In the High Court of Justice
Queen's Bench Division
Administrative Court in Wales

CO Ref CO/4737/2014

In the matter of an appeal by way of Case Stated

MAURICE JOHN KIRK (Appellant)

versus

THE DIRECTOR OF PUBLIC PROSECUTIONS (Respondent)

On the Appellant's Application dated 26 April 2016

Following consideration of the documents lodged by the parties

Order by the Honourable Mr Justice Hickinbottom

This application fails for want of jurisdiction.

Observations

The Appellant applies to set aside the Order of Blake J dated 15 April 2016, dismissing his application to set aside the Order of Gilbart J dated 21 January 2015, in which he refused the Appellant's appeal by way of case stated against the Order of the Cardiff Crown Court of 1 July 2014, refusing his appeal against his conviction for battery of David Rogan, a prison guard, on 10 December 2013, the offence occurring on 21 September 2013.

The appeal by way of case stated came before Gilbart J on 21 January 2015. The Appellant, who was then a serving prisoner, did not attend. On the evidence and submissions before him, Gilbart J found that (i) despite a telephone call from the Appellant's sister to the court, to the effect that the Appellant had been removed from the bus, the Appellant had not attended because he had refused to get into the prison van to attend court, and (ii) other than one ground of appeal, none was arguable. That single arguable ground of appeal was that the judge at the Crown Court appeal had refused to allow someone (Mr Ewing) to take notes for the Appellant at the hearing. Gilbart J made it clear that, although the judge may arguably have erred in law in that regard, it would not in any event have made any difference to the safety of the conviction.

The issue concerning the notetaker came before a Divisional Court of this court (in the form of a judicial review brought by Mr Ewing) on 2 February 2016, judgment being given on 8 February 2016. The Appellant was an Interested Party in that claim, and appeared in person as such. The court held that the judge had acted unlawfully, but it denied any substantive relief because it found that that error had no bearing on the outcome of the appeal (see [30]).

On 15 February 2016, the Appellant applied for the revocation or variation of Gilbart J's order on several bases, including (i) he had not refused to get into the prison van on the day of the appeal hearing, but had in effect been prevented from attending by the prison authorities, and (ii) the success of the judicial review concerning notetaking. The application purported to be made under CPR rule 3.1(7) and/or the inherent jurisdiction of the court.

The application was considered by Blake J on the papers. On 15 April 2016, he made an order, treating the application as being made under CPR rule 52.17, and "dismissing" the application. As he referred to the fact that there was no right to renew the application for permission under subrule (5), by that order, Blake J was clearly refusing the Appellant permission to make an application to reopen a final determination of an appeal under CPR rule 51.17(4). There was no review or

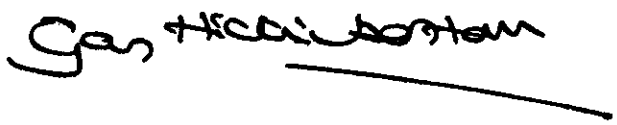
appeal against that determination (CPR rule 52.17(7)).

The Appellant now seeks to set aside or vary the Order of Blake J. The application has no merit. Blake J was right to treat the application of 15 February 2016 as an application under CPR rule 51.17 to reopen a final determination of an appeal. Gilbart J refused the appeal on its merits, and his judgment was a final determination of it. CPR rule 3.1(7) is a case management power to set aside case management orders made under the CPR: the power to file and hear an appeal by way of case stated is found in section 28(1) of the Senior Courts Act 1981. Rule 3.1(7) is manifestly inappropriate to challenge a final determination of an appeal by way of case stated. The inherent jurisdiction to set aside any order must be used sparingly in any event; and it is inappropriate where there is express provision under the CPR, as there is in this case. Blake J was correct to treat the application as being made under CPR rule 52.17.

He was equally correct in refusing the application for the reasons he gave. It was open to Gilbart J to accept the evidence before him as to the reason for why the Appellant was not present; and he did not arguably err in finding that all of the grounds of appeal (except the notetaking ground) were unarguable. Following the Divisional Court judgment, we know that the notetaking ground was immaterial to the safety of the conviction.

In any event, as I have indicated, Blake J's decision is not open to review or appeal. In the circumstances, for the Appellant now to seek to set aside or vary the Order of Blake J is an abuse of process, this application being an attempt to rerun the argument in the 15 February 2016 application (which was dealt with properly and comprehensively by Blake J), in circumstances in which there is no review or appeal from Blake J's order. This application seeks to circumvent that proscription in the CPR.

This court has no power to review the Order of Blake J, which was properly made. This application fails for want of jurisdiction.

Signed 

Dated

Sent to the claimant, defendant and any interested party / the claimants, defendants, and any interested party's solicitors on (date):

FORM MPA