Neutral Citation Number: [2024] EWCA Crim 447

Case No: 202301958 A5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM KINGSTON UPON THAMES CROWN COURT
HIS HONOUR JUDGE JOHN
T20177455

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2024

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE WALL
and
HIS HONOUR JUDGE RICHARDSON KC

- -

Between :

SHARRIFF DACRES	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Clare Montgomery KC and Kwaku Awuku-Asabre (instructed by **Stokoe Partnership**) for the **Appellant**
Jonathan Polnay KC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 21 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

LORD JUSTICE WILLIAM DAVIS :

Introduction

1. Sharriff Dacres is serving a sentence of 14 years' imprisonment imposed on 18 October 2018 in the Crown Court at Kingston upon Thames for an offence of conspiracy to transfer or sell prohibited weapons. He now applies for an extension of time in which to appeal against that sentence. The extension required is 1,672 days which equates to just over 4 ½ years. It is not said that the sentence imposed was not justified by the extent of the applicant's involvement in the conspiracy of which he was convicted. Rather, the complaint is that the judge failed to give credit for time spent in custody prior to the sentence being imposed. The applicant spent time serving a sentence for another offence whilst he was also on remand for the conspiracy offence. That time was excluded from the period in custody to be credited administratively by HMPPS. Because the judge did not exercise his discretion to adjust the sentence to allow for that time, it is said that the sentence was manifestly excessive or wrong in principle.

Factual background and the course of the criminal proceedings

2. The history of the criminal proceedings involving the applicant is not straightforward. On 12 June 2016 a large organised party took place near Watford. During the later stages of the party the event descended into violence. In the course of the violence someone was shot. A total of three shots were fired. The used cartridges were recovered from the scene of the shooting. Two days later a semi-automatic pistol was found at the address at which the applicant's cousin, Alexander Dacres, lived. In addition, a white shirt was found at the address. It bore traces of gunshot residue. The applicant's DNA was found on the shirt.

3. On 15 June 2016 the applicant was arrested. When interviewed he made no comment. Subsequently he was identified by someone who had been at the party as being the individual who had fired shots. The identifying witness said that the gunman had been wearing a white shirt. The applicant was charged with attempted murder, possession of a firearm with intent to endanger life and possession of a prohibited weapon. He was remanded in custody.

4. In due course he stood trial in the Crown Court at Harrow. In December 2016 he was acquitted on the trial judge's direction of the offences of attempted murder and possession of a firearm with intent to endanger life. No verdict was reached in relation to the offence of possession of a prohibited weapon. A re-trial took place in January and February 2017. The applicant's cousin, Alexander Dacres, was convicted of offences including possession of a firearm with intent to endanger life. The applicant was convicted of possession of a prohibited weapon. He was sentenced to a term of 7 years' imprisonment.

5. On 11 April 2017 the applicant was arrested for and charged with conspiracy to transfer or sell prohibited weapons. The conspiracy began at some point after 1 January 2016. The applicant's alleged role in it ceased on 17 June 2016 i.e. when he was arrested in relation to the alleged offences committed in Hertfordshire. There were two criminal agreements. The first agreement was to import prohibited firearms from Eastern Europe. It ran until early 2017. During the currency of the agreement,

there were 9 shipments involving at least 72 firearms. The destination of the weapons was Sheffield and the South East of England. The second agreement, to which the applicant was a party, concerned the sale or transfer of 24 firearms with another 8 weapons being seized by the authorities before they reached the customers. Some of the firearms were the same make as the one discharged at the party near Watford. The applicant's role in the conspiracy was as lieutenant to the organiser of the transfer of firearms in the South East. His role was taken on by someone else after his arrest in June 2016.

6. The trial in relation to the firearms conspiracies commenced in January 2018 before HH Judge John and a jury in the Crown Court at Kingston upon Thames. The applicant was convicted on 3 April 2018 of conspiring to transfer or sell prohibited weapons. He was remanded in custody to await sentence. Others who had been charged with the offence had pleaded guilty. It was necessary for the trial judge (who was not the judge who had dealt with the case in Harrow) to be in a position to sentence all defendants together.

7. On 15 May 2018 the Court of Appeal quashed the conviction of the applicant for possession of a prohibited weapon. This was because the direction of the trial judge in that case in relation to identification of the gunman had been deficient. A re-trial was ordered. The re-trial had yet to commence when the applicant appeared for sentence in Kingston upon Thames.

8. At the sentence hearing counsel who then appeared for the applicant invited Judge John to reduce the sentence of imprisonment which inevitably was to be imposed for the conspiracy to transfer or sell prohibited weapons. The proposition was that account should be taken of the time spent in custody serving the sentence for the offence of possession of a prohibited weapon. This was a period of 452 days i.e. from the date of conviction until the point at which the conviction was quashed. The judge refused to take that course. He said that he ignored the conviction and sentence of 7 years' imprisonment "for one of the….handguns involved in this case as it has been quashed and the retrial is awaited on 10 December".

9. In the wake of the conviction and sentence imposed for the offence of conspiracy, the prosecution decided not to proceed with the re-trial. On 4 December 2018 the case from Harrow was mentioned before HH Judge Lodder KC sitting in Kingston upon Thames. The indictment charging possession of a prohibited firearm was left on the file.

Post-sentence events

10. Between 17 June 2016 and 17 February 2017 the applicant had been remanded in custody awaiting his trial in relation to possession of a prohibited weapon. Between 30 August 2016 and 29 October 2016 he was serving a sentence for an unrelated offence of assault. But the balance of this period on remand was not taken into account in relation to the sentence imposed on 18 October 2018. After representations by the applicant's solicitor, HMPPS (HMP Wandsworth) decided that the period on remand in relation to possession of a prohibited weapon would count as time served. They determined that the possession charge was a "related offence" within the meaning of s240ZA(8) of the Criminal Justice Act 2003.

11. The applicant on 17 August 2021 was transferred to HMP Onley. That establishment made a fresh calculation of the applicant's earliest date of release. It was decided that the possession charge was not a related offence. The applicant's earliest date of release was adjusted accordingly. On 19 April 2023 the applicant's solicitors sent a Pre-Action Protocol letter to HMP Onley. This set out the basis on which the applicant proposed to seek judicial review of the decision that the possession charge was not a related offence. On 9 May 2023 the decision was re-made. The earlier calculation by HMP Onley was reversed. The period between June 2016 and February 2017 (less the time serving the sentence for assault) was to count as time served in relation to the sentence of 14 years' imprisonment.

12. There are two consequences of this re-made decision. First, the applicant's sentence imposed at Kingston upon Thames requires no discretionary adjustment to take account of the period whilst he was remanded in custody awaiting the trial and verdict at Harrow. That period has been ordered to count towards the sentence by HMPPS. Second, HMPPS have determined for their purposes that the possession charge was a related offence within the terms of s240ZA. Their judgment was that the possession charge was founded on the same facts or evidence as the conspiracy.

Legal framework

13. The statutory regime in respect of time remanded in custody to count as time served is set out in s240ZA of the 2003 Act. The parts which are relevant for our purposes are as follows:

> (1)This section applies where—
>
> (a)an offender is serving a term of imprisonment in respect of an offence, and
>
> (b)the offender has been remanded in custody (within the meaning given by section 242) in connection with the offence or a related offence.
>
> ….
>
> (1B)In this section any reference to a "sentence", in relation to an offender, is to—
>
> (a)a term of imprisonment being served by the offender as mentioned in subsection (1)(a)
>
> ….
>
> (2)It is immaterial for the purposes of subsection (1)(b) or (1A)(b) whether, for all or part of the period during which the offender was remanded in custody, the offender was also remanded in custody in connection with other offences (but see subsection (5)).

> (3)The number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by the offender as part of the sentence.
>
> But this is subject to subsections (4) to (6).
>
> (4)If, on any day on which the offender was remanded in custody, the offender was also detained in connection with any other matter, that day is not to count as time served.
>
> (5)A day counts as time served—
>
> (a)in relation to only one sentence, and
>
> (b)only once in relation to that sentence.
>
> …..
>
> (8)In this section "related offence" means an offence, other than the offence for which the sentence is imposed ("offence A"), with which the offender was charged and the charge for which was founded on the same facts or evidence as offence A.
>
> (8A)Subsection (9) applies in relation to an offender who is sentenced to two or more consecutive sentences or sentences which are wholly or partly concurrent if—
>
> (a)the sentences were imposed on the same occasion, or
>
> (b)where they were imposed on different occasions, the offender has not been released during the period beginning with the first and ending with the last of those occasions.
>
> (9)For the purposes of subsections (3) and (5), the sentences are to be treated as a single sentence.

This regime is applied administratively. A sentencing judge plays no part in determining the number of days for which the offender was remanded in custody. Nor does the judge have any role in deciding what in any particular case is or is not a related offence.

14. For an offender who has committed a single offence and has been remanded in custody prior to sentence in relation to that offence, the scheme is very straightforward. HMPPS will count the period spent on remand in custody as time served. Where an offender has committed more than one offence and each offence was founded on the same facts or evidence, HMPPS will count the total period spent on remand in custody in connection with all of the offences as time served. These consequences flow from s240ZA(3).

15. If any period on remand for a relevant offence coincides with a period when the offender is detained because for instance he has been recalled on licence in relation to an earlier sentence, that period will not count as time served: s240ZA(4). Where an

offender is sentenced to imprisonment for unrelated offences on different days, the eventual total sentence will be a single sentence so long as the offender has not been released from the earlier sentence(s) when the last sentence is imposed: see s240ZA(9).

16. Sometimes an offender will be charged in separate proceedings with two unrelated offences which then run in parallel. It can be the case that one offence is sufficiently serious to justify a remand in custody. Had the other offence been charged alone, the likelihood is that the offender would have been remanded on bail. What if the final outcome is that the offender is convicted of only the less serious offence? In those circumstances, the time spent remanded in custody in relation to the more serious but unrelated offence will not count as time served. The sentencing judge then has a discretion to adjust the sentence imposed in relation to the less serious offence to reflect the time remanded in custody in respect of the more serious offence. That discretion exists where to pass the sentence which otherwise would be appropriate would create an injustice: *Prenga* [2017] EWCA Crim 2149.

17. The factual situation in *Prenga* was that the offender had been on bail for an offence committed in this country when he was arrested in relation to a European Arrest Warrant. He was remanded in custody in respect of the extradition offence. His bail initially was not revoked. Thus, for a period he was "detained in connection with any other matter" and the time spent in custody due to the EAW did not count as time served. After about three months the offender applied to have his bail revoked. He then was remanded in custody in relation to the offence in this jurisdiction. That allowed the period spent in custody thereafter to count as time served. By the time the offender came to be sentenced for the offence committed in the UK the EAW had been withdrawn. The issue was whether the sentence should be adjusted to take account of the three months when the offender was in custody solely in relation to the EAW.

18. It follows that the court in *Prenga* was not dealing with an offender charged with different UK offences. However, the court considered the nature of the discretion generally. It reviewed the relevant authorities. The court did not confine itself to the particular factual circumstances applicable to the offender with which it was dealing.

19. At [45] and [46] the court identified two overarching principles to be applied by a sentencing judge when considering whether to exercise the discretion:

> "First, the discretion to modify a sentence, which is otherwise lawful is, on the basis of case law, an exceptional jurisdiction. This is because the rules laid down in the CJA 2003 for the according of credit against sentence for periods spent on remand or on qualifying bail are intended to lay down a comprehensive scheme governing the issue. A defendant's entitlement to "credit" is thus fixed by statute. Parliament has made policy choices in approving this regime, for instance as to the amount of credit for time spent on qualifying curfew (50% of the actual days). Parliament has also made clear that time spent on remand in cases unrelated to the case under consideration should not prima facie warrant any adjustment to

> the sentence. The cases where the statutory regime does not ensure justice should therefore be rare."
>
> "Second……It is not uncommon for two parallel or overlapping sets of proceedings to be brought against an individual for two different offences. It is not unusual for a defendant to be on remand in relation to one, serious, charge in circumstance where (otherwise) he would have been on qualifying curfew in relation to some other, less serious, charge. Where the most serious charge is discontinued, credit is not normally given in relation to sentence on the second charge."

20. The court in *Prenga* also considered the relevance of the failure of those representing the offender to raise the exercise of a discretion at the sentencing hearing. That was because at the point of sentence in that case no-one had raised the issue. It appeared that neither the prosecution nor the defence were aware that the EAW had been discharged. The court concluded that no injustice had occurred. The onus was on the offender to put forward all matters of mitigation at the point of sentence. This factor is not relevant in the applicant's case. The judge sentencing him in October 2018 was asked specifically to reduce the sentence to allow for the time in custody for the prohibited weapon offence.

21. There have been two more recent decisions of this court in relation to the approach to be taken when an offender has spent time in custody and the effect of s240ZA(4) is that the time does not count as time served. In *Williams* [2022] 2 Cr App R (S) 5 the appellant was remanded in custody for an alleged offence of breaching a restraining order. At the time the alleged breach was committed the appellant was on bail for an earlier alleged breach of the same restraining order. For whatever reason the appellant's bail for the earlier alleged breach was not revoked. He spent approximately 9 months awaiting trial remanded in custody solely in respect of the later alleged breach. He was acquitted of that offence but convicted of the earlier breach. The judge was invited to exercise his discretion and to reduce the sentence to take account of the period in custody which would not count as time served. The judge declined to exercise his discretion. He imposed a sentence of 4 years' imprisonment in respect of the earlier breach of the restraining order. This court allowed the appeal and reduced the sentence by 9 months to take account of the time spent remanded in custody in respect of the offence of which the appellant was acquitted.

22. The court in *Williams* did not refer to *Prenga*. It did not consider the principles to which we have referred. The court expressed its view in very brief terms, namely "….Our view is that there ought to be appropriate recognition of the fact that the appellant has spent a significant period of time in custody in respect of an alleged offence of which he was subsequently acquitted, namely a period of approximately 9 months…." The court did not explain why it was appropriate to take account of that period in custody. It did not refer to the "exceptional jurisdiction" involved in modifying a sentence which was entirely lawful.

23. In *Jones* [2023] EWCA Crim 672 the appellant had spent approximately 2 months remanded in custody in relation to an allegation of assault. The appellant was

acquitted of that offence. His appeal was directed towards the judge's failure to reduce his overall sentence for a raft of other offences to take account of the fact that this period in custody would not count as time served. The court concluded that the overall sentence was modest by reference to the number of offences committed by the appellant. The court went on to say: "Nor do we think that in all the circumstances here there is any unfairness which needs correcting. The appellant had no right to any reduction for time spent in custody for the allegation of assault." As in *Williams* the court did not refer to *Prenga*. However, the reference to the absence of unfairness equates to the concept that the court must not permit an injustice to occur.

24. We have no doubt that the principled approach in *Prenga* must be adopted in any case where the operation of s240ZA(4) means that a period in custody will not count as time served. Cases where the statutory regime does not confer the appropriate benefit on an offender will be rare. The discretion to modify what otherwise would be the proper sentence is an exceptional jurisdiction. In this context, for the circumstances to be exceptional they must be more than unusual. They must be such that the application of the statutory regime would lead to real injustice.

Extension of time

25. In order to pursue his appeal the applicant requires an extension of time of approximately 4 ½ years. His solicitor (who was first instructed in April 2017 in relation to the conspiracy charge) has provided a witness statement setting out the history since the date of the sentence. At the sentence hearing the applicant was represented by leading and junior counsel. As we have said, they asked the judge to reduce the sentence to take account of the time spent in custody for the offence of possession of a prohibited weapon. Following the hearing leading counsel took the view that the judge's approach was not open to challenge on appeal. He considered that, were it to be legitimate to take account of the circumstances of the offence of possession of a prohibited weapon, this would aggravate the sentence for the offence of conspiracy.

26. When the prosecution decided not to pursue a re-trial of the offence of possession of a prohibited weapon, the case was mentioned before HH Judge Lodder KC. The issue of the time spent in custody in relation to that offence was raised before him. Judge Lodder said that any application in relation to the sentence imposed on 18 October 2018 should be made to HH Judge John or to the Court of Appeal Criminal Division. At that point the applicant was well within time to make an application to Judge John to vary the sentence pursuant to the slip rule. Leading and junior counsel disagreed about the course to take at this point. Leading counsel remained of the view that the sentence would not be varied whether at a slip rule hearing or on appeal. Junior counsel considered that there were grounds to reduce the sentence.

27. Leading counsel delegated the task of advising on an appeal against sentence to junior counsel. Junior counsel was not prepared to provide negative advice in relation to such an appeal. We have been told that this difference of opinion was not communicated to the applicant at the time. It is not clear whether the applicant's solicitor was aware of the position. His witness statement does not provide clarity on this issue. Junior counsel (who by now had taken silk) on 29 June 2019 provided the solicitor with an advice in relation to an appeal against sentence. He advised that

there were no grounds of appeal. This advice was not given to the applicant. Again the witness statement does not explain why the solicitor took that course.

28. At some point thereafter fresh leading counsel was instructed. On 14 February 2020 he advised that the applicant had arguable grounds of appeal against his sentence i.e. Judge John should have acceded to the submission that the sentence ought to have been reduced to take account of time spent in custody in relation to the allegation of possession of a prohibited weapon. On 27 May 2020 the solicitor wrote to HMP Wandsworth in relation to the time spent on remand in relation to the possession allegation. He argued that this period (245 days) should count as time served in relation to the sentence imposed by Judge John. In September 2020 HMP Wandsworth agreed to adjust the applicant's release date. At that point nothing further was done in relation to the applicant's sentence.

29. We have already set out the course of events following the applicant's transfer to HMP Onley. They culminated in a return to the position reached in September 2020. The grounds of appeal with which we are concerned were not lodged until 14 June 2023. We have no satisfactory explanation from the solicitor as to why nothing was done in relation to the period of 452 days between February 2020 when fresh counsel advised and June 2023. His witness statement includes the following:

> "Since (the applicant was transferred to HMP Onley on 17 August 2021) the applicant's family has been working to gather the necessary funds to appeal the sentence, leading to the instruction of present counsel in October 2022….
>
> ….notwithstanding the delay in receiving advice on an appeal, the applicant and his family have been determined to pursue an appeal against sentence since the applicant was sentenced to serve 14 years' imprisonment"

There is no further explanation of the delay.

30. The authorities in relation to the circumstances in which this court will extend time to appeal are extensive. They were reviewed in *JH* [2024] 1 Cr App R 5 at [8]:

> "….*the applicant relies on the decision of this court in R. v King (Ashley) [2000] 2 Cr. App. R. 391 in support of the contention that an extension of time may be granted even if no proper explanation has been given for the delay. That, however, was an exceptional case involving the potential involvement of the CCRC, and reference must be made to more recent authority, including the decisions of this court in R. v Hughes (James) [2009] EWCA Crim 841; [2010] 1 Cr. App. R. (S.) 25 , R. v Thorsby (Adrian) [2015] EWCA Crim 1; [2015] 1 Cr. App. R. (S.) 63 , R. v Wilson (David) [2016] EWCA Crim 65 , R. v Roberts (Mark) [2016] EWCA Crim 71; [2016] 2 Cr. App. R. (S.) 14 , R. v James (Wayne) [2018] EWCA Crim 285; [2018] 1 Cr. App. R. 33 , R. v Gabbana (Jason) [2020] EWCA Crim 1473 , R. v Patterson (Ian) [2022] EWCA Crim 456 and R. v FG [2022] EWCA Crim 1460 . In short, the court*

> *will always examine all the circumstances of the case including the length of the delay, the reasons (if any) for it, and the overall interests of justice including the public interest in finality, the interests of victims, the practicability of a retrial, and any potential injustice to the defendant. Certainly, asserted strong merits cannot of themselves be assumed by prospective appellants and their lawyers to be some sort of trump card in securing an extension of time."*

JH was an appeal against conviction. The same principles apply to appeals against sentence: see *Thorsby* and *Roberts*. A significant factor in determining whether an extension of time should be granted is the need for efficient use of resources and good administration: see *Patterson*.

The same principles were reiterated in *Brennand* [2024] 1 Cr App R 14 at [28]:

> "…..As made clear in **Paterson**, simply demonstrating an arguable case on the merits is not a "trump card" that can overcome even substantial delay. As reflected in the judgment quoted above, the time limit on applications for leave to appeal is not imposed arbitrarily or for simple administrative convenience. Principally it is a measure designed to secure the proper administration of justice; it reflects the important principle of finality in litigation. Substantial delay in making an application for leave to appeal also risks impairing the Court's ability to do justice…..there may, exceptionally, be appeals sought to be brought where the ground(s) advanced are of such cogency that the court is satisfied that it would be contrary to the interests of justice not to allow the substantive appeal to be argued. In such exceptional cases, the Court may grant the necessary extension of time, notwithstanding that no satisfactory explanation for a significant delay has been given. Having considered the points argued on the Applicant's behalf, we are satisfied that the present case is emphatically not such a case."

31. We conclude that no proper explanation has been given for the delay in this case. By February 2020 the applicant was in receipt of advice that he had grounds to appeal against his sentence. His solicitor has asserted that he had been determined to pursue an appeal since the imposition of the sentence. Nothing was done in relation to an appeal. The solicitor has referred to the gathering of funds by the applicant and his family from August 2021 onwards. This does not explain how it was possible to instruct counsel in February 2020 or the basis on which the solicitor was acting in May 2020. In any event, no particulars have been given of the efforts made to gather funds, of why they only began in August 2021 and of why it took 15 months from that point up to the instruction of counsel in October 2022.

32. The lack of an adequate explanation for the delay is an important consideration in any decision to extend time. It will not act to bar an extension of time. However, where the delay is as long as in this case, the applicant has a very high hurdle to overcome in terms of establishing injustice were the extension not to be granted.

The respective positions of the parties on the substantive merits of the application

33. The applicant was represented before us by Clare Montgomery KC and Kwaku Awuku-Asabre. The prosecution were represented by Jonathan Polnay KC. We were greatly assisted by their detailed written submissions supplemented by oral argument.

34. The applicant's first submission is that HH Judge John should not have sentenced the applicant when he did. In October 2018 it was understood that a re-trial was due to take place in relation to the offence of possession of a prohibited weapon. The judge ought to have postponed sentence until the outcome of that re-trial was known so that the sentence could reflect all relevant matters. When the judge proceeded to sentence but at the same time ignored the possession offence, he created an injustice.

35. The applicant goes on to argue that, in the circumstances which now obtain, this is a case in which the exceptional jurisdiction in *Prenga* should be exercised. The circumstances here are very rare. In the year ending September 2022 this court quashed 79 convictions. In the previous year 127 convictions were quashed. Only in some of those cases was a re-trial ordered. In even fewer cases was the individual sentenced for other matters following which the re-trial did not take place. That combination of circumstances can only be described as exceptional. The submission is that s240ZA(4) was never intended to cater for this situation. Parliament did not intend to exclude this very unusual case. There was no policy decision to that effect.

36. In relation to delay, the applicant submits that the responsibility for the delay lies with the legal representatives. Further, the delay has caused no problem in dealing with the case since it only concerns allowing for a period in custody to count as time served. The applicant has spent 1 ¼ years in custody for which no allowance has been made. This is a serious miscarriage of justice. The applicant's case is that the sentence should have been 11 ½ years rather than 14 years' imprisonment. The time spent in custody serving the sentence for the possession offence equates to a custodial term of 2 ½ years. The argument is that the applicant would have been better off had his conviction stood. The effect of s240ZA(9) would have meant that the whole period in custody from June 2016 to October 2018 (subject to the brief separate custodial term in the later part of 2016) would have counted as time served.

37. Mr Polnay argues that the judge cannot be criticised for taking the course he did in sentencing in October 2018 for the offence of conspiracy. All parties wished to know what sentence was to be imposed for that offence. It was a highly relevant consideration in determining whether a re-trial would be required. In any event, the fact that the applicant's sentence was not postponed takes him nowhere in relation to the proposed appeal.

38. Mr Polnay accepts that the precise circumstances of this case are unusual. However, s240ZA(4) does cover the situation in which the applicant finds himself. The terms of the sub-section are clear. The words "detained in connection with any other matter" encompass detention in relation to a sentence which later is quashed. Mr Polnay points to the operational guidance issued by HMPPS in relation to s240ZA. This makes the same point under the heading "Quashing a sentence does not turn sentence time into remand time". He argued that, whilst the particular set of circumstances affecting the applicant were unusual, a similar situation could arise where someone on licence is recalled at the same time as being prosecuted for further offences. If there

were a delay in sentencing for the further offences, the offender would not be entitled to count as time served the period spent on recall. For those reasons, Mr Polnay argues that the policy of s240ZA does apply to the applicant.

39. However, Mr Polnay recognises that there is a discretion which can be exercised in accordance with the principles in *Prenga*. He invites us to have regard to the following factors: whether there is a good explanation for the delay in bringing the application; the extent to which the two allegations are linked; the length of the period in custody involved; whether an injustice would be created were the period in custody not to be reflected in the sentence.

40. If, having taken those matters into account, the conclusion is that justice requires some adjustment of the sentence, it is argued that this cannot be an arithmetical exercise based purely on the relevant period in custody and the reduction needed to match that period. It is necessary to have regard to the effect any reduction in sentence would have on the period on licence.

Discussion

41. We are satisfied that HH Judge John cannot be criticised for not adjourning sentence pending the outcome of the anticipated re-trial. He expressly excluded any consideration of the factual background of the possession offence from his sentencing decision. Thus, had there been a conviction for that offence at the re-trial, the sentencing judge would have been in a position to determine the appropriate sentence for that offence and would have been able to make any necessary adjustment to ensure that the overall sentence was just and proportionate. Moreover, we can understand why all parties were anxious for sentence to be imposed in relation to the conspiracy. Given the likely length of that sentence, it was likely to be relevant to any decision not to pursue the re-trial. In any event, we agree that a failure to adjourn the sentence is now of no relevance to the appeal. The argument is artificial.

42. We consider that the basis on which the applicant was detained between February 2017 and May 2018 plainly was within the policy boundaries of s240ZA at the time of his detention. The fact that the sentence which underpinned that detention was quashed does not alter the position. S240ZA is a comprehensive scheme in relation to remand periods counting as time served. For an individual to serve part of a custodial sentence which then is quashed on appeal is not a highly unusual event. In this case it occurred in the context of the quashing of a conviction which is a less common event. However, had Parliament intended that a person in that position should be entitled to count that time in custody as time served, it could and would have said so.

43. It follows that the applicant must demonstrate that this is an exceptional case where application of the policy will cause him real injustice. We do not accept the parallel which Mr Polnay sought to draw between the applicant and someone recalled on licence who then is sentenced for another offence is of particular assistance. It would be very unlikely that the offence for which the person was on licence had the same kind of connection with the new offence and the two offences in this case. We consider that the applicant probably was fortunate that HMPPS determined that the possession of a prohibited weapon was founded on the same facts or evidence as the conspiracy of which he was convicted. However, that was the view taken by HMPPS. It would be very unusual for that to be the position where a person was recalled on

licence. Even if there were a proper parallel to be drawn, it would not assist us. The person recalled on licence is serving the balance of a sentence for an offence they had committed. The applicant must be taken not to have committed the offence of possession of a prohibited weapon.

44. On the other hand we reject the proposition that the applicant would have been better off had the conviction for possession of a prohibited weapon stood. Had Judge John sentenced the applicant in those circumstances, he inevitably would have ordered the sentence to run consecutively to the sentence imposed in February 2017. Although the weapon to which that sentence related was said by the judge to be one of the firearms imported and transferred pursuant to the criminal agreements, the offence of possession of a prohibited weapon could not be said to be subsumed by the conspiracy. That offence was linked to the use of the firearm in an attempt to murder someone. This feature went well beyond the transfer or sale of firearms. In addition, the offence attracted a mandatory minimum term. Doubtless the judge would have tailored his sentence on the conspiracy to take account of the need to ensure a total sentence that was proportionate. It is submitted that Judge John should have imposed a sentence of 11 ½ years for the conspiracy to allow for the time spent serving the sentence for possession. Had the sentence for possession not been quashed and had the judge been imposing a consecutive sentence for the conspiracy, we consider that the judge would not have reduced the sentence to that extent. In all likelihood the practical effect of the overall sentence would have been more onerous than the sentence about which he now complains. We consider that the proposition that the injustice to the applicant is demonstrated by him being worse off than if the conviction for possession had stood is untenable.

45. It is relevant to the issue of injustice that the applicant was not re-tried on the possession indictment. It is apparent to us that the view taken by the prosecution in December 2018 was born of pragmatism. The applicant had been sentenced to 14 years' imprisonment. The issue for the prosecution was whether the public interest required a re-trial on the possession indictment. A significant factor was the sentence imposed by Judge John. The indictment was left on the file. The argument of the applicant is that the sentence imposed for the offence of conspiracy should have been 11 ½ years' imprisonment. What the view of the prosecution would have been had that been the sentence imposed in October 2018 cannot be stated with certainty. However, there is a high likelihood that the re-trial would have been pursued. The applicant may have been acquitted in the re-trial. Equally, he might have been convicted. The outcome for the applicant is that he has avoided that risk.

46. When someone succeeds in an appeal against conviction resulting in a sentence of imprisonment being quashed, that person will have spent time in custody in relation to an offence they have not committed. There is no mechanism for the person to put that period of custody on deposit ready to be utilised in the event of further criminality even if the further criminality has some connection to the other offence. There is no question of any injustice being perpetrated as a result. In this case, the person whose conviction and sentence were quashed coincidentally was already due to be sentenced for other criminality. The period in custody spent serving the quashed sentence overlapped with the period of remand for the other criminality. It is not obvious to us that the situation which arose here gave rise to injustice when it would not have done had there been a separation in time between the two sets of proceedings.

47. We also take account of the fact that, were the sentence to be reduced whether by 2 ½ years or some lesser figure, the applicant would reap the benefit of less time on licence. Assuming the sentence of 14 years' imprisonment to be appropriate – and it has not been suggested that it was not – the licence period would be 7 years. That licence period would be reduced pro rata depending on the extent of any reduction in the sentence imposed by Judge John. The purpose of licence conditions in substantial measure is to protect the public. The overall justice of the case must be considered with that factor taken into account.

Conclusion

48. In light of the factors we have identified, we do not consider that the applicant's case is exceptional so as to invoke the discretionary jurisdiction as set out in *Prenga.* We take account of the very considerable delay in making the application for leave to appeal. Although the applicant is said to have been "determined to pursue an appeal" since the date of sentence, he permitted the case to lie dormant for long periods. That feature is hardly indicative of a real sense of injustice on the part of the applicant. The applicant fell squarely within the provisions of s240ZA. The specific chronology in his case was very unusual. But it was not very unusual that his conviction for possession of a prohibited weapon was quashed. It was an event sufficiently common for HMPPS to have operational guidance. That guidance properly reflected the policy and effect of s240ZA(4). The statutory regime assumed that someone whose conviction was quashed would not be able to have the time spent serving a sentence count against a sentence imposed for a different offence. The coincidence of circumstance in relation to the proceedings against the applicant did not render the position exceptional in relation to the applicant.

49. It follows that the proposed grounds of appeal are not of such cogency as to justify an extension of time of more than 4 ½ years. We refuse the application to extend time. That means that the application for leave to appeal falls.