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One strike and you are out? Judicial review of criminal matters and interpretation of the procedural rule on "totally without merit" applications

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Legislation:

[CPRr.54.12](#)

[CPRr.54.17](#)

Case:

[R. \(on the application of Imbeah\) v Willesden Magistrates' Court \[2016\] EWHC 1760 \(Admin\); \[2018\] 4 W.L.R. 3; \[2016\] 7 WLUK 361 \(QBD \(Admin\)\)](#)

***Crim. L.R. 458** An anomaly in the law concerning judicial review in criminal matters was revealed in a recent case in the High Court: [R. \(on the application of Imbeah\) v Willesden Magistrates' Court.1](#) The facts were commonplace: it concerned a challenge to a decision of a District Judge to proceed with a trial without disclosure by the prosecution of CCTV evidence of the custody suite, which had been marked as disclosable on the unused schedule. The claimant had been convicted of driving with excess alcohol. The issue raised by the defence was that the breath-testing machine was at fault and that a statutory warning was not given before the test was taken.

The application for permission for judicial review was refused by Leggatt J and adjudged to be "totally without merit". Under [CPR r.54.17\(1\)](#), a claim may be found to be totally without merit at the permission stage, which means "bound to fail".² This decision can be made on the papers or after an oral hearing. In this case it was made on the papers.

This presented the claimant with an insuperable barrier. The effect of such a decision is that it extinguishes the claim completely. Unlike a judicial review claim concerning a civil matter, a claimant in a criminal cause or matter cannot appeal to the Court of Appeal. [Section 18\(1\)\(a\) of the Senior Courts Act 1981](#) excludes jurisdiction to hear such appeals. A criminal cause or matter is one where the direct outcome is a trial of the claimant and his punishment³ although the case law is far ***Crim. L.R. 459** from consistent.⁴ The potential outcomes of such cases include possible conviction and deprivation of liberty by way of a term of imprisonment. Needless to say, this is an intrusion into the rights and liberties of an individual of an entirely different order than that consequent to a civil case.

In [Imbeah](#) Leggatt J held that the claim was misconceived as there was an alternative

remedy available by way of appeal to the Crown Court. He later accepted in a longer written judgment that his reason was inadequate in light of [Hereford Magistrates' Court Ex p. Rowlands](#)⁵ (although he maintained his original decision that the claim was totally without merit). In [Ex p. Rowlands](#), Lord Bingham CJ said that the existence of a right to appeal to the Crown Court should not ordinarily weigh against a grant of leave to bring a claim. This was based on the principle that to guarantee the integrity of proceedings in the lower courts it was essential to have supervision by the High Court by way of judicial review. This principle, is premised on the fact that Magistrates' Courts are the "work-horses of the criminal justice system" which "handle the vast majority of criminal cases, and for most citizens they represent the face of criminal justice".⁶ Therefore, given "The crucial role of the magistrates' courts ... [it] makes it the more important that that jurisdiction should be retained with a view to ensuring that high standards of procedural fairness and impartiality are maintained".⁷

The claimant in [Imbeah](#) complained on this point—to the authors' knowledge the first time this has been raised in a criminal cause or matter. She made an application to the court to either hear argument that, contrary to [CPR r.54.17](#) it did have jurisdiction to hold an oral hearing (even where the claim had been designated as "totally without merit"), or to accept the submission that it had jurisdiction and hold the oral hearing.

Contrary to the claimant's submissions, Leggatt J held that the rule under [CPR r.54.17](#), as applied to criminal matters, was not contrary to the overriding objective as the language of [CPR r.52.12\(7\)](#) is "unequivocal and unqualified".⁸ He said that it was "readily understandable" why there is no further avenue of appeal as the High Court is exercising "an essentially appellate function, as it does on an application for judicial review of a decision of a magistrates' court".⁹

With respect, there are difficulties with this position. First, criminal causes and matters include cases that go beyond challenges (a) concerning the outcome of a trial or (b) to decisions by Magistrates' Courts. In respect of the former, they have been held to include interlocutory decisions, such as the grant or refusal of an adjournment, which the Divisional Court has held should not await the outcome of the trial.¹⁰ In respect of the latter, they include numerous matters quite distinct from a trial in a Magistrates' Court, for example, decisions to order a prosecution,¹¹ recommendations for deportation,¹² an application under [s.59 of the Criminal Justice and Police Act 2001](#) **Crim. L.R. 460* relating to property that has been seized with use or purported use of powers relating to criminal investigations,¹³ extradition proceedings,¹⁴ decisions in relation to witness summonses,¹⁵ a decision of the Home Secretary to refuse to refer a case to the Court of Appeal under [the Criminal Appeal Act 1968 s.17](#),¹⁶ orders made by circuit judges for the production of certain documents,¹⁷ a judgment of the High Court dismissing an application for judicial review of a decision of a police force to issue a caution,¹⁸ and, proceedings under the [Criminal Procedure \(Insanity\) Act 1964](#).¹⁹ To take, for example, judicial reviews of a decision to prosecute, it is quintessentially not an appellate matter because it involves an exercise of the supervisory jurisdiction to intervene to prevent an abuse of power by a public body and to thereby maintain the rule of law. This core function of judicial review has been long accepted in the field of criminal law.²⁰ In respect of the Magistrates' Courts, Lord Bingham CJ said that:

"For most of this century at least, certiorari has provided the usual if not invariable means

of pursuing challenges based on unfairness, bias or procedural irregularity in magistrates' courts. The cases which show this are legion".[21](#)

To describe it as "essentially an appellate function" is to both misstate and emasculate the High Court's true "constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power".[22](#)

Secondly, the appellate function of the High Court in relation to the Magistrates' Courts is set out by Parliament in the various statutory provisions governing appeal by way of case stated.[23](#) Those provide that an application may be made on grounds that a decision was wrong in law or in excess of jurisdiction.[24](#) To be clear, disputes of fact cannot be brought by either judicial review or appeal by way of case stated, and can only be raised in appeal to the Crown Court.[25](#) Accordingly, the High Court's appellate function and the other routes of appeal from the Magistrates' Courts are clearly distinct from and not co-extensive with its supervisory jurisdiction.

It might be thought that this will be a very rare problem. This is not the case. To consider the most recent civil justice statistics, of the 8,743 applications lodged for judicial review in 2014 and 2015, 528 were recorded as criminal, of which 112 were held to be totally without merit—in other words, 22% of all applications for judicial review in criminal matters in 2014–2015 were held to be totally without **Crim. L.R. 461* merit.[26](#) By way of example, one of the authors was recently instructed in a very similar matter to *Imbeah*. In *L*, the defendant was accused of drink driving, leaving the scene of an accident and failing to report an accident. In defence he argued alibi, and that in any case he was not given the mandatory statutory warning before being required to provide the breath samples. On the day of trial, the prosecution had not warned any witnesses at all or served any evidence that the warning had been given. The District Judge granted an adjournment of his own motion without the Crown providing any explanation in court for its aforementioned omissions. The District Judge gave as one of his reasons for adjourning the case that he could not see how the defendant could be acquitted if the prosecution were allowed an adjournment to deal with the witness problems, especially as the defendant had given a no comment interview. The District Judge said that given this, he was not willing to allow the defendant to benefit from the prosecution's difficulties. The defendant applied for judicial review of the decision. That application was rejected by the single judge and designated as totally without merit. The single judge gave detailed reasons relating to the fact that there was a dispute of fact about how the prosecution came to think that all the witnesses had been agreed, which it was not the function of the Administrative Court to settle. He did not address at all the second main ground—that the prosecution had not called or served any evidence of the statutory warning. With no route to question this decision, the defendant faced trial on the adjourned date.

In our view it is an anomaly that these types of cases have lesser procedural safeguards than civil matters. The existence of a right of appeal against totally without merit decisions has been described by the Court of Appeal as one of the two sufficient and conjunctive safeguards, the other being careful consideration by the single judge in the High Court.[27](#)

It is unclear whether claimants will be helped by an appeal to common law standards of fairness or [ECHR art.6](#). The latter point was raised in *Imbeah* although not fully argued and Leggatt J held that there was no breach. It is submitted that a determination of permission to bring a criminal cause or matter by way of judicial review is a determination of a criminal

charge thus engaging [art.6](#). This is because an individual has been officially notified by a competent authority that they have committed a criminal offence.²⁸ It does not follow that there is an automatic right to an oral hearing or other remedy against a refusal. On applications for permission to appeal, [art.6](#) has not been breached where the issues determined are solely ones of law.²⁹ This applied to the question of whether the appeal was arguable.³⁰ However, would the important distinction between criminal appeals and judicial review claims also require a different standard of procedural fairness? Maurice Kay LJ said in [Grace](#) that the combined safeguards available to civil claims ensured no **Crim. L.R. 462* detract from "the vital constitutional importance of the judicial review jurisdiction".³¹

Having said this, we now turn to the roots of this anomaly. The proposal for [r.54.12\(7\)](#) was part of a wider *Ministry of Justice consultation Judicial Review: Proposals for Reform issued in December 2012*. In the paper there is no acknowledgement in any of the sections on the proposal that the result in criminal cases would be that no reconsideration would be possible. In a footnote on the section on current procedure, where an application for permission to appeal to the Court of Appeal after a refusal at a renewal hearing is considered, it is noted that this is not available in criminal judicial review cases.³² It is not mentioned in the impact assessment which was published alongside the consultation.³³

In the *Government response to the consultation, Reform of Judicial Review: the Government Response, published in April 2013*, criminal judicial review is not mentioned at all. In the responses the Department had received to question 11, which asked whether there were specific types of judicial review to which the denial of a renewed oral hearing would not be appropriate, no-one seems to have mentioned criminal judicial reviews at all.³⁴ After that discussion the report notes the risk of variability in judicial decision-making but states that "aggrieved parties would be entitled to appeal to the Court of Appeal against the refusal of permission, although only on the papers."

Therefore, it appears that the impact of this reform on criminal claimants was not appreciated, and it was not part of the intention of the reform that any claimants should have recourse to only one judge, on a single occasion at the permission stage. Analysis of the publication *Civil Justice Statistics Quarterly October–December 2015*³⁵ shows that since 2000 the overall number of applications has increased more than three-fold.³⁶ However this large increase in judicial review which motivated the reforms is not evidenced in the figures for criminal judicial reviews.³⁷ Criminal judicial reviews have been broadly stable since 2000, and have dipped slightly in recent years.

Judges, even High Court judges, are not infallible as [Imbeah](#) shows. A reasonable measure to deal with the explosion in judicial review, largely fuelled by immigration cases, has had the unanticipated effect of chipping away at one of the rarely used but important constitutional safeguards against unlawful criminal conviction. The two safeguards in [Grace](#) should function in tandem—one of them, arguably the more important, simply does not operate for criminal claimants. Leggatt J accepted the submission that this put them at a disadvantage but stated that had the rule been intended not to apply to criminal judicial review it would have been bound to say so. Absent the unlikely event of a change of heart in the legislature, or a differing interpretation by a higher court, it seems that a significant proportion criminal claimants will continue to face that disadvantage indefinitely.

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1. [R. \(on the application of Imbeah\) v Willesden Magistrates' Court \[2016\] EWHC 1760 \(Admin\); \[2017\] 1 Cr. App. R. 3 \(p.24\).](#)
 2. [R. \(on the application of Grace\) v Secretary of State for the Home Department \[2014\] EWCA Civ 1091; \[2014\] 1 W.L.R. 3432 at \[13\].](#)
 3. [Amand v Secretary of State for the Home Department \[1943\] A.C. 147](#) at 162.
 4. [R. \(on the application of Guardian News and Media Ltd\) v City of Westminster Magistrates' Court \[2011\] 1 W.L.R. 3253; \[2011\] 1 W.L.R. 3253; \[2012\] E.M.L.R. 11](#) (p.230).
 5. [Hereford Magistrates' Court Ex p. Rowlands \[1998\] Q.B. 110; \[1997\] 2 Cr. App. R. 340.](#)
 6. [Ex p. Rowlands \[1998\] Q.B. 110](#) at 117H.
 7. [Ex p. Rowlands \[1998\] Q.B. 110](#) at 125D.
 8. [Imbeah \[2016\] EWHC 1760 \(Admin\); \[2017\] 1 Cr. App. R. 3](#) (p.24) at [7].
 9. [Imbeah \[2016\] EWHC 1760 \(Admin\); \[2017\] 1 Cr. App. R. 3](#) (p.24) at [7].
 10. [DPP v Balogun \(Practice Note\) \[2010\] EWHC 799 \(Admin\); \[2010\] 1 W.L.R. 1915](#) per Leveson LJ.
 11. [Provisional Cinematograph Theatres Ltd v Newcastle-upon-Tyne Profiteering Committee 27 Cox 63 HL.](#)
 12. [Secretary of State for the Home Department Ex p. Dannenberg \[1984\] Q.B. 766; \[1984\] 2 C.M.L.R. 456; \[1984\] Crim. L.R. 362 CA \(Civ Div\).](#)
 13. [R. \(on the application of Panesar\) v Central Criminal Court \[2014\] EWCA Civ 1613; \[2015\] 1 W.L.R. 2577; \[2015\] 1 Cr. App. R. 17. \(p.210\) CA \(Civ Div\).](#)
 14. [Governor of Brixton Prison Ex p. Levin \[1997\] A.C. 741; \[1998\] 1 Cr. App. R. 22 HL.](#)
 15. See Archbold 2017 (London: Sweet & Maxwell, 2017), para.7–23.
 16. [Secretary of State for the Home Department Ex p. Garner \(1991\) 3 Admin. L.R. 33; \[1990\] COD 457 CA \(Civ Div\).](#)
 17. [Carr v Atkins \[1987\] Q.B. 963; \(1987\) 85 Cr. App. R. 343 CA \(Civ Div\).](#)
 18. [R. \(on the application of Aru\) v Chief Constable of Merseyside \[2004\] EWCA Civ 199; \[2004\] 1 W.L.R. 1697 CA \(Civ Div\).](#)
 19. [R. \(on the application of South West Yorkshire Mental Health NHS Trust\) v Bradford Crown Court \[2003\] EWCA Civ 1857; \[2004\] 1 W.L.R. 1664 CA \(Civ Div\).](#)
 20. [Horseferry Road Magistrates' Court Ex p. Bennett \[1994\] 1 A.C. 42; \(1994\) 98 Cr. App. R. 114.](#)

21. [Ex p. Rowlands \[1998\] Q.B. 110](#) at 120B.
22. [Ministry of Defence Ex p. Smith \[1996\] Q.B. 517](#) at 556D per Sir Thomas Bingham MR.
23. [Magistrates' Court Act \(MCA\) 1980 s.111.](#)
24. [MCA 1980 s.111\(1\).](#)
25. [MCA 1980 s.108\(1\).](#)
26. Ministry of Justice. National Statistics. Civil justice statistics quarterly: October to December 2015, <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2015#history> [Accessed 27 March 2017]. The figures for judicial reviews for 2014 and 2015 combined, set out above, were extracted from the spreadsheet published alongside the quarterly figures.
27. [Grace \[2014\] EWCA Civ 1091; \[2014\] 1 W.L.R. 3432](#) at [15]; [R. \(on the application of W\) v Secretary of State for the Home Department \[2016\] EWCA Civ 82; \[2016\] 1 W.L.R. 2793.](#)
28. [Eckle v Germany \(1983\) 5 E.H.H.R. 1](#) at [73].
29. [Monnell v United Kingdom \(1988\) 10 E.H.R.R. 205.](#)
30. See also [Oates \[2002\] EWCA Crim 1071; \[2002\] 1 W.L.R. 2833; \[2002\] 2 Cr. App. R. 39](#) (p.654).
31. [Grace \[2014\] EWCA Civ 1091; \[2014\] 1 W.L.R. 3432](#) at [15].
32. *Ministry of Justice, Judicial Review: Proposals for Reform (2012), p.18, fn.28.*
33. The Law Commission also produced a paper in 2010 that examined the High Court's supervision of the Crown Court acting in its appellate function. The *Law Commission, The High Court's Jurisdiction in Relation to Criminal Proceedings, Law Com. No.324, (HC 329)*. This proposed a unitary system of appeal from the Crown Court to the Court of Appeal. There has yet to be a response from the Government.
34. *Ministry of Justice consultation Judicial Review: Proposals for Reform (December 2012), pp.20–21, paras 82–87.*
35. *Civil Justice Statistics Quarterly October–December 2015, pp.14–19.*
36. *Civil Justice Statistics Quarterly October–December 2015, pp.14–19.*
37. *Civil Justice Statistics Quarterly October–December 2015, p.15.*

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