



Neutral Citation Number: [2024] EWHC 2801 (Admin)

Case No: AC-2023-LON-003674

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2024

Before :

RIGHT HONOURABLE LORD JUSTICE BEAN
AND MRS JUSTICE THORNTON DBE

Between :

RAI
- and -
GUILDFORD MAGISTRATES COURT
SPELTHORNE BOROUGH COUNCIL

Applicant

Respondents

Gerard Pitt (instructed by **IBB Law**) for the **Applicant**
Duncan Milne instructed for Spelthorne District Council (written representations only)

Hearing date: 31 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE THORNTON DBE

Mrs Justice Thornton DBE:

Introduction

1. This is an appeal by way of case stated, pursuant to s111(1) Magistrates Courts Act, against a decision of Guildford Magistrates Court on 2 August 2023, ordering the applicant was to pay compensation of £22,000 and prosecution costs of £6,067.88.
2. Four questions stated by the Magistrates for the opinion of the Court are as follows:
 - i) Were we right to conclude the applicant had the means to pay compensation in the sum of £22,000 given what was known about his means and personal circumstances?
 - ii) Was it just and reasonable to make a costs order in the sum of £6,067.88 given what was known about the applicant's means and personal circumstances?
 - iii) Were we right to make a 28-day collection order and direct the applicant to contact the HMCTS Fine Collection Team to arrange payment by instalments?
 - iv) By ordering the applicant to pay costs, rather than the surcharge were we acting contrary to section 161A(1) Criminal Justice Act 2003?
3. In the context of question 4, I observe that Section 161A(1) of the Criminal Justice Act 2003 has been repealed by the Sentencing Code and the relevant provision is Section 42 Sentencing Act 2020 (Court's duty to order payment of surcharge).

Background

4. The stated case records the following by way of background.
5. On the 3rd May 2023 the applicant pleaded guilty before Surrey Justices sitting at Guildford to an offence of fraud, contrary to sections 1 and 3 of the Fraud Act 2006. Between the 20/12/2017 and 05/04/2021, at Staines-Upon-Thames, the applicant committed fraud by dishonestly failing to disclose to Spelthorne Borough Council information in relation to his claim for housing benefit and council tax reduction namely that (i) he was no longer in receipt of jobseekers' allowance and/or employment support allowance; and/or (ii) he was in receipt of an income from work, intending by that failure, to make a gain namely housing benefit for £20,898.01 and a council tax reduction of £3,495.14.
6. On the 2nd August 2023 the applicant was sentenced to six months imprisonment, suspended for two years, with a requirement to carry out 200 hours of unpaid work. He was ordered to pay compensation of £22,000 to Spelthorne Borough Council and prosecution costs of £6067.88. The surcharge was reduced to nil. The magistrates made a collection order with a payment term of 28 days.

The Magistrates' reasons for the order

7. The Stated Case sets out the Magistrates' reasoning clearly and candidly, as follows:

“Following the contentions of the parties we came to the following conclusions:

- a) The applicant made credit card applications to Capital One and Marbles in August and December 2019 and told them he was earning £30,000 per annum to obtain credit. He was not earning an income from paid employment during this period and admitted he made this false declaration to obtain credit, he told the probation officer he was desperate and needed money for living expenses. Misrepresenting his finances to the credit companies gave us cause for concern as this was further evidence of dishonesty, in addition to the benefit overpayments. We had less confidence that the financial information put forward by the applicant was reliable.
- b) We noted the applicant had been repaying the benefit overpayment to Spelthorne Borough Council since May 2022 without default and in the written basis of plea stated his intention to repay the amount in full. The applicant had steady employment with British Gas. We took the view that the benefit overpayment was a priority debt as it was public money and should be paid ahead of the applicant's other debts to his family/friends/solicitor.
- c) We were given a schedule of costs detailing the work undertaken and hourly rate, this appeared reasonable. Issue was not taken with the quantum; submissions were made in relation to the applicant's personal circumstances and ability to pay. We do not recall being informed that the hearing on 31/05/23 was ineffective due to a lack of a pre-sentence report and being asked to adjust the costs accordingly. If we had been made aware an adjustment to cost would have been made to reflect this. We concluded it was just and reasonable to award costs.
- d) We did not expect the applicant to be able to repay the compensation and costs in one go, and it may have taken some time to repay. Our intention was the applicant would contact the fines office and arrange a suitable repayment plan at a rate he could afford. This repayment plan might be altered in the future if his financial circumstances changed. We therefore made a collection order with payment in 28 days and advised the applicant to contact the fines office to discuss a payment plan. This is standard practice in Surrey and Sussex Local Justice Area.
- e) We were advised that compensation takes priority over the surcharge and reduced the surcharge to nil.

Consequently, we found:

The applicant had the means to pay compensation and costs having considered his personal circumstances and ability to pay. The costs applied for were just and reasonable having regard to the nature of the investigation, legal costs incurred and the applicant's personal circumstances and ability to pay."

8. The case stated explains the following concession about an error of law by the magistrates:

“We erred in law by reducing the surcharge to nil as it is mandatory unless a defendant has insufficient means to pay both compensation and surcharge. We found the applicant had the means to pay costs in addition to compensation and therefore should have imposed the surcharge.”

Discussion

The role of this Court

9. An appeal by case stated is not an appeal on the merits. The High Court's function is limited to whether the Magistrates' decision was "wrong in law or is in excess of jurisdiction"- see s.111(1) of the Magistrates' Courts Act 1980. That engages public law principles, including a reasonableness standard for primary decision-makers evaluating the evidence (Director of Public Prosecutions v Ward [2024] EWHC 1763 (Admin) at [10]).

The order for costs – an error of law on the face of the order

10. On its face, the order requiring the applicant to pay the costs of the prosecution is unlawful. This is because Section 42 of the Sentencing Act provides in material part as follows:

42 Court’s duty to order payment of surcharge

“(1) A Court when dealing with an offender for one or more offences committed on or after 1 April 2007 must also order the offender to pay a surcharge.

This is subject to subsections (2) to (4).

...

(3) Where a court dealing with an offender considers –

(a) that it would be appropriate to make one or more of-

i) a compensation order,

ii) an unlawful profit order, and

iii) a slavery and trafficking reparation order, but

(b) that the offender has insufficient means to pay both the surcharge and appropriate amounts under such of those orders as it would be appropriate to make,

the court must reduce the surcharge accordingly (if necessary to nil).”

11. Accordingly, the order for the nil surcharge must be taken to record the applicant as having insufficient means to pay both the compensation and the statutory surcharge. Yet the magistrates also imposed a costs order. Section 18 of the Prosecution of Offences Act 1985 requires a costs order to be ‘just and reasonable’. It should not exceed the sum a defendant is able to pay having regard to the defendant’s means and any other financial order imposed upon him (R v Northallerton Magistrates Court ex p

Dove [2000] 1 Crim App R (S). The Sentencing Council's explanatory materials on prosecution costs advises that where the court wishes to impose costs in addition to compensation and/or the surcharge, but the offender has insufficient resources to pay the total amount, the court must apply the following order of priority: (1) compensation; (2) surcharge; (3) costs.

12. By the case stated the magistrates now concede that nil surcharge was imposed in error and explain that this is because the applicant had the means to pay compensation and costs. This is however ex post facto reasoning which directly contradicts the terms of the order.

The compensation order – the payment term

13. The case stated explains that, having made a compensation order for £22,000, the magistrates made a collection order with 'payment in 28 days and advised the applicant to contact the fines office to discuss a payment plan'.

14. Section 135 of the Sentencing Act provides in material part as follows:

“(1) A compensation order must specify the amount to be paid under it.

(2) That amount must be the amount that the court considers appropriate, having regard to any evidence and any representations that are made by or on behalf of the offender or the prosecution.

(3) In determining –

(a) whether to make a compensation order against an offender, or

(b) the amount to be paid under such an order,

the court must have regard to the offender's means, so far as they appear or are known to the court.

15. The Courts Act 2003 created a fines collection scheme, which extends to collection of compensation (Schedule 5 paragraph 2(2)). Paragraphs 13, 14 and 22 of Schedule 5 provide in material part as follows:

13 Contents of collection orders: general

“(1) The collection order must –

(a) state the amount of the sum due,

(aa) where that sum consists of or includes a fine, a sum required to be paid by a compensation order...state

(i) the amount of the fine, the amount required to be paid by the compensation order....”

14 Contents of collection orders: no attachment of earnings order etc. made

“(1) If the relevant court has not under Part 3 made an attachment of earnings order or an application for benefit deductions, the collection order must state the payment terms.

(2) ‘*The payment terms*’ means

(a) a term requiring P to pay the sum due within a specified period, or

(b) terms requiring P to pay the sum due by instalments of specified amounts on or before specified dates.”

22 Application to fines officer for variation of order or attachment of earnings order etc.

[...]

“(2) [P may at any time apply to the fines officer under this paragraph for] –

(a) the payment terms to be varied, or

.....

(3) No application may be made under sub-paragraph (2)(a) unless –

(a) there has been a material change in P's circumstances since the collection order was made (or the payment terms were last varied under this paragraph), or

(b) P is making further information about his circumstances available.”

16. On its face, the order by the magistrates for ‘payment’ in 28 days complies with paragraph 14(2)(a) of Schedule 5 because the order requires payment of the sum due within a specified period. However, on the information before the magistrates as to the applicant’s means, it was clearly irrational to require him to pay £22,000 within 28 days. The Claimant is employed as a gas engineer. He has £2250 monthly income after tax. He was voluntarily repaying £135 a month. The applicant’s skeleton argument states that “the unchallenged contention of the applicant was that his disposable income before the loan repayments was £250 a month”.

17. Subsequently, in the case stated, the magistrates explain that their intention was not for the applicant to pay the sum due within 28 days but for him to pay by instalments according to a repayment plan to be determined by the fines office:

“We did not expect the applicant to be able to repay the compensation and costs in one go, and it may have taken some time to repay. Our intention was the applicant would contact the fines office and arrange a suitable repayment plan at a rate he could afford. This repayment plan might be altered in the future if his financial circumstances changed. We therefore made a collection order with payment in 28 days and advised the applicant to contact the fines office to discuss a payment plan. This is standard practice in Surrey and Sussex Local Justice Area.”

18. The practice adopted by the magistrates in this regard is unlawful. It is wrong to fix an amount of compensation without regard to the instalments which are capable of being paid by the offender and the period over which those instalments should be paid but

rather to leave those questions for the fines office to sort out (Archbold (2025) 5A-462 and R v Margaret York [2018] EWCA Crim 2754 cited in 5A-462).

19. Section 135 of the Sentencing Act 2020 provides that a court making a compensation order must ask whether it is appropriate. That requires an enquiry, by the magistrates, into whether the compensation order will be oppressive or an undue burden given the offender's means, whether realistically the offender can be expected to repay in the terms proposed and whether the compensation order accords with the nature of the offence and the nature of the offender (R v Ganyo [2011] EWCA Crim 2491). The fines collection officer has power under paragraph 22 of Schedule 5 to the 2003 Act to vary the financial order in the event of a material change of circumstances or of further information becoming available, but the original decision is one for the magistrates, and cannot be delegated.
20. The magistrates did not address the question of how long it would take the applicant to pay off the £22,000 and did not therefore consider whether the payment term was oppressive, an undue burden or otherwise inappropriate.

The length of the repayment period

21. Explanatory material published by the Sentencing Council on collection of fines/compensation explains that compensation should normally be payable within 12 months, but that in exceptional circumstances it may be appropriate to allow it to be paid over a period of up to three years. Caselaw put before us reflects the approach of the Sentencing Council. In R v Yehou [1997] 2 Cr App R(S) a compensation order requiring payment over of £9000 over a substantial period of time was reduced to an amount which the offender could pay within 3 years. In R v Oliver (1989) 11 Cr App R(S) 10 the Court expressed the view that a two-year period will seldom be too long, and in an appropriate case three years will be unassailable, depending on the nature of the offender and the nature of the offence.
22. In R v Ganyo [2011] EWCA Crim 2491, having directed itself to the statutory test of appropriateness, the Court upheld repayment periods of 8 years and 5.5 years. The facts of the case were however highly unusual - the deception had enabled one offender to obtain a nursing qualification and the other to commence a course on radiography. On those facts the Court approved the analogy drawn by the sentencing judge with repayment by students of university and maintenance fees. I note the view expressed in Anthony and Berryman's *Magistrates' Court Guide* (2023 edn. at B10.8) that:

“With respect, Ganyo is wrong. The CA overlooked the Sentencing Council guidelines which recommends maximum periods for repayment in comity with Oliver and Yebou.”
23. It is not for us to say in this court whether Ganyo was wrongly decided, but I do consider that, save perhaps in wholly exceptional cases, the Sentencing Council guidance should be regarded as authoritative.
24. Although a case about a compensation order made in the Crown Court, the principles outlined by the Court of Appeal in R v Margaret York [2018] EWCA Crim 2754 are relevant to the exercise conducted by the magistrates' court in the present case.

“19. On the facts of this case, it seems to us that six principles are relevant. First, an offender must give details of her means. Second, before making compensation order, a judge must enquire about, and make clear findings about the offender’s means. Third, before making a compensation order the court must take into account an offender’s means. Fourth, a compensation order should not be made unless it is realistic, in the sense the court is satisfied that the offender has or will have the means to pay that order within a reasonable time. Although a compensation order based on the repayment period as long of 100 months has been upheld, it has been said that while a repayment period of two or three years in an exceptional case would not be open to criticism, in general, excessively long repayment periods should be avoided. Fifth, a court should not make a compensation order against an offender without means on the assumption that the order will be paid by somebody else, for example, a relative. Finally and sixth, it follows that it is wrong to fix an amount of compensation without regard to the instalments which are capable of being paid by the offender and the period over which those instalments should be paid but rather to leave those questions for the Magistrates to sort out.”

25. Applying the principles to the present case: the applicant had given details of his means. It was open to the magistrates to express scepticism about those means. In this context I do not accept the submission on behalf of the applicant that the process was unfair. As Spelthorne Borough Council observed in its skeleton argument, in practice magistrates regularly receive submissions or statements of financial means which they must then assess. Credibility was obviously in play given the applicant accepted he had lied in his application for a credit card. Contrary to the submission advanced on behalf of the applicant, the magistrates were entitled to take a view about his credibility without having to specifically put the issue to him. The burden of disclosure is on the applicant and in the absence of disclosure reasonable inferences can be drawn (R v Northallerton Magistrates Court ex parte Dove (2000 1 Cr App R (S) 136 at 142).
26. It was open to the magistrates to conclude, as they did, that the public money obtained by deception ought to be repaid before the applicant’s other debts. However, the magistrates ought then to have made clear findings about the applicant’s available means, in particular the amount of disposable income (before payment of the debts) and to take those means into account in determining the compensation order. It is not apparent from the case stated that they did so.
27. The magistrates did not specify the amount payable by instalments nor the period by which the instalments were to be paid, as required by paragraph 14(2)(b) of Schedule 5 of the Courts Act 2003. Given the significant sums involved in the offending in the present period a payment period of up to 3 years may be appropriate provided it can be justified by reference to the applicant’s disposable income (prior to the payment of his debts).

Conclusion

28. Applying the law, as I consider it to be, to the four questions.
 - (1) Were we right to conclude the applicant had the means to pay compensation in the sum of £22,000 given what was known about his means and personal circumstances?

No. There were no clear findings about the applicant's means, in particular his monthly disposable income (prior to paying off his debts) and no consideration was given to the length of time it would take the applicant to pay off the amount sought.

- (2) Was it just and reasonable to make a costs order in the sum of £6,067.88 given what was known about the applicant's means and personal circumstances?

No. No clear findings had been made about the applicant's means, in particular his monthly disposable income prior to payment of his debts.

- (3) Were we right to make a 28-day collection order and direct the applicant to contact the HMCTS Fine Collection Team to arrange payment by instalments?

No. The amount of the monthly instalment and payment period should have been specified in the order (Courts Act 2003 Schedule 5 Paragraph 14(2)b) and it was unlawful for the magistrates to delegate these decisions to the fines collection officer.

- (4) By ordering the applicant to pay costs, rather than the surcharge were we acting contrary to ~~[section 161A(1) Criminal Justice Act 2003]~~ Section 42 of the Sentencing Act 2020.

Yes. This is conceded in the case stated.

Decision

29. I quash the Magistrates' order for the payment of compensation and costs and for a nil surcharge and direct that consideration of the appropriate financial orders be listed for redetermination by a differently constituted bench, comprising either a district judge or a lay bench, in accordance with the terms of this judgment.

Bean LJ

30. I agree.