviour towards his

wife allegedly becoming increasingly hostile, and Ms Madzikanda sought and obtained various orders against the claimant.

9. The relevant part of the history for today's purposes commences on 28 March 2023. On that date the claimant was found guilty by the Coventry Magistrates Court of sending a letter or communication which conveyed a message which was indecent or offensive. The court imposed a community sentence, including 150 hours of unpaid work, and also imposed a restraining order prohibiting him from contacting Ms Madzikanda directly or indirectly, via third party or any social media platforms. It also prohibited him from distributing letters, leaflets or post on any social media platform information regarding Ms Madzikanda, and he was prohibited from entering what I presume is the street upon which Ms Madzikanda resides. That order was stated to last until 27 March 2033.

10. The claimant appealed against both his conviction and sentence, as was his right. That appeal appears to have been received by the court on or about 12 April 2023. However, there was a delay in listing the hearing of the appeal. By an email dated 20 July 2023 from the Coventry listing office the claimant received an apology for the delay in processing the appeal. The claimant contends that the delay in processing the appeal was somehow caused by his ex-wife, although the basis for such an accusation appears to be nothing more than conjecture. It is far more likely that this delay was due to nothing more than oversight on the part of an overburdened listing section attempting to cope with a large backlog of cases. At any rate, nothing turns on this because it is not in dispute that the claimant's appeal was listed to be heard initially on 22 September 2023 at the defendant court.

11. That hearing could not proceed, as all appeals listed for that month were removed as no judges were available. The matter was then re-listed for 6 October 2023 when matters of timetabling were addressed. A further hearing was scheduled for 10 November 2023. Unfortunately, court appointed counsel was not available on that date to assist the claimant. Counsel was required to conduct the cross-examination of the complainant, given the nature of the dispute. The matter was therefore adjourned for two weeks to 24 November 2023.

12. On that date the matter came before HHJ Walsh. Regrettably, the matter had to be adjourned once again due to the fact that court appointed counsel had not been notified of the hearing and was not in a position to proceed that day. I have had the benefit of seeing a transcript of that hearing. It is abundantly clear that HHJ Walsh did his utmost to try and secure counsel for the hearing so as to be able to proceed on that day. That included taking steps to identify any counsel in the building who might be able to assist at short notice by taking on the hearing. However, these attempts were to no avail and HHJ Walsh very reluctantly, especially given the effect on the complainant, which was made clear to him by prosecuting counsel, adjourned the matter once again. It was agreed in the course of that hearing that the matter would be set down for 12 January 2024. Mr Madzikanda was asked whether that date was okay, and the transcript records him as stating that it would be. He was informed that he would have to attend on that date.

13. In the course of today's hearing Mr Madzikanda has raised an issue with the accuracy of that transcript. He suggests that from his recollection the date for the adjourned hearing was 24 January 2024 and not 12 January 2024, as recorded on the transcript. It is not clear how that other date would assist Mr Madzikanda, but in any event, there

is nothing before me to suggest that there has been any inaccurate transcription of the date of the adjourned hearing.

14. So far so good. However, on 28 November 2023 Mr Madzikanda was sent a notice of hearing of appeal stipulating a hearing date of 29 January at 10.30am. There is a record of the claimant having signed a receipt for that notice of hearing on 29 November, that is the day after the date of the notice, at 10.26am. The position, therefore, as at that date, i.e. 29 November, was that notwithstanding what was said by HHJ Walsh about the hearing being on 12 January, the only formal notification received by the claimant was one informing him that the hearing would be held on 29 January 2024.

15. The defendant has provided evidence of a further notice being sent on 29 December 2023 with a hearing date of 12 January 2024, as HHJ Walsh had initially directed. There is, however, no evidence of the claimant ever signing for receipt of that further notice. As Mr Hadland states in his evidence:

> "The defendant has conducted an internal search of court records and does not hold a record of the claimant signing for receipt of this notice. It is possible that the claimant did not receive this updated notice informing him of the upcoming 12 January appeal hearing. The defendant has no record of contact from the claimant seeking to confirm the correct date of the appeal hearing."

16. The hearing went ahead on 12 January in accordance with the later notice. The hearing commenced at 11.23am before Mr Recorder Bhatia. The claimant was not in attendance and could not be located. After allowing some time for the claimant to attend, counsel for the Crown moved to dismiss the appeal with costs, on the grounds of non-attendance. The court was reminded that the matter had been adjourned on "multiple occasions and [Mr Madzikanda] was here at the last hearing and was well-

aware that the hearing was listed for today". No mention was made at that hearing of the fact that another notice had been sent initially with a hearing date of 29 January 2024.

17. The learned Recorder then proceeded to decide as follows:

> "I take it there has been no communication to the court this morning on behalf of Mr Madzikanda. Just check with listing. Yes. Because he has appealed on previous occasions. Given that, we are satisfied, as I understand, that the proper notice has been given, he has responded before. We are all satisfied because we have had enquiries made that there has been no communication, either via telephone, email or any other means to explain his non-attendance today. In the circumstances, we are of the view that the appeal is dismissed. In terms of the prosecution costs, this has been going on for some time. The adjournments have not been the fault of Mr Madzikanda have they.
>
> MS CALLAWAY: The first adjournment I'm aware, Your Honour, was for a court appointed advocate to be put in place. That was the first adjournment. The second one was due to the fact that the other one wasn't available, and it was listed then again here today. So fortunately, it hasn't been the fault of himself, it is just because he represented himself that the appeal couldn't go ahead. However, Your Honour, we are here today with our witnesses to go ahead with the trial, and he was well-aware. As such, he should bear some costs that we have had to incur in being here prepared.
>
> THE RECORDER: Yes, we take the view that he should bear responsibility certainly for a contribution towards the costs. Doing the best we can, we think that £250 towards the prosecution costs is appropriate and we make that order."

18. I note as an aside that the claimant informs me today that he has in fact paid a sum over £400 in respect of prosecution costs. That may be in respect of the court fee on top of the costs contribution ordered by Recorder Bhatia.

19. Mr Madzikanda is adamant that he did not receive any such further notice setting out a hearing date of 12 January and says that is why he did not attend the hearing on that date. He alleges that the later notice stipulating a hearing date of 12 January was the

result of a fraudulent act. The basis for this allegation appears to be a communication from the defendant on 24 January 2024 in which it is stated:

> "Following the hearing on 24 November a letter was sent advising you that your appeal is to be heard 12 January 2024. Having checked our records, it appears this letter was signed for on 29 November 2023."

That information was incorrect. As the defendant now accepts, the letter signed for on 29 November 2023 gave the hearing date as 29 January 2024. There is, as I have said, no record of the claimant ever having signed a later notice sent on 29 December 2023 containing a hearing date of 12 January 2024.

20. I make a finding to the effect that the defendant's explanation was incorrect. However, it is impossible to discern any fraudulent activity or dishonest intent. It can readily be inferred that the writer of the letter had simply confused the two notices of hearing, only one of which had been signed. Had there been any intention to perpetrate a fraud, which is an extraordinary allegation to make against court staff who would have nothing to gain in the process, then one might have expected some manipulation or fabrication of documents rather than the provision of a patently incorrect explanation that does not correspond with existing documents.

21. I probed Mr Madzikanda this morning as to why court staff would engage in such a fraud against him, and he was unable to give any reason why they would do so. That therefore is the background to this claim.

<u>The decision under challenge</u>

22. The defendant points out that there is a lack of clarity as to the decision being judicially reviewed, and, in particular, it is submitted that it is unclear whether the claimant wishes to challenge the act of someone on behalf of the defendant allegedly

fraudulently changing the appeal hearing date, someone on behalf of the defendant allegedly wrongly claiming that a notice of appeal had been signed for, the defendant's decision to proceed in his absence on 12 January 2024, its decision to dismiss the appeal, or some or all of these.

23. Having considered the claim as a whole and the claimant's submissions, it is clear to me that, whilst the claimant believes that a fraud was involved, his essential complaint is that his appeal was dismissed in his absence in circumstances where he had not received notice of the hearing on 12 January 2024. That was certainly the basis on which Eyre J granted permission:

> "On the material provided by the claimant, it is at least arguable that the hearing on 12 January 2024 took place in his absence in circumstances when he had not been notified of that hearing but had instead been told that the hearing would be on 29 January 2024. In those circumstances, it is arguable that there was a public law error in the hearing of the appeal."

24. I therefore proceed on that basis, namely, that the challenge is as to the fact that the hearing on 12 January 2024 proceeded without the claimant being duly notified of the hearing.

25. The next question to consider is whether any such decision is properly amenable to judicial review. Mr Forest points out that it may be said the proper course is not in fact a claim of judicial review but an appeal by way of case stated. I have been referred to an authority in his skeleton argument which states that:

> "Absent exceptional circumstances, the procedure under sections 28 to 28A of the Supreme Court Act 1981, that is a statutory appeal by way of case stated, ought to be used instead of judicial review. See for example *R (on the Application of) Sivasubramaniam v Wandsworth County Court* [2002] EWCA Civ 1738 [2003] 1WLR 475 per Phillips L, Master of the Rolls as he then was, giving the judgment of the court at 46-47. I am reminded that this is not a jurisdictional bar but a

> discretionary one which is founded on giving effect to Parliamentary intention and because the latter procedure is often more procedurally convenient and is fairer to the defendants. See *R (On the Application of) Brighton & Hove County Council v Brighton & Hove Justices* [2004] EWHC 1800 (Admin), per Stanley Burton J, as he then was, at 23-24."

26. However, Mr Forest very fairly acknowledges that, even if the discretionary bar applies, there may be said to be features in this claim, by contrast with those in *Brighton & Hove CC*, that might persuade the court to decide in its discretion to hear the judicial review.

27. In my judgment, the claimant ought not to be barred from pursing the matter by way of judicial review. I have very much in mind that the claimant is a litigant in person. Although commendably he has done much work to familiarise himself with the workings of the Administrative Court, he can be forgiven for not appreciating that a challenge to a decision of the court ought generally to be by way of an appeal by way of case stated rather than an application for judicial review.

28. I also note that the claim has been found to be arguable, and having looked at the papers I agree that the claim is far from frivolous and indeed has considerable merit. The defendant, whilst not actively objecting to the claim as an application for judicial review, did not resist permission on the grounds of any discretionary bar and, given the stage that we have reached, it would be contrary to the interests of justice to shut the claimant out of the judgment seat. I therefore conclude that it is appropriate to hear this matter, albeit that it is brought by way of an application for judicial review.

Legal principles

29. In dealing with appeals against conviction and/or sentence the defendant is required, as it is in dealing with any case before it, to deal with it justly and in accordance with

the overriding objective: Criminal Procedure Rule 1.1. Doing so under Criminal Procedure Rule 1.1(1) and Rule 1.3 includes, under Rule 1.1(2), the defendant "(c) dealing with the prosecution and the defence fairly; (d) recognising the rights of a defendant" i.e. the accused "particularly those under Article 6 of the European Convention on Human Rights; (e) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case; and (f) dealing with the case efficiently and expeditiously".

30. Under Criminal Procedure Rules, Rule 3.8(2): "At every hearing [the Crown Courts] must, where relevant – (a) if the defendant" i.e. the accused "is absent, decide whether to proceed nonetheless".

31. Crown Court officers are responsible for keeping records of proceedings of the court and notifying the parties or their legal advisers of the place and time appointed for any proceedings: s.82(1) of the Supreme Court Act 1981. They must give as much notice as reasonably practicable of every hearing to, inter alia, the parties, Criminal Procedure Rule 34.8(2)(a) and Rule 3.14(a). Under Criminal Procedure Rule 25.18 they "must serve on each party notice of where and when an adjourned hearing will resume, unless that party was present when that was arranged."

32. In determining the appeal by dismissing it, in addition to section 108(1)(b) of the Magistrates' Courts Act 1980, the defendant was exercising powers and an original de novo jurisdiction under sections 45, 48 and 79(3) under the Supreme Court Act 1981: see also Criminal Procedure Rule 34.1. Criminal Procedure Rule 25.1 and 25.2(1)(b) provide that where the Crown Court tries a case it "must not proceed if the defendant is absent, unless the court is satisfied that (i) the defendant has waived the right to attend, and (ii) the trial will be fair, despite the defendant's absence."

Discussion

33. In the present case the claimant did receive oral notice at the hearing on 24 November 2023 of a fresh hearing date of 12 January 2024. However, that oral notice was clearly superseded by the written notice sent to the claimant on 28 November 2023 and which he signed on the following day as having been received. That written notice provided for a hearing on 29 January 2024. Having sent out such notice it is not open to the defendant to rely on the previous oral notice, and it does not seek to do so.

34. The only question that remains therefore is whether the further notice of hearing issued on 29 December 2023 had the effect of superseding or nullifying the notice of hearing issued on 28 November 2023. In my judgment, fairness and the interests of justice demand that it does not have that effect:

(a) As stated already, the claimant cannot rely on the superseded oral notice given at the hearing on 24 November 2023.

(b) Any litigant in receipt of formal written notification of a date for hearing would be entitled, save in exceptional circumstances, to treat that as overriding any earlier oral notice.

(c) The terms of the 28 November written notice left no room for doubt that the hearing would take place on 29 January 2024.

(d) The defendant's own position is that the further notice of 29 December 2023 "may not have been received". The defendant prudently operates a system whereby reliance is placed on signed acceptance of notice having been received. There is no

record of such receipt in respect of the further notice. I find that it is more likely than not that the claimant did not receive that notice.

(i) Whilst the further notice is correctly addressed, there is no other record of it actually having been sent to the claimant either electronic or otherwise.

(ii) The claimant is a highly engaged litigant. He has attended all previous hearings and has queried delays in the listing of his appeal. Had he received this further notice, it is highly likely that he would have contacted the defendant very shortly thereafter to query why he was being sent two notices of the hearing in quick succession.

(iii) The claimant had nothing to gain and everything to lose by not turning up to his own appeal hearing. It would amount to an extraordinary and surprising change of attitude on the claimant's part for him not to have attended a hearing of which he had notice. The strong likelihood is that, for whatever reason, and as the defendant accepts is a possibility, the notice simply was not received.

(iv) The claimant contacted the court almost immediately upon being notified that his claim had been dismissed on 12 January. His evident distress at the time, which unfortunately appears to have manifested itself in some possibly aggressive behaviour, supports the view that he had not known about, or expected there to be a hearing on 12 January.

(v) This is not an area where the mere sending of the notice, even if that could be proved, would suffice to amount to notice. As provided by Criminal Procedure Rule 25.18 the court "must serve on each party notice of where and when an adjourned hearing will resume unless that party was present when that was

arranged". The mere sending of the notice would not amount to service for these purposes.

35. There appears to be no judicial input in the change of hearing date or any administrative reason for the change as between the 28 November notice and 29 December notice. It may be inferred, given the clear listing notified by the judge at the hearing on 24 November, that the first notice of 28 November, which the claimant did receive, was sent out in error. He was, however, entitled to rely upon it because he was not to know that it was sent in error.

36. In reaching its decision that the claimant was absent without good reason the defendant court was not referred to the 28 November 2023 notice of hearing. It is inconceivable that if the court had been made aware of that notice that it would not have made further enquiry or that it would have proceeded to dismiss the appeal as it did.

37. Taking account of all of the above, I am satisfied that there was a failure to serve notice of the hearing on the claimant, as required by the rules and as demanded by natural justice and Article 6 rights to a fair hearing. The failure to give such notice and the decision to proceed in the claimant's absence amounted to a serious irregularity and/or a breach of natural justice. That entitles this court to quash the decision to dismiss the claimant's appeal and to set aside the order made on that occasion.

38. That deals with the substance of the matter. I deal very briefly with the allegations of fraud which the claimant has not withdrawn. As I have already said, I can discern no fraud on the basis of the documentary material I have seen. The claimant has been

wholly unable to identify any motive that would support such a fraud being perpetrated against him by court staff. There is no credible evidence that Ms Madzikanda was involved in the production of any of the court documents, despite Mr Madzikanda's protestations to the contrary. His contention that there is a fraud is wholly fanciful and based on little more than conjecture and dissatisfaction with the way in which the matter has proceeded. In so far as fraud forms any part of the allegations on which Mr Madzikanda relies, I reject those allegations in their entirety.

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