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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JUDE BELL
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE PROBATION BOARD
FOR NORTHERN IRELAND

Mr Michael Forde (instructed by Toal Heron Donnelly Solicitors) for the Applicant
Mr Joseph Kennedy (instructed by the Crown Solicitors Office) for the Respondent

COLTON J

Introduction

[1] I am obliged to both counsel for their focused written and oral submissions.

[2] This application initially came before Mr Justice Huddleston on an emergency basis on 23 December 2022. The applicant sought to challenge two decisions of the Probation Board for Northern Ireland ("the respondent") namely:

- (a) The imposition of a curfew on the applicant purportedly as part of a combination order imposed by Antrim Crown Court, during the hours of 11:00am-11:30am, 3:00pm-3:30pm and 7:00pm-7:30pm, every day of the week.
- (b) Their refusal to allow the applicant to spend the Christmas period at his father's address of 83 Glengomna Road, Draperstown, BT45 7BY.

Leave was granted in respect of the curfew issue but refused in respect of the Christmas leave issue.

Factual background

[3] On 1 December 2022 the applicant was sentenced for the offence of common assault (indictable), contrary to section 47 of the Offences Against the Person Act 1861 to a combination order comprising a 100 hours' community service order and a three year probation order.

[4] A number of additional requirements were imposed by the judge.

[5] In general terms these included a requirement that he actively participate in various programmes of work, attend appointments arranged with his general practitioner and mental health professionals, avoid consumption of alcohol or illegal substances with an agreement to submit to testing and a requirement that he permanently reside at an address approved by his probation officer.

[6] Significantly the judge did not impose a curfew requirement.

[7] After he was sentenced the applicant's supervising probation officer prepared a Case Plan in respect of his supervision. The plan included "additional order requirements." These included the additional conditions imposed by the court but also added additional requirements which read as follows:

"You will initially be subject to the following curfews as a requirement of your Case Plan:

11:00-11:30am, 3:00-3:30pm and 7:00-7:30pm and
10:00pm-8:00am.

These will be subject to review when stability is demonstrated."

[8] The applicant does not challenge the curfew between 10:00pm and 8:00am as it is a condition of the accommodation regime at which he resides.

[9] Put simply, the applicant's case is that the respondent does not have the power to impose a curfew requirement.

[10] It appears the applicant was first informed of the intention to include a curfew as part of the Case Plan on 2 December 2022. At his meeting with the probation officer, he indicated that he would be challenging the imposition of curfews.

[11] On 7 December 2022 the applicant's solicitor wrote to the respondent challenging the proposed curfew and asked it to "confirm that our client will therefore not be subject to a curfew period (other than the standard house rules of the hostel accommodation where our client resides)."

[12] On 12 December 2022 the supervising officer replied on behalf of the respondent in the following terms:

“... In relation to the additional curfews in place, it is PBNI’s position that from a risk management perspective these are required in order to safely manage the assessed risk he currently presents.

While the additional curfews are not specified as an additional requirement imposed by the court, he will be required to sign up to his Case Plan, which these curfews will be part of. The Case Plan is a fundamental aspect to a probation order.

The curfews will be subject to review and will be amended accordingly once JB has demonstrated some level of stability and engagement.

If JB is not content to sign his Case Plan PBNI will be making an application to the have the Order Revoked, or Amended, on the basis that we cannot safely manage the risk posed in the absence of the curfews. ...”

[13] Importantly, from the respondent’s perspective, the applicant signed the Case Plan on 13 December 2022.

[14] Additionally, the applicant has appealed the sentence, which in the respondent’s view means the applicant is no longer bound by the conditions of supervision. I have some reservations about whether this view is correct, but it is not relevant for the issue before this court.

[15] Returning to the applicant’s challenge a pre-action protocol letter was sent to the respondent on 16 December 2022. In relation to the issue of the curfew the position of the respondent is set out in the pre-action response of 22 December 2022. At para 5(b)-(e) the response states:

“(b) In the applicant’s case there is a requirement to impose a curfew condition during daytime hours in order to monitor the applicant’s compliance with other conditions of his probation. The curfew during daytime hours allowed the presentation and condition of the applicant to be assessed vis-à-vis drugs and alcohol, monitor his whereabouts and keep a check on who he is mixing with.

(c) The curfew is a necessary mechanism in place to allow the respondent to supervise the additional conditions imposed by the Court. There is no other, less intrusive means, to supervise the conditions imposed by the Court.

(d) The regular curfew seeks to ensure that he cannot seek to mix with his partner without prior approval of the respondent.

(e) The approved accommodation has a curfew from 10:00pm-8:00am which the applicant does not challenge. In the absence of the applicant accepting the conditions of the sourced accommodation, including the curfew, the respondent would have had to find alternative suitable accommodation that could only be approved by PBNI or refer the matter back to the court and the court may revoke the combination order and impose another sentence.”

[16] The thinking behind the imposition of a curfew condition as part of the Case Plan is further dealt with in the affidavit filed by the supervising officer. At para 13 she avers:

“13. The respondent’s assessment was that daytime curfews (11:00am-11:30am; 3:00pm-3:30pm, and 7:00pm-7:30pm) were necessary to include in the Case Plan as:

(a) It would ensure that the applicant was keeping regular contact with hostel staff and it would be possible to know where he was at regular times during the day as well as night under the hostel’s curfew); this was deemed particularly pertinent in the early stages of his release before a period of stability had been demonstrated.

(b) The hostel could assist with the applicant’s supervision by being able to notify me of any suspected issues with the applicant’s compliance with the no alcohol/illegal drugs/misuse of drugs requirement;

(c) The regularity of having to attend the hostel would improve the chances of compliance with the requirements to have no contact with the victim

who is also the applicant's partner (who lived in the North Antrim Coast), and

- (d) Encourage the applicant to avoid re-offending by supporting the development of structured use of his time, reducing the opportunity for risk taking behaviours and encourage him to access the supports available.

..."

[17] I make it clear that I fully understand the thinking behind the decision to impose a requirement for a curfew. There were grounds to justify such a requirement. However, the issue for this court is whether the respondent could lawfully impose such a requirement.

[18] At the hearing Mr Kennedy developed the argument set out in the pre-action response and in the respondent's affidavit. He argues that the substantial grounds for including the daytime curfew are "connected to" the additional requirements set by the court and necessary for the proper supervision of the applicant whilst on probation - at least in the initial period post release.

[19] The respondent is obliged to supervise the applicant under the combination order imposed by the court. The respondent's position is that it has a discretion as to the measures put in place to supervise the conditions of probation.

[20] It is argued that the curfew in this case is one such mechanism which supports the supervision of the applicant's adherence to the requirements set out in the combination order.

[21] Mr Kennedy therefore says that the curfew was necessary in order to have the applicant's compliance with the other conditions adequately monitored. He characterises the curfew as "an incident of supervision." Thus, the curfew was not being imposed by the respondent but was a consequence of the supervision required under the combination order.

[22] Leaving aside this issue, Mr Kennedy points out that the applicant in fact consented to signing the Case Plan. This was in the context where his solicitors had written to the respondent challenging the requirement for a curfew and after the respondent's reply on 12 December 2022.

[23] Mr Forde points to the contents of that letter where the applicant was told "if he was not content to sign the Case Plan an application would be made to have the order revoked or amended." He says this was akin to putting "a gun to the applicant's head." This is particularly so when one considers the reference to the order being "revoked." He argues that it was clear to the parties that the applicant

intended to challenge the requirement for a curfew by way of judicial review proceedings which were issued promptly on an emergency basis.

[24] For the sake of completeness the appeal against sentence was lodged on 19 December 2022. I am informed by Mr Forde, and I accept, that Mr Justice Huddleston was made aware of the fact of the appeal when leave was granted.

Consideration

The relevant legislation

Imposition of probation orders

[25] The Criminal Justice (Northern Ireland) Order 1996 (“the 1996 Order”) provides the power to a court to sentence a defendant to a community-based order.

[26] Article 10 provides for the imposition of probation orders:

“10. The court may make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period specified in the order of not less than 6 months nor more than 3 years.

(6) An offender in respect of whom a probation order is made shall keep in touch with the probation officer responsible for his supervision in accordance with such instructions as he may from time to time be given by that officer and shall notify him of any change of address.”

[27] Article 13 provides for the imposition of community service orders. Article 15 provides for the imposition of what are known as combination orders combining probation and community service.

[28] Focusing on probation orders, for the purposes of this application Article 11 of the 1996 Order provides for the implementation of additional requirements which may be included in such orders. It provides:

“Additional requirements which may be included in such orders

11.-(1) Subject to paragraph (2) a probation order may in addition require the offender to comply during the whole or any part of the probation period with such requirements as the court, having regard to the

circumstances of the case, considers desirable in the interests of -

(a) securing the rehabilitation of the offender;
or

(b) protecting the public from harm from him
or preventing the commission by him of
further offences.

...

(3) Without prejudice to the generality of paragraph (1), the additional requirements which may be included in a probation order shall include the requirements which are authorised by Schedule 1."

[29] Schedule 1 sets out additional requirements which may be imposed such as requirements as to residence, requirements as to activities, requirements as to attendance at a day centre, requirements as to treatment for mental conditions etc, and requirements as to treatment for drug or alcohol dependency.

[30] Schedule 1 of the 1996 Order is a non-exhaustive list of additional requirements.

[31] The power to impose a curfew requirement is expressly provided for in Article 35 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). It states:

"Powers to impose curfew or electronic monitoring requirements

35.-(1) Subject to the following provisions of this chapter, a curfew requirement or an electronic monitoring requirement may be made -

...

(c) a requirement of -

(i) a probation order."

Thus, a sentencing judge can impose a curfew requirement as part of an additional requirement when imposing a probation order.

[32] Article 37 of the 2008 Order provides:

“Curfew requirement

37.-(1) In this Part ‘curfew requirement’ means a requirement that a person remain, for specified periods at a specified place; and in this Article ‘specified’ means specified in the requirement.

(2) Specified periods shall not amount to –

- (a) less than 2 hours, or
- (b) more than 12 hours,

in any one day.

(3) A curfew requirement shall not be imposed without obtaining and considering information about the place proposed to be specified in the requirement (including information as to the attitude of persons likely to be affected by the enforced presence there of the person subject to the requirement).”

Enforcement of probation orders

[33] Schedule 2 of the 1996 Order deals with the enforcement of community orders.

[34] Part III provides for the revocation of an order with or without resentencing. It provides:

“Revocation of order with or without resentencing

7.-(1) This paragraph applies where a relevant order is in force in respect of any offender and, on the application of the offender or the responsible officer; it appears to a court of summary jurisdiction acting for the petty sessions district concerned that, having regard to circumstances which have arisen since the order was made, it would be in the interests of justice –

- (a) that the order should be revoked; or
- (b) that the offender should be dealt with in some other manner for the offence in respect of which the order was made.

(2) The court may –

- (a) if the order was made by a magistrates' court -
 - (i) revoke the order; or
 - (ii) revoke the order and deal with the offender, for the offence in respect of which the order was made, in any manner in which it could deal with him if he had just been convicted by the court of the offence;
- (b) if the order was made by the Crown Court, commit him to custody or release him on bail until he can be brought or appear before the Crown Court.

(3) The circumstances in which a probation order may be revoked under sub-paragraph (2)(a)(i) shall include the offender making good progress or his responding satisfactorily to supervision.

(4) In dealing with an offender under sub-paragraph (2)(a)(ii), a court of summary jurisdiction shall take into account the extent to which the offender has complied with the requirements of the relevant order.

(5) Where a court deals with an offender's case under sub-paragraph (2)(b) it shall send to the Crown Court such particulars of the case as may be desirable.

(6) Where a court of summary jurisdiction proposes to exercise its powers under this paragraph otherwise than on the application of the offender it shall summon him to appear before the court and, if he does not appear in answer to the summons, may issue a warrant for his arrest.

(7) No application may be made by the offender under sub-paragraph (1) while an appeal against the relevant order is pending.

[35] Para 8 provides for an offender who has been sentenced by the Crown Court by virtue of para 7(2)(b). It in effect mirrors the powers available to the court of summary jurisdiction and provides at 8(2):

“(2) If it appears to the Crown Court to be in the interests of justice to do so, having regard to circumstances which have arisen since the order was made, the Crown Court may –

- (a) revoke the order; or
- (b) revoke the order and deal with the offender, for the offence in respect of which the order was made, in any manner in which it could deal with him if he had just been convicted by or before the court of the offence.”

[36] The amendment of community orders including probation orders is dealt with in Part IV. Paragraph 13 deals with amendment of requirements of probation orders. It provides:

“13.-(1) Without prejudice to the provisions of paragraph 12, but subject to sub-paragraph (2), a court of summary jurisdiction for the petty sessions district concerned may, on the application of the offender or the responsible officer; by order amend a probation order –

- (a) by cancelling any of the requirements of the order; or
- (b) by inserting in the order (either in addition to or in substitution for any such agreement) any requirement which the court could include if it were then making the order.

(2) A court of summary jurisdiction shall not amend a probation order under sub-paragraph (1) -

- (a) by reducing the probation period, or by extending that period beyond the end of 3 years from the date of the original order; or
- (b) by inserting in it a requirement that the offender shall submit to treatment for his mental condition, or his dependency on drugs or alcohol, unless the amending order

is made within 3 months after the date of the original order.

(3) In this paragraph and paragraph 14, references to the offender's dependency on drugs or alcohol includes references to his propensity towards the misuse of drugs or alcohol."

[37] A curious consequence of this drafting is that an application to amend the requirements of a probation order can only be made to a court of summary jurisdiction. Paragraph 13 does not provide for the referral of such an application to the Crown Court which is provided in respect of an application to revoke an order. It may well be that an amendment to the probation order imposed by the Crown Court could be achieved by way of an order made under paragraph 8(2)(b) as set out in para [32] above.

Conclusion

[38] I am satisfied that the respondent does not have the power to impose a curfew on an offender who is subject to a probation order unless such a curfew is part of the order itself. To impose such a curfew without a legislative basis or as part of a court order is unlawful.

[39] I recognise that under the Probation Board (Northern Ireland) Order the duties of probation officers are stated in broad terms.

[40] Thus 14(a) provides:

"14A. It shall be the duty of probation officers –

- (a) to supervise the persons placed under their supervision and to advise, assist and befriend those persons;
- (b) to enquire in accordance with any direction of the court into the circumstances or home surroundings of any person with a view to assisting the court in determining the most suitable method of dealing with him; and
- (c) to perform such other duties as may be prescribed or imposed by or under any statutory provision or as the Probation Board may direct."

[41] Similarly, the order made by the court in this case, in common with similar orders, does provide very general powers of supervision on probation officers. Thus, in this case the combination order provides that:

“Defendants shall keep in touch with the probation officer in accordance with such instructions as may from time to time be given.”

[42] Compliance with the specific requirements set out in the combination order will obviously require ongoing supervision by the applicant’s probation officer.

[43] However, in my view it could not be said that the proposed curfews in this case, to use Mr Kennedy’s term, are an “incident of supervision.” Such a conclusion would involve a very elastic view of the powers of the supervising officer.

[44] Put simply, I conclude that a curfew could only be imposed by order of a court. The imposition of a curfew represents a significant restriction on a person’s liberty. No doubt it was for this reason that it was felt necessary to legislate specifically for the power to impose curfews as requirements of probation orders. As an additional issue I note that the relevant legislation prohibits curfews for less than two hours.

[45] The court weighs in the balance the forceful submissions by Mr Kennedy to the effect that no order of the court is required in this case because firstly, the applicant in fact consented to the order and, secondly, his appeal renders the matter academic.

[46] I am less attracted to the former argument given the circumstances in which the applicant signed his Case Plan, particularly when it was clear there was to be a legal challenge to the requirement. There is greater force in the argument that this matter is academic given the appeal against the sentence. However, having regard to the principles in *Salem* I consider that it is appropriate for the court to deal with the substantive issue raised by Mr Forde. This is particularly so in light of the respondent’s contention in pre-action correspondence and in affidavit evidence to the effect that it considers that the respondent does have the power to impose such requirements as part of its supervisory role.

[47] The court therefore concludes that the respondent does not enjoy the power to impose the curfew requirements of the type sought in this case.

[48] However, in light of the fact that this sentence is now under appeal I do not consider that any declaration is required. This judgment should speak for itself.