Case No: Co/3404/2017

Neutral Citation Number: [2017] EWHC 2101 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2017

Before :
LADY JUSTICE HALLETT DBE
THE VICE PRESIDENT OF THE CRIMINAL DIVISION
THE HON MRS JUSTICE ANDREWS DBE

- -

Between :

R(on the application of TYRONE CARDIN)	**Claimant**
- and -	
(1) BIRMINGHAM CROWN COURT	**Defendant**
(2) BIRMINGHAM MAGISTRATES' COURT	

And

(1) THE CROWN PROSECUTION SERVICE
(2) THE GOVERNOR OF HMP WINSON GREEN

Interested Parties

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- -

Stephen Cragg QC (instructed by **Jonas Roy Bloom**) for the **Claimant**
Tom Little (instructed by **the Crown Prosecution Service**) for the **First Interested Party**

Hearing date: 9 August 2017

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Judgment

Mrs Justice Andrews:

1. This is the judgment of the Court.

2. The Claimant is currently on remand in HMP Winson Green awaiting trial for four offences of robbery, one offence of assault with intent to rob, one offence of dwelling house burglary and one offence of theft from a motor vehicle. He seeks permission to judicially review (i) the issue by the First Defendant, Birmingham Magistrates' Court, of a warrant authorising his detention for 48 hours pending an appeal by the prosecution against a decision by the Deputy District Judge (Magistrates Court) ("the DDJ") to grant him bail and (ii) the decision by Birmingham Crown Court to allow that appeal and direct that he be remanded in custody pending trial. He claims that because the prosecution failed to serve written notice of appeal upon him within the time prescribed by the Bail (Amendment) Act 1993, or at all, the Crown Court had no jurisdiction to hear the appeal. He also contends that the Magistrates' Court were under a positive duty to order his release from custody when the time for service of the written notice of appeal expired.

3. As the matter involves the liberty of the subject and required urgent consideration, and the application for permission would necessarily canvass the same arguments as the substantive claim, directions were given for an expedited "rolled-up" hearing.

4. As the following narrative will demonstrate, the Claimant is seeking to take advantage of a minor administrative error in the Magistrates' Court office which caused him no prejudice whatsoever.

5. The Claimant and his two co-defendants, his sister Rene Cardin and a woman named Molly Evans, were charged with the offences on 21 June 2017. All three were remanded in custody at the Police Station. Their first appearance was at the Birmingham Magistrates' Court on the same day. The DDJ sent their cases to the Crown Court for a Plea and Trial Preparation Hearing on 19 July. Each of the defendants applied for bail. Those applications were opposed by the prosecution, but the DDJ granted them bail subject to various conditions.

6. Section 1 of the Bail Amendment Act 1993 ("the 1993 Act") provides, so far as is relevant, as follows:

> *1. Prosecution right of appeal*
>
> *(1) Where a magistrates' court grants bail to a person who is charged with … an offence punishable by imprisonment, the prosecution may appeal to a judge of the Crown Court against the granting of bail.*
>
> *….*
>
> *(4) In the event of the prosecution wishing to exercise the right of appeal set out in subsection (1) above, oral notice of appeal shall be given to the court which has granted bail at the conclusion of the proceedings in which bail has been granted and before the release from custody of the person concerned.*

(5) Written notice of appeal shall thereafter be served on the court which has granted bail and the person concerned within two hours of the conclusion of such proceedings.

(6) Upon receipt from the prosecution of oral notice of appeal from its decision to grant bail the court which has granted bail shall remand in custody the person concerned, until the appeal is determined or otherwise disposed of.

(7) Where the prosecution fails, within the period of two hours mentioned in subsection (5) above, to serve one or both of the notices required by that subsection, the appeal shall be deemed to have been disposed of.

(8) The hearing of an appeal under subsection (1) .... above against a decision of the court to grant bail shall be commenced within forty-eight hours, excluding weekends and any public holiday (that is to say, Christmas Day, Good Friday or a bank holiday) from the date on which oral notice of appeal is given."

7. There is nothing in the statute which gives any assistance as to what is meant by "*the conclusion of the proceedings in which bail has been granted*" even though that is the point at which the two hours for service of the written notice of appeal starts running. In a case involving multiple defendants who are jointly charged with the same criminal offences and appearing before the court on the same occasion, there is some force in the argument that the proceedings have not concluded until the court has finished dealing with all the defendants. However, that was not the way in which the Associate Prosecutor treated the proceedings in the present case.

8. The hearing of the bail applications made on behalf of the Claimant and his sister took place before the short adjournment on 21 June 2017. After the DDJ had granted them bail, the Associate Prosecutor, Mr Purser, gave oral notice of an intention to appeal the granting of bail in respect of both defendants at 12.54pm. The Claimant and his solicitor were both present in court when the notice was given, and as required by the statute, the oral notice was given before the Claimant was released from custody. The Claimant therefore knew that the prosecution intended to appeal against the grant of bail and, as he was present when Mr Purser articulated the Crown's objections to his application for bail, he would also have had a good idea of what the grounds of appeal were likely to be.

9. In accordance with s.1(6) of the Act, the Magistrates' Court was obliged to remand the Claimant in custody until the appeal was determined or otherwise disposed of. The normal procedure would be for the court to issue a warrant authorising the detention of the defendant for two hours, that being the period within which the prosecution has to serve the written notice of appeal on the defendant. In practice, the individual representing the Crown at the bail hearing will probably not have the authority to make a decision about whether to appeal, and the oral notice would preserve the Crown's position until such time as that decision could be taken by someone who had. In the present case Mr Purser checked with someone of requisite seniority who confirmed that an appeal should be pursued.

10. At 1.56pm Mr Purser gave written notice to the relevant court officer at the Magistrates' Court of the prosecution's intention to appeal the granting of bail to the Claimant and Rene Cardin.

11. In the normal course of events a defendant would either be served with the written notice of appeal in the cells or, as was the plan in the present case, brought back into court for service to be effected. Unfortunately, due to an administrative error, the court office generated a remand warrant for the Claimant which stated, incorrectly, that the written notice of appeal had been served on him at 12.54pm. The remand warrant is addressed to the authorised officers of the prisoner escort contractors and the Governor of the nominated prison establishment (in this case, HMP Winson Green). The order reads as follows:

"*The defendant is to be taken to the nominated prison establishment and held in custody until any further order of this court or the Crown Court. Unless the defendant waives his right to appear, he is to be taken before the Birmingham Crown Court at a date and time to be notified.*"

12. The bail hearing for the third of the defendants, Molly Evans, commenced at 2pm. Once again, bail was opposed. It is unclear why she was dealt with separately from her co-defendants; it is possible that there was insufficient time to hear her bail application before 1pm, but there may have been some other reason. At 2.20pm, after the DDJ had granted her conditional bail, Mr Purser gave oral notice that that decision would also be appealed.

13. At 2.33pm both Rene Cardin and Molly Evans were served with the written notices of appeal. It appears that it was only at that juncture that it was discovered that the Claimant had already been collected by the prison escort contractors and was in the process of being transferred to prison. Inquiries by the court associate revealed that the reason for this was that the warrant had incorrectly stated that written notice had already been served on him. Mr Jonas, the Claimant's solicitor, demanded that the Magistrates' Court should cancel the warrant, which it refused to do.

14. Mr Purser was keeping notes of these events electronically as they unfolded. His note of what happened reads as follows:

"*Written notice of appeal handed to Rene and Molly at 14.33. Court informed that Tyrone has already been taken to prison! Apparently the court office generated a warrant for him after the morning session to say (incorrectly) that written notice had already been given. I tell the court that Tyrone needs to be returned to court ASAP (doesn't appear likely) – the other option is to have court fax a copy of the written notice to Winson Green with instructions that it be served on D as soon as he arrives. Copies of the appeal notice are served on all three Def sols in court."*

15. The last sentence does not paint the full picture. Mr Purser gave copies of the written notice to the solicitors representing Rene Cardin and Molly Evans, but when he tried to give a copy to Mr Jonas he refused to take it, stating that he had no instructions to accept service on behalf of his client. Mr Purser told him that the document was "for information only" and Mr Jonas then accepted a copy of the notice.

16. At 2.50pm the Magistrates' Court sent a copy of the written notice of appeal in relation to the grant of bail to the Claimant by fax to the prison. However, it appears from an email subsequently sent by a member of the administrative staff in the court to the prison, attaching the notice of appeal, that the fax did not go through. There is other evidence which suggests that subsequent attempts to send the notice by fax also

failed. There is no evidence as to what, if anything, was said on the fax cover sheet by way of explanation. The email was timed at 3.13pm. It did not contain express instructions to the prison staff to serve the attached notice on the Claimant. As Mr Little, who appeared on behalf of the CPS, submitted, the court staff would not have sent either of those documents to the prison unless they had been directed to do so either by the DDJ or the clerk of the court. Bearing in mind the practical difficulties of trying to get in touch with those charged with transporting a prisoner whilst they were in transit, the court had plainly decided to take up Mr Purser's alternative suggestion as to how to serve the written notice on the Claimant.

17. Since Winson Green is only three miles from the court, it was reasonable to expect that the van would have arrived by the time the court tried to transmit the fax, but that did not happen, for reasons that have not been explained. It is possible that the van visited another court to collect other prisoners before making its way to the prison. The precise time at which the prison van arrived at the prison is unknown. Mr Jonas was told at one stage that it was "shortly after 3pm" but the account given to him by email on 19 July 2017 from a Mr Sporcic, the Head of Community Engagement at the prison, who had investigated the matter with the prison custody office, indicates that the van had not arrived when the email was received at 3.13pm. The lady who had sent the email from the court office was notified of this by someone in the custody office, and in response she said that the prisoner was on his way. Even in the absence of express instructions, it must have been obvious to those in the prison custody office that the court intended the written notice to be served by them on the Claimant when he arrived at the prison. The fact that the person in the custody office rang the court office to tell them that he had not yet arrived confirms this, as there would have been no point in conveying that information to the Magistrates' Court otherwise.

18. Despite this, it appears from Mr Sporcic's email that the staff in the prison custody office inexplicably took it upon themselves to decide <u>not</u> to serve the notice on the Claimant when he did arrive, because by the time that happened, they believed the two hours prescribed for service under the Bail Act had already expired. If the "proceedings in which bail was granted" concluded when all matters pertaining to the Claimant and his sister were disposed of, before the short adjournment, then that belief was correct. If the "proceedings in which bail was granted" were the proceedings involving all three defendants, they did not conclude until the bail application for Molly Evans was disposed of at around 2.20pm. The question when the proceedings concluded for the purposes of starting time running may have assumed some importance in this case had the prison staff done what they were supposed to do and the Claimant had arrived before 4.20pm. However, given that the Claimant was never served with the written notice it is unnecessary for us to consider that matter further.

19. There is no evidence that anyone informed the Magistrates' Court, let alone the CPS, at any point up to and including the time when the appeal was heard in the Crown Court, that the prison had not served the notice on the Claimant. That only became clear after the commencement of this claim for judicial review, in consequence of Mr Jonas' diligent and persistent attempts to obtain clarification of what happened.

20. Mr Jonas rang the prison twice later in the afternoon of 21 June to explain that the warrant was defective. He requested to speak to a manager and was informed that a manager would call him back, but no-one did. Mr Jonas has explained in his first

witness statement that because of the procedural formalities that must be completed in order to book a prison visit, in practical terms it was impossible for him to arrange to see his client in the period between the proceedings in the Magistrates' Court and the hearing of the appeal.

21. The following day Mr Jonas had conversations with various senior court staff at the Magistrates' Court, in an attempt to persuade them to revoke the defective warrant. Having considered the case of *R(Jeffrey) v Warwick Crown Court* [2002] EWHC 2469 (Admin) the court staff decided that the Claimant's detention was not unlawful, and that it would be a matter for the Crown Court judge to decide whether he had jurisdiction to hear the appeal. A senior court manager informed Mr Jonas that the effect of ***Jeffrey*** was that the Magistrates' Court would not do anything about the warrant. Mr Jonas was dissatisfied with that position, but decided that there was no prospect of his being heard on an application for a writ of habeas corpus before the appeal took place.

22. On 23 June, within the 48 hours prescribed by s.1(8) of the 1993 Act, the Claimant was produced at Birmingham Crown Court for the hearing of the prosecution appeal. He was represented by another solicitor from the same firm as Mr Jonas, Mr Bryce, as Mr Jonas had another professional engagement. It is not suggested, nor could it be suggested, that there was insufficient time to prepare for the appeal hearing and to represent the Claimant's rights and interests at the appeal. The solicitors knew what the grounds of appeal were and there was no need for them to take fresh instructions.

23. The Claimant told Mr Bryce that he had not been served with the written notice of appeal whilst he was at the prison. At that time, Mr Bryce was unaware that any fax or email had been sent to the prison.

24. No attempt was made by the prosecution to serve the written notice on the Claimant at court. Of course, at that time the CPS had no reason to know that the fax had not gone through or that the prison authorities had made no attempt to serve the notice of appeal despite being aware that the notice had been sent to them for that very purpose.

25. Mr Bryce submitted to HH Judge Creed that the appeal was deemed "disposed of" by virtue of s.1(7) of the Bail (Amendment) Act and that he therefore had no jurisdiction. The Crown Court clerk then indicated that the court papers forwarded by the Magistrates' Court indicated that a fax had been sent to the prison containing the notice of appeal. Mr Bryce told the Judge that his client had not received the notice. The prosecution submitted that any procedural error had been due to circumstances beyond their control. The Judge, applying the decision in ***Jeffrey***, indicated that he was satisfied that the requirements of service had been met by the sending of the fax, and that the prosecution had acted with all due diligence. Since everyone was aware of the prosecution's intention to appeal, there was no prejudice to the Claimant.

26. The Judge proceeded to hear all three bail appeals and allowed the appeals. There has been no criticism of the merits of that decision.

27. It should be readily apparent from the foregoing history that if the administrative error had not been made when the warrant was issued by the Magistrates' Court, the Claimant would have been detained in the cells at the court and produced at the same time as his co-defendants and served with the written notice within the 2 hours

provided for in s.1(5) of the 1993 Act. His detention in prison pending the disposal of the prosecution appeal would then have been authorised by the issue of a warrant in exactly the same form as the one that was issued prematurely. It was not the prosecution's fault that at the time when it was expected to serve him, in court, he was in a van whose current location and prospective time of arrival at the prison were unknown.

28. Frankly it is difficult to conceive what else the prosecutor could have done in those circumstances to try to ensure that the document reached the Claimant personally, other than to ask that the court should send a copy of the document electronically to the prison with a request that it be served on the Claimant when he arrived there. The time at which the Claimant arrived was something that neither the court nor the prosecutor had any power to influence.

29. If the "conclusion of the proceedings" is treated as being the time at which the oral notice was given by Mr Purser, namely 12.54pm, it is apparent that even if the fax sent to the prison had gone through, the Claimant could not have been served within the 2 hours because the prison van did not arrive until well after the expiry of the time limit. If the "conclusion of the proceedings" is treated as being the time when the proceedings against all three defendants were concluded, then it is possible that he could have been served in time. It was not the prosecution's fault that when he did arrive, the prison staff decided not to bother to serve the notice on him (and omitted to tell the court office of that decision). That is not something that the prosecution could be expected to have foreseen.

30. Although it relates to the second ground of appeal in the claim form, logically the first question for this Court to consider is what, if any, effect the error on the face of the warrant had on the lawfulness of the Claimant's detention. The answer to that is none. It is well established that a custodial authority is bound to rely on the terms of a court order even if erroneously drawn, unless and until it is amended or revoked: see e.g. *R v Governor of HMP Moorland* [2006] EWCA Civ 2700 followed more recently in *R(Ellerton) v Secretary of State for Justice* [2010] EWCA Civ 906, see especially the observations of Sedley LJ at [14] and [15].

31. In *McGrath v Chief Constable of the Royal Ireland Constabulary and another* [2001] UKHL 39 Lord Clyde articulated the position as follows at [17]:

> " W*arrants issued by a court of law require to be treated with the same respect as must be accorded to any order of the court. The general rule was stated by Romer LJ in Hadkinson v Hadkinson [1952] P 285, at 288:*
>
> *"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A person who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it … It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether*

an order was null and void — whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed' (Per Lord Cottenham LC in Chuck v Cremer (1846) Cooper temp Cott 205 , 338)."

That passage was followed in R v Oldham Justices, Ex p Cawley [1997] QB 1 , where it was held that a prison governor did not require to question the order contained in a warrant of committal."

32. Given that the warrant was a lawful order unless and until it was set aside, the Claimant's detention pursuant to that warrant was also lawful. In any event, once oral notice of the intention to appeal had been given by the prosecutor, s.1(6) of the 1993 Act mandated the Magistrates' Court to "*remand in custody the person concerned, until the appeal is determined or otherwise disposed of."* That is what the warrant did. The erroneous reference to the written notice having been served on the defendant was immaterial. Irrespective of the normal practice of issuing two separate warrants, the Magistrates' Court was entitled to direct, when it did, that the Claimant be held in custody until further order of that court or the Crown Court and that he be produced at the Crown Court for the hearing of the appeal. There was no way of knowing, at the time when the warrant was issued, that the prosecution would be unable to serve the written notice on the Claimant within two hours of the conclusion of the proceedings.

33. The mistaken statement on the face of the warrant that written notice of appeal had already been served on the Claimant made no practical difference, and caused no prejudice, as the Claimant would have been lawfully detained throughout the period in question had the mistake not occurred. He would have been detained for two hours at court and then served with the written notice of appeal, and a further warrant would have been issued in essentially the same terms as the warrant that was issued. There is no arguable breach of Article 5 ECHR in these circumstances. For all these reasons, the second ground of claim is bound to fail. In fairness to Mr Cragg, he did not pursue it with the same vigour as he did the first ground, which was the matter at the heart of this application and to which most of the legal argument was addressed. That is the matter to which we now turn.

34. The contention of the Claimant was that the Crown Court had no jurisdiction to entertain the prosecutor's appeal. That issue turns on the proper interpretation of s.1(7) of the 1993 Act. HH Judge Creed followed the interpretation of that section by Hooper J in *R(Jeffrey) v Warwick Crown Court* (above). In that case the defendant had been served by the prosecution three minutes after the 2 hour time limit expired, for reasons beyond the prosecutor's control. After pointing out that if s.1(7) were to be construed literally, a defendant could defeat the prosecutor's appeal, for example by absconding, barricading himself in his cell or taking other steps to avoid being served with the written notice, Hooper J said this:

" *Parliament did not intend that subsection (7) could defeat an appeal if the prosecution has given itself ample time to serve the notice on the defendant within*

the two hour period, has used due diligence to serve the notice within that period and the failure to do so is not the fault of the prosecution, but is due to circumstances outside its control. If it were necessary to rewrite subsection (7) to achieve Parliament's intention, I would do so by adding the following at the conclusion of the sub-section: "unless such failure was caused by circumstances outside the control of the prosecution and not due to any fault on its part."

35. The approach taken by Hooper J is in accordance with the approach advocated by the House of Lords in *R v Soneji* [2006] 1 AC 340 to an alleged failure to comply with a provision prescribing the doing of some act before a power was exercised; namely, to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid.

36. On behalf of the Claimant, Mr Cragg QC submitted that ***Jeffrey*** was wrongly decided, and in any event could be distinguished, because the notice in that case was served fractionally late, whereas in the present case it was never served at all. It did not matter whether the Claimant had suffered any prejudice from not having a copy of the written notice, because the statute created an entitlement that he should have one. Parliament had spelt out the consequences of non-compliance with the requirements of s.1(5) in no uncertain terms. The time limit set by that section is absolute (as confirmed by the provisions of the Criminal Procedure Rules which make it clear that it cannot be extended or truncated). Hooper J's construction of the subsection created a flexible timescale for service of the written notice, and was incompatible with Art 5 ECHR because it would bring about a situation where deprivation of liberty became arbitrary or at the very least created uncertainty as to the period for which a person could be detained even though bail had been granted.

37. The Article 5 point is misconceived. The maximum period for which a person can be lawfully detained pursuant to these provisions of the 1993 Act is prescribed by Section 1(6) – namely, until the prosecutor's appeal has been determined. Section 1(8) requires that appeal to be heard within a very short time after bail was granted. There is nothing arbitrary about the defendant's detention pending such an appeal and his detention serves the lawful purpose of ensuring that a successful appeal is not rendered nugatory. Article 5 does not assist in determining the question of construction of section 1(7). If the prosecution does not lose its right of appeal if, through no fault of the prosecution, the defendant is not served with a written notice of appeal within the time prescribed under section 1(5), he would still be lawfully detained until the appeal is determined.

38. In support of the strict construction of s.1(7) Mr Cragg relied on the observations of Laws LJ in *R v Middlesex Guildhall Crown Court ex parte Okoli* [2001] Cr App R 1, a case in which the Divisional Court was considering the wording of s.1(8) of the 1993 Act. The issue in that case was whether the hearing of the appeal had commenced within the time set out in that subsection and if not, what the consequences of failure to commence hearing the appeal within that time would be. The Divisional Court decided, unsurprisingly, that 48 hours from the *date* on which oral notice of intention to appeal is given does not mean 48 hours from the *time* at which that notice is given. It did not need to look at s.1(7) to reach that conclusion. However, at paragraph 18 Laws LJ made the following observations about the Court's analysis of s.1(8):

"*This seems to me to be reinforced by the reference to "two hours" in subsection 7… The legislative policy there is that the prosecution are strictly bound to serve the notices mentioned in subsection (7) within the period of two hours as there mentioned… Subsection (8) falls to be contrasted with that state of affairs by use of the expression "from the date on which oral notice of appeal is given".*

39. Those observations were not directed towards the consequences of failing to serve a notice within the time specified in subsection (5) (let alone the consequences where service of the notice within that time is impossible) but rather, towards the distinction between the use by Parliament of a precise reference to hours in that subsection, and the use of the word "date" in subsection (8). There is nothing in that passage which detracts from the construction placed on subsection (7) by Hooper J.

40. Mr Cragg also relied on the Divisional Court's view that the provisions of s.1(8) were mandatory rather than directory because "*the context is one where the citizen's liberty is involved. It is of the highest importance that provisions of this kind should be construed so as to promote legal certainty as far as that may be done.*" Those are observations with which this Court would respectfully agree; however, there is no issue as to the mandatory nature of s.1(5). Nor does the construction of s.1(7) adopted by Hooper J enable the prosecution to opt out of service of the written notice within the time prescribed without suffering the consequences, if it is possible for it to effect service. The issue is whether s.1(7) should be construed so as to deprive the appellate court of jurisdiction to reverse a decision by the magistrates to grant bail if the prosecution could not have served the defendant within the two hours, however hard it tried.

41. Mr Little submitted that in circumstances where, through no fault of the prosecutor, personal service was impossible within the time limit prescribed by statute, and where the respondent to the bail appeal had been given oral notice and was legally represented by lawyers aware of the written notice and of its terms, then a failure to serve the written application is not a bar to a Crown Court judge having jurisdiction to determine the bail appeal. Taken to its logical conclusions the Claimant's submissions to the contrary could create remarkable consequences which Parliament could never have intended. It was possible to think of any number of situations in which through no fault on the part of the prosecutor, it was impossible to serve the notice on the defendant within the two hours specified in s.1(7). If bail is granted in circumstances when it should not have been, it cannot have been Parliament's intention that the Prosecution should be deprived of the ability to challenge that decision on appeal by reason of a technical failure to comply with the provisions of the statute that was no fault of the Prosecution and caused the defendant no prejudice.

42. Both Counsel referred to the provisions of the Criminal Procedure Rules which envisage that the court might order substituted service on the defendant in circumstances in which it became apparent that the prosecution could not serve the defendant personally in time. Rule 4.9 of the Criminal Procedure Rules provides that the court may allow service of a document by a method other than those described in rules 4.3 to 4.6 and in rule 4.8. However, the rule goes on to say that an order allowing service by another method must specify the method to be used and the date on which the document will be served. Rule 4.10 provides a general prohibition on the service of various documents, including a notice of appeal against the grant of bail, on

a defendant's legal representative, but that rule is subject to the caveat "unless the court otherwise directs".

43. It may have been open to the court to have directed that the prosecutor should serve the notice on Mr Jonas and ordered that this would be deemed to be good service on his client, though as Mr Little very fairly pointed out, such a course may have given rise to an interesting debate as to whether the Rules Committee was empowered to make provision for a departure from the terms of the primary legislation which expressly requires service "on the person concerned". However, the court made no such direction in the present case. Although the fax and email must have been sent at the Magistrates' Court's behest, there was no order for substituted service by fax or email, although if the Notice of Appeal had been served by the prison on the Claimant within the time limit, the absence of such an order would not have proved fatal, as the prosecution would still have managed to effect service on him through the agency of the court and the prison service.

44. Mr Cragg relied on these provisions of the Rules to submit that the prosecution were at fault, because they could and should have applied for an order for substituted service. He acknowledged that no doubt Mr Jonas would have resisted any such application, but the court may well have granted it, and then service would have been deemed to have taken place within the prescribed time limit. Mr Little's riposte was that whereas in the light of hindsight it may have been possible for Mr Purser to take other steps to try and address the situation, that does not affect the fact that it was not the prosecution's fault that they were unable to serve the defendant in time. That was due to factors entirely outside their control. One cannot use hindsight to attribute fault where there is none.

45. We agree with Mr Little that faced with the situation of a defendant travelling towards the prison in a van, whose time of arrival was unknown, the prosecutor did the best he could by asking the Magistrates' Court to send the notice to the prison by fax with an instruction to effect service on him as soon as he arrived. An order for substituted service on Mr Jonas would not have been effective to bring the notice of appeal to the attention of the Claimant, as Mr Jonas had no means of gaining entry to the prison and the same practical difficulties would no doubt have prevented the prosecutor from doing so. Nobody could have expected the prison staff to decide not to serve the notice on the Claimant as soon as he arrived, which was what they were expected to do. It would have been a counsel of perfection to have expected the prosecutor to await confirmation from the court that the fax had gone through, and even if he had, there was nothing more in practical terms that he could have done to serve the document within the time limit if he had been told that the attempts to fax the document had proved to be unsuccessful.

46. In any event, the true construction of the primary legislation cannot depend upon there now being provisions in the Criminal Procedure Rules that might, in appropriate circumstances, be invoked to address some of the difficulties in personal service that might unexpectedly arise. If Mr Cragg's construction is correct, it would mean that even if the prosecution, through circumstances outside its control, had no opportunity to serve written notice of appeal on a defendant within the prescribed two hours, the defendant would have to be released on bail, irrespective of the merits of the appeal, and the Crown would have no mechanism for revoking bail absent a change of circumstances. In our judgment, it cannot have been Parliament's intention that the

Crown should lose the opportunity to reverse a decision that was wrong in principle, with the result that a defendant who might abscond or commit further offences or interfere with prosecution witnesses was released on bail, if the reason why the notice of appeal was not served in time (or indeed at all) was outside the prosecution's control.

47. We note that s.1(7) begins with the words "where the prosecution fails…" It does not say "where the prosecution does not serve" or "where the notice of appeal is not served". The word "fails" in this context carries with it an implication of fault, and would not generally be used to describe the situation in which a person is unable to do something. One dictionary definition of "fails" is "to neglect to do something", and in our judgment that is the sense, rather than the wider sense of "being unsuccessful in achieving one's goals" in which the word should be understood in this specific context. Hooper J's purposive construction of section 1(7) of the 1993 Act is sound, and accords with the overriding objective to ensure that cases are dealt with justly. Judge Creed was right to decide that he had jurisdiction to hear the appeal, and the Claimant has been lawfully in custody at all material times.

48. Ground 3 in the claim form is based on the provisions of Rule 14.9(10) of the Criminal Procedure Rules which provides:

"*The court officer for the court which has granted bail must instruct the defendant's custodian to release the defendant on the bail granted by that court, subject to any condition or conditions of bail imposed, if –*

(a) The prosecutor fails to serve an appeal notice within the time to which paragraph (4) refers."

49. Mr Cragg submitted that this provision clearly implies a duty on the Magistrates' Court to ensure that service has taken place. We are not persuaded that such a duty exists. This is a procedural rule, whose function is to provide a mechanism for the release of a defendant held in custody in circumstances in which the prosecution has not complied with s.1(5) of the 1993 Act. It is not for the court to satisfy itself that the prosecution has complied with its obligations. The obligation to effect the defendant's release arises when it becomes clear to the court that those obligations have not been met. In this case there was a dispute about that, which was not and could not have been resolved prior to the matter coming before the Crown Court. Once the judge had ruled that he had jurisdiction to hear the appeal and had decided that the Claimant should remain in custody, Rule 14.9(10) had no relevance.

50. It is a complete answer to this ground that on the true construction of s.1(7) of the 1993 Act this was not a case in which the fact that the Claimant had not been served within the two hours (or at all) mandated his immediate release from custody. The fact that no appeal notice was served on the Claimant (or could have been served within the time limit) was not the prosecutor's fault. Moreover, there is no evidence that the court officer was ever made aware by the member of the administrative staff who was dealing with the matter that the fax had not gone through; or that the court ever knew that the prison had failed to serve the notice on the Claimant on his arrival, as it was obviously the court's intention that it should. Therefore, there was nothing to trigger the court officer giving an instruction to the prison to release the Claimant from custody.

51. A further obstacle was that the court had issued a warrant for the Claimant's detention until further order of the court or the Crown Court; therefore, as Mr Jonas recognized at the time, the only ways to effect the Claimant's release would have been an application for a writ of habeas corpus, or an application to the court to set aside the warrant or to persuade the Crown Court that the appeal had been deemed disposed of and that a fresh order to release the Claimant should be issued. A court officer could not take it upon himself to instruct the prison to act in a manner that would have involved disobedience to the warrant issued by the court, and even if an officer had done so, the prison would have been obliged to follow what was ordered in the warrant.

52. For the above reasons, none of the grounds for judicial review in the claim form stands any realistic prospect of success. We therefore refuse permission. We hope that in the time available for the preparation and hand down of this judgment (as urgent business in the long vacation), we have done justice to the arguments advanced.