

Questioning the courts

Lawyers shouldn't be afraid of challenging court decisions where their clients' rights are concerned, says Benjamin Newton

A CASE THAT has, quite rightly, attracted attention recently is the decision of Silber J in *R (Fergus) v Southampton Crown Court* [2008] EWHC 3273. Perhaps the reason for this is that in some respects it is a throwback to a bygone age – that in which a Crown Court judge's power to send someone inside before anything had been proved against them was subject to the safeguard of appeal. Now the only remedy is the somewhat narrower prospect of judicial review, but that did not stop the claimant in *Fergus* seeking justice for himself.

The claimant was arrested on 26 June 2008 and appeared at Southampton magistrates' court two days later, where he was charged with possession with intent to supply a class A drug, possession of criminal property, and possession of cannabis. The prosecution did not oppose bail, and both the claimant and his co-defendant were granted bail with conditions of residence and reporting. The matter eventually came for a plea and case management hearing on 31 October 2008, the claimant having abided by the conditions of his bail throughout.

The claimant had learned through his solicitors that he would be re-arrested on 31 October to be interviewed about the provenance of cash found during the original raid, but he nonetheless attended the hearing. The prosecution were also aware but had no intention of opposing bail. Possession of cannabis was accepted, but 'not guilty' pleas were entered in relation to the remaining counts and a trial date was fixed.

During the hearing, however, the judge expressed concern that bail had been granted in a case of possession with intent. Having reviewed the previous convictions of the defendants, he proceeded to revoke bail in the following terms: "Count 1 is a very serious matter; Mr Fergus, your record does you no credit at all, Mr [co-defendant], you are younger and there is less there. Never the less, I am worried about both of you failing to attend, you will both be remanded."

An application was consequently made, before Silber J on 4 December 2008, for judicial review of that decision. The bases were that: i) the decision was irrational, ii) it was a frustration of legitimate expectation, and iii) there was a failure to give reasons.

No submissions were made by Southampton Crown Court, and the Crown Prosecution Service indicated that they did not oppose the application and had not at any stage objected to bail. In quashing the decision to revoke bail, Silber J made reference to the case of *R (On application of M) v Isleworth Crown Court* [2005] EWHC 363 (Admin).

In this case the judge considered the presumption in favour of granting bail and the high threshold that a defendant should only be remanded if it was "necessary". He also said there were "very significant factors here that cause concern": the defendant had been on bail for more than four months, he complied with all reporting and residence conditions of bail and he surrendered to bail when required to do so.

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Silber J therefore held: "First, it is not reasonable for a court to withdraw bail unless it is necessary to do so especially as any decision to withdraw bail engages rights under Article 5. Second, any such reason justifying the decision to withdraw bail must be stated by the decision maker explaining why bail should be withdrawn and that reason must relate to the facts. Such a reason must be more than merely reciting that one of the statutory grounds has been made out. The underlying facts have to be put forward."

To some extent this decision re-states the existing law. It is, however, enormously refreshing to see the law robustly applied on the issue of bail. Despite the wealth of authorities, both domestic and European, on the issues that arise surrounding bail, the fact that the decision is made by a single judge, exercising his discretion and forming his own opinion of the strength of the prosecution objections, makes use of those authorities difficult.

Rare is the case when an advocate can say



that a judge must grant bail because the law so dictates, and brave is the advocate who tries. Once it is accepted on behalf of the defendant that the decision does lie within the judge's discretion, however, then any prospect of challenging an adverse decision effectively disappears. What this case shows is that lawyers must remain vigilant in protecting their clients' right to liberty and be brave enough to challenge decisions that are not legally justifiable.

Cases such as this, where a tribunal fails to give adequate reasons for depriving a defendant of their liberty, should be of particular concern. Article 5 jurisprudence makes it clear that it is unacceptable for a court to simply state which ground they are relying on without explaining why. Such concerns are not limited to our lower courts. In *Gault v UK* (20 November 2007, *Application no.1271/05*) the European Court of Human Rights found a breach of art. 5 as a result of the Court of Appeal's failure to adequately justify a remand in custody.

If *Fergus* teaches us anything, it is not so much what the law is, but that it is lawyers making the effort to ensure that it is applied which will ensure that the standard of justice in our system remains as high as it should be. No human being should needlessly spend months of their lives in custody when the circumstances are such that they should properly have been granted bail, at least not in a legal system that still purports to apply the presumption of innocence.

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