5KBW CRIMINAL APPEAL UNIT: CASE SUMMARY AND COMMENT

Sohila Tamiz and Pedram Tamiz [2024] EWCA Crim 200

Renewed Applications for Leave to Appeal and Loss of Time Orders

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After a four and a half week trial, ST and PT were convicted of a series of offences arising out of their harassment and unlawful eviction of their tenants. Both sought permission to appeal against their convictions based on nine grounds. The applications were rejected by the Single Judge and were renewed to the full Court of Appeal (Criminal Division) where they were again rejected. In so doing, the Court set out helpful guidance as to the correct approach to advising upon and drafting renewed leave applications, and emphasised the dangers of pursuing wholly unmeritorious grounds after rejection by the Single Judge.

Advising on renewing an application for leave - The correct approach

The Court set out the problem:

> "[3] [The Single Judge had] explained in detail how and why the applications were unarguable, and he refused permission to appeal. [*However*] These renewed applications to the full court make no allowance for, or reference to, that detailed analysis by the single judge. It is as if it had not happened…"

> [104] "…it looks as if the applications were renewed almost automatically. In our view, the practice of simply replicating an application for permission to appeal, as if the single judge had not set out detailed reasons for refusal, is becoming more common and needs to stop. It takes no account of the fact that, in the last 20 years, the s.31 procedure has been improved out of all recognition: instead of one or two paragraphs, the single judge provides

a detailed mini-judgment explaining the reasons for refusal. In our view, those reasons need to be respected and properly considered before any renewed application is made."[1]

The Court set out the correct approach and stressed the need to analyse the reasoning of the Single Judge before advising on whether the application should be renewed.

> [104] "…Following refusal [*by the Single Judge*], it seems to us that the applicants should have sat down and said to themselves, "Well, what is wrong with what the single judge said? What is the answer to the points he made and which are made in the Respondent's Notice? Is there an answer?"

The risk of a loss of time order

In terms of the merits of the applications, the Court concluded that:

> [103] "… we consider that these renewed applications are, and always were, hopeless. They have incurred a considerable waste of court resources. We are therefore going to invite [counsel for the applicants]… to address the court as to why we should not make loss of time orders in each case."

Having heard submissions, the Court stated:

> [104] "We have considered carefully whether to make loss of time orders in this case. This was a case where there were a number of detailed rulings by the trial judge during the course of a four-and-a-half week trial. The grounds of appeal largely focussed on those rulings. They were then considered in detail by the single judge. There was also a detailed Respondent's Notice. The single judge's refusal meant that most of the points on which the applicants relied before us had already been judicially considered and rejected not once but twice. …

[1] Emphasis added

[106] "The problems caused by renewing an application, despite what the single judge has said, were particularly acute in this case. The three members of this court have had to get up to speed with a vast amount of detail arising out of a trial that lasted four-and-a-half weeks. That has taken each of us around three days. So that is nine days of judicial time…."

[107] "Accordingly, these applications have had a huge impact on resources. And yet they were inherently hopeless, as we have demonstrated: unrealistic and devoid of any merit…"

However, the Court did not make a loss of time orders – "but we have to say it was a very close-run thing" - in part because of the following factors [108]:

(a) "the personal circumstances of both ST and PT which we do not set out here";
(b) "the single judge did not tick the relevant box (which is far from being determinative, but is material)"

[109] That said, the time has come when applicants who wish to renew their failed PTA applications need to think long and hard about their prospects of success and the risk of failure. In particular, they need to grapple with what the single judge has said, not just ignore it. In the future, in a case of this sort, this court will have no hesitation in making a loss of time order.

Comment

Advising on renewal:

As the Court stressed, the starting point in advising on a renewed application for leave will be to consider the reasoning of the single judge and, if justified, setting out in the renewed application why it is submitted that they were flawed.

Loss of time orders:

A 'loss of time order' can be made where an applicant is unsuccessful in either their initial application for leave to appeal before the single judge, or, where this is refused, in their renewed leave application to the full CACD.[2]

[2] Criminal Appeal Act 1968, ss. 29(1),(2) and 31(2)(h). Criminal Practice Direction (CPD) 39E

As this case illustrates, if the CACD considers an application to be totally without merit, it can make such an order even if the grounds of appeal are supported by the advocate.[3]

If made, the direction has the effect of ordering the applicant to lose credit for a specified period of time already spent in custody between the date that they lodged their application for leave to appeal and the date of dismissal. [See generally Taylor on Criminal Appeals, Ch 11.]

The debate as to the fairness of loss of time orders has been brought to the fore by the Issues Paper for the Law Commission's Criminal Appeal project[4]. One of the questions asked was: "Should the power to make a "loss of time" order [LOTO] be amended or removed?"[5]

Whilst recognising that unmeritorious applications for leave require the resources in the Criminal Appeal Office, it is submitted that there are strong arguments that an applicant who seeks to challenge their conviction or sentence should not be penalised by a loss of time direction and that LOTO should be abolished:

(a) Public funding for a second opinion advice is almost non-existent and many applicants are unrepresented.
(b) A LOTO is often a disproportionate penalty for what is in effect a vexatious litigant.
(c) There is no clear guidance as to when such orders will be made and the duration.
(d) There is a very limited scope for challenging the length of these orders. There is no possibility of a point being certified for the Supreme Court because there has not been an "appeal", only an unsuccessful application for leave to appeal (see the Criminal Appeal Act 1968 s.33(1)), and an application to the European Court of Human Rights is unlikely to be heard in time to make any difference to the time served unless the initial sentence was of a very significant length.

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[3] *Hart; George; Clarke; Brown* [2007] 1 Cr App R 31
[4] Available here: https://lawcom.gov.uk/document/appeals-issues-paper/
[5] See DRAFT RESPONSE TO THE LAW COMMISSION'S "CRIMINAL APPEALS: ISSUES PAPER" Paul Taylor KC, Edward Fitzgerald KC, Kate O'Raghallaigh; Bar Council Law Reform Committee response: https://www.barcouncil.org.uk/policy-representation/consultations.html