

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (JUDICIAL REVIEW)

Cavanagh's (Mark) Application [2014] NIQB 13

IN THE MATTER OF AN APPLICATION BY MARK CAVANAGH  
FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE EXERCISE OF THE POWER CONTAINED IN  
SECTION 16 OF THE PRISON ACT (NORTHERN IRELAND) 1953

Before: Morgan LCJ, Girvan LJ and Gillen J

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] The applicant is a remand prisoner who seeks judicial review of a decision made by a Governor at HMP Maghaberry purporting to act under section 16 of the Prison Act (Northern Ireland) 1953 ("the 1953 Act") to remove him from HMP Maghaberry to a PSNI station for interview about offences other than those with which he had already been charged. It is contended that this should have been achieved by way of an application pursuant to Article 47(4A) of the Magistrates' Court (Northern Ireland) Order 1981 ("the 1981 Order") duly made to Downpatrick Magistrates' Court which had remanded him in custody on foot of charges relating to offences occurring within the County Court Division of Ards.

[2] Mr Macdonald QC appeared with Ms Doherty on behalf of the applicant. Dr McGleenan QC appeared with Mr McAteer on behalf of the PSNI. Mr McMillen QC appeared with Ms Murnaghan on behalf of the Prison Service. The court is indebted to counsel for their helpful and succinct submissions.

## **Evidential background**

[3] On 21 May 2013 the applicant was arrested in the County Court Division of Ards for drugs-related offences. On 24 May 2013 he was charged with several co-accused and remanded in custody by Downpatrick Magistrates' Court to HMP Maghaberry. That court sits within the Ards Division. The PSNI continued investigations in relation to other suspected offences and subsequently sought to have the applicant and a co-accused produced from prison for police interview.

[4] Detective Constable Thompson averred that the usual method of producing a prisoner on remand for further interview is by application under Article 47(4A) of the 1981 Order. It was the understanding of the PSNI that an Article 47 application would have resulted in the applicant being placed in police custody for up to 3 days following which the applicant and co-accused would have had to be taken back to Downpatrick Magistrates' Court and returned in the custody of the court to HMP Maghaberry. It was the PSNI's belief that this would cause a problem in this case because they had identified a number of serious offences that had allegedly been committed in the County Court Division of Belfast with which they might charge the applicant and his co-accused. The PSNI considered that if they charged the applicant and co-accused they would have to be brought to Belfast Magistrates' Court and, if remanded in custody there, Belfast Magistrates' Court would have issued a warrant of committal on remand resulting in the applicant being taken directly to HMP Maghaberry. This, it was believed, would have meant that the PSNI could not then comply with the obligation to bring the applicant back to Downpatrick Magistrates' Court.

[5] For this reason the PSNI decided that section 16 of the 1953 Act provided the correct mechanism for the production of the applicant. The decision was approved by D/Chief Inspector Galbraith. DC Thompson avers that police had regard to *PSNI Service Procedure – Production of convicted/remand prisoners for interview in connection with other criminal offences (SP 16/2010)* and the judgment of Weatherup J in O'Neill's (Gerard) Application [2010] NIQB 8.

[6] Whilst it had been initially indicated to Downpatrick Magistrates' Court that an application would be made under Article 47(4A) of the 1981 Order, DC Thompson indicates that at that stage the perceived difficulties arising in the case had not yet been appreciated. On 3 October 2013 the applicant's solicitor attended Downpatrick Magistrates' Court for a remand hearing. The PPS indicated to him that an Article 47(4A) application would not now be made. The solicitor avers that a police officer who was present told him that it was "too much hassle" to produce the prisoners and have them returned again to custody. The District Judge dealt with the remand application by remanding the applicant and his co-accused in custody until further hearing by videolink on 31 October 2013. During the hearing the PPS indicated that the applicant would be produced on 8 October 2013 for

further questioning pursuant to section 16 of the 1953 Act. The District Judge queried whether this was the appropriate mechanism but the PPS representative indicated that the question of the exercise of the section 16 power was a matter for the police.

[7] The applicant's solicitor wrote several pre-action letters to the PSNI, the Governor at HMP Maghaberry and the Minister for Justice, seeking documentation relevant to the decision made under section 16 and then seeking undertakings that the applicant would not be produced under section 16 until the matter was resolved. It appears that correspondence was not sent or directed to the relevant personnel immediately and that pre-action correspondence was overtaken by events when application was made for leave to apply for judicial review on 7 October 2013.

### **PSNI's application under section 16 of the Prison Act**

[8] On 2 October 2013 the PSNI applied for the applicant to be produced for interview on 8 October 2013 to Grosvenor Road police station by e-mailing a form entitled *Application for Production of Prisoner*. The form stated:

"It is anticipated that at the conclusion of the interviews, Mark CAVANAGH may be charged with a number of offences which occurred in the County Court Division of Belfast. The charges for which he is currently on remand for (sic) occurred in the County Court Division of Ards."

[9] The decision to produce the prisoner was taken by Kenneth Hull, a Governor Grade 5 at HMP Maghaberry, in conjunction with his line manager, the head of the Prison Escorting and Court Custody Service. Mr Hull averred that he took into account the fact that the applicant was on remand for drugs related charges and the PSNI was seeking to interview him in connection with unrelated and serious matters. He stated that section 16 applications are considered seriously and are not granted on the basis of administrative convenience for the PSNI. He pointed out that in the past he has refused such applications if they contained incorrect details or sought prisoners for interview in connection with the same offences in respect of which they were being held on remand. He indicated that once a prisoner is produced for interview pursuant to section 16 the protections provided by the Police and Criminal Evidence (Northern Ireland) Order 1989 apply.

[10] In answer to pre-action correspondence in which the applicant's solicitor expressed concern that the power to produce the applicant had been unlawfully delegated to the prison governor, principal officer, and/or senior officer in the Prison Service Mr Hall averred that the Prison Service is an executive agency of the Department of Justice and the Governor is acting on behalf of the Department of Justice. Applications under section 16 are made by police and other parties for a number of purposes. He believed that an appropriately qualified member of the

Department's staff, which could include a Governor or Principal Prison Custody Officer, could make the decision on behalf of the Department. They were appropriately placed to consider the application because they had access to, and knowledge of, the prisoner's situation. Prior to devolution of policing and justice in 2010 the same procedure had existed, albeit that the Governor had made the decision on behalf of the Secretary of State.

[11] In response to the applicant's solicitor's expressed concern that the decision to produce the applicant had been taken without allowing his solicitors to make any representations to the PSNI and/or Prison Service, Mr Hall averred that the Prison Service does not consult prisoners in respect of section 16 applications. His view was that the test of whether production of the prisoner is in the interests of justice requires a balancing of the prisoner's interests against those of the interests of society, in this case the balance coming down in favour of making a person available for interview by police when there are sufficient grounds to suspect him of having committed an offence. A prisoner retains the right not to cooperate in the police investigation or to refuse to answer questions.

#### **The subsequent production of the application pursuant to Article 47 of the 1981 Order**

[12] Leave to apply for judicial review was granted and the respondents agreed not to pursue production of the applicant pursuant to section 16 of the Prison Act pending full hearing of the application. On 5 November 2013 the applicant and co-accused were produced at Downpatrick Magistrates' Court so that an Article 47(4A) application could be made. No representations were made by solicitors for the applicant and co-accused. The District Judge made an order under that provision. The applicant was duly taken from the court for interview at Bangor PSNI station. He was charged with 2 offences contrary to section 44 of the Serious Crime Act 2007. These offences are alleged to have occurred in the Belfast area.

[13] The interview concluded on 7 November 2013 and the applicant was admitted to bail to appear at Belfast Magistrates' Court on 21 November 2013. Although the PSNI describe this as technical bail it appears that it was ordinary police bail. On 7 November 2013 he was then brought back to Newtownards Magistrates' Court where he was remanded in custody to appear before Downpatrick Court on 28 November 2013 for the drugs-related offences.

[14] On 21 November 2013 he appeared in Belfast where bail was revoked and he was remanded into custody to appear by videolink on 19 December 2013. DC Thompson does not consider that the granting of bail was a satisfactory way of having a prisoner produced in such circumstances because a defence solicitor could argue that such a prisoner should remain on bail and could refer to this in bail applications relating to other charges.

### **The relief sought**

[15] The applicant seeks an order of certiorari quashing the decision on 4 October 2013 to produce him at Grosvenor Road PSNI station under section 16 of the 1953 Order and a declaration that the delegation of power to authorise production pursuant to section 16 of the 1953 Act was unlawful. The principal amended ground on which the relief is sought is that the PSNI and the Prison Service misapprehended their powers under section 16 and were in error in concluding that there were such practical and legal difficulties in the proper use of Article 47(4A) in the circumstances of the case that they were entitled to use the statutory power in section 16. The applicant also relied on additional procedural grounds, namely that the policy to delegate the decision-making power pursuant to section 16 of the 1953 Act to a Prison Governor or Principal Officer was unlawful and the decision was taken in a procedurally unfair manner in that the applicant was not given any or adequate opportunity to make representations, in advance of the decision being made, in relation to the need for his production or the mechanism for his production.

### **The relevant statutory provisions**

[16] Section 16 of the 1953 Act provides:

*“Removal of prisoners for judicial and other purposes.*

16.- (1) The Department may, if it is satisfied that the attendance at any place of a person detained in a prison is desirable in the interests of justice or for the purposes of any public inquiry, direct him to be taken to that place.

(2) The Department may, if it is satisfied that a person so detained requires medical investigation or observation or medical or surgical treatment of any description, direct him to be taken to a hospital or other suitable place for the purposes of the investigation, observation or treatment.

(3) Where any person is directed under this section to be taken to any place he shall, unless the Department otherwise directs, be deemed to be in custody while being so taken, while at that place, and while being taken back to the prison in which he is required in accordance with law to be detained.

(4) A person taken from a prison for medical investigation or observation or medical or surgical treatment under sub-section (2) of this section may by direction of the Department, but not otherwise, be discharged on the expiration of his sentence without necessitating his return to prison.

(5) In this section 'hospital' has the same meaning as in the [Health and Personal Social Services (Northern Ireland) Order 1972]."

[17] Article 47 of the 1981 Order deals with the period of remand in custody or on bail. The relevant paragraphs of Article 47 state:

"(4A) In the exercise of its power under paragraph (1)(a) to remand in custody an accused to whom this paragraph applies, a magistrates' court may, on an application made under this paragraph by a member of the [Police Service of Northern Ireland] not below the rank of inspector, commit the accused to detention at a police station.

(4B) In the exercise of its power under paragraph (1)(a) to remand in custody an accused to whom this paragraph applies, a magistrates' court may, on an application made under this paragraph by a member of the [Police Service of Northern Ireland] not below the rank of inspector, commit the accused to the custody (otherwise than at a police station) of a constable.

(4C) The period for which an accused is remanded under paragraph (4A) or (4B) shall not exceed 3 days commencing on (and including) the day following that on which he is remanded.

(4D) Paragraphs (4A) and (4B) apply to an accused who-

- (a) is not under the age of 21 years; and
- (b) is not already detained under a custodial sentence.

(4E) An accused shall not be committed to detention at a police station under paragraph (4A) unless there is a need for him to be so detained for the

purposes of inquiries into other offences; and, if a person is committed to such detention-

- (a) he shall, as soon as that need ceases, be brought back before the magistrates' court which committed him or any other magistrates' court for the county court division for which that court was acting or before any other magistrates' court having jurisdiction to conduct the proceedings;
- (b) he shall be treated as a person in police detention to whom the duties under Article 40 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (responsibilities in relation to persons detained) relate; and
- (c) his detention shall be subject to periodic review at the times set out in Article 41 of that Order (review of police detention).

(4F) An accused shall not be committed to the custody (otherwise than at a police station) of a constable under paragraph (4B) unless there is a need for him to be kept in such custody for the purposes of inquiries into other offences; and if a person is committed to such custody, he shall, as soon as that need ceases, be brought back before the magistrates' court which committed him or any other magistrates' court for the county court division for which that court was acting or before any other magistrates' court having jurisdiction to conduct the proceedings.

(5) The court may order the accused to be brought before it at any time before the expiration of the period for which he has been remanded.

(6) In this Article, "custodial sentence" includes-

- (a) an order for detention in a young offenders centre within the meaning of the Treatment of Offenders Act (Northern Ireland) 1968;
- (b) a juvenile justice centre order within the meaning of the Criminal Justice (Children) (Northern Ireland) Order 1998."

[18] Article 16(1)(b) of the 1981 Order provides:

*“General jurisdiction to deal with charges*

16. - (1) Subject to the provisions of this Part, a magistrates’ court for a county court division may conduct a preliminary investigation or a preliminary inquiry into an indictable offence or hear and determine a complaint charging a summary offence, if in any such case-

....

(b) the offence was committed elsewhere than in the county court division and the defendant is or is resident (or in the case of a body corporate has its registered office or principal place of business) within the county court division;”

### **Conclusion**

[19] In Re O’Neill [2010] NIQB 8 the question arose as to whether the section 16 power under the 1953 Act had been validly exercised in relation to a remand prisoner remanded in custody at Craigavon Magistrates’ Court. Acting under section 16 the Prison Governor released the prisoner into the custody of police for interview in relation to a burglary in Belfast. Weatherup J concluded that there were parallel powers exercisable under section 16 of the 1953 Act and Article 47(4A) of the 1981 Order. Section 16 was not rendered redundant by Article 47(4A) though Article 47(4A) did provide greater safeguards for a detainee. Weatherup J accepted the police contention that there were practical difficulties in the operation of Article 47(4A) where the case involved different Magistrates’ Courts though the nature of such difficulties was not examined and there was no direct challenge to the proposition as to the existence of the problems outlined by the police. At paragraph 18 of his judgment he said:

*“The requirement in Article 47 is that after the police interviews the person be brought back to the Magistrates’ Court making the transfer order or another Magistrates’ Court in the same division or a Magistrates’ Court having jurisdiction to deal with the original proceedings. It is apparent that the issue of how this might be achieved when the person has been further remanded on new charges requires to be addressed by the Court Service and the Police Service and the Prison Service.”*



He concluded that there had not in fact been any abuse of the section 16 power in the circumstances of that case but he did record the police concession that Article 47(4A) ought to be the primary source of the power to order the transfer of a remand prisoner to the police for questioning about another offence.

[20] Article 47(4A) provides a judicial oversight on the question of whether a remand prisoner should be released into police custody for questioning about other offences. Where the legislature considers the exercise of such a power calls for judicial oversight, the use of another procedure that results in no judicial oversight (or at most the limited oversight available in judicial review proceedings) must be exceptional and should only be exercised in circumstances in which the principal statutory power is not capable of being properly exercised. Otherwise the statutory intent of Article 47(4A) would be liable to be defeated.

[21] The answer to the present case is to be found in a proper understanding of the jurisdiction of Downpatrick Magistrates' Court to deal with the situation arising from the police decision to charge the applicant with offences committed within the Belfast County Court jurisdiction. In reality the difficulties arising in the present case were more apparent than real.

[22] What actually transpired following the exercise by Downpatrick Magistrates' Court of the Article 47(4A) power showed that there was in reality no practical difficulty in the use of that statutory power. The police granted bail to the applicant in relation to the alleged Belfast offence and brought the applicant back to Downpatrick Magistrates' Court as required under Article 47. It was open to the police to grant bail to the applicant and the applicant could be brought before Belfast Magistrates' Court at a later date. The suggestion by the police that the bail was merely "technical" and an inappropriate mechanism to use is misconceived. In practical terms it was most unlikely that Downpatrick Magistrates' Court would have granted immediate bail on the Ards offences knowing that additional more serious charges were to go before the Belfast Magistrates' Court when the granting of bail would deprive the Crown of the opportunity to oppose the release of the defendant from custody in relation to the Belfast charges. What actually properly happened in the present case demonstrates that it was not in fact necessary to resort to section 16 of the 1953 Act because Article 47(4A) could be properly used.

[23] There is another reason why there was no practical difficulty in the use of Article 47(4A) in the present case. In Re Barry Morgan [2014] NIQB 2 this court clarified the jurisdiction of Magistrates' Courts under Article 16 of the 1981 Order. In that case the court concluded that a District Judge in Downpatrick Magistrates' Court dealing with committal proceedings relating to offences committed in the County Court Division of Ards had jurisdiction under Article 16(1)(b) to deal with an additional complaint relating to an offence allegedly committed in the County Court Division of Craigavon. This

was because the defendant was in the jurisdiction of the Magistrates' Court in the County Court Division for Ards in answer to the charge relating to the Ards offences at the time when the additional complaint was laid against him in respect of the Craigavon offence.

[24] The applicant argued that Article 16(1) of the 1981 Order in conferring jurisdiction on the Magistrates' Court was dealing only with (a) summary offences and (b) committal proceedings. If brought before the Downpatrick Magistrates' Court in answer to the new Belfast charges, he would not be answering a charge in respect of a summary offence and he would not be before the court in connection with committal proceedings which would in all probability not take place for a protracted period. However, Article 16 is expressed by its introductory title as the provision dealing with the general jurisdiction of Magistrates' Courts "to deal with charges." It makes provision for judicial oversight by a Magistrates' Court over questions of the detention or bailing of defendants charged with summary offences and indictable offences. The Magistrates' Courts' jurisdiction in relation to a defendant charged with indictable offences continues up to the stage of committal proceedings. Where a defendant charged with an indictable offence comes before a Magistrates' Court the Magistrates' Court supervises the conduct of the proceedings up to the committal stage and, in practice, the relevant case will be adjourned from time to time until the actual committal proceedings can get underway. Where a district judge has, in relation to an indictable offence, jurisdiction to conduct the committal proceedings he must also inevitably have jurisdiction to deal with the initial stages in the process which lead up to that committal stage. Thus Downpatrick Magistrates' Court had jurisdiction to deal with the question whether the applicant should be remanded in custody or granted bail in respect of offences in relation to which that court would ultimately have jurisdiction.

[25] Further, under section 7 of the Criminal Justice Act (Northern Ireland) 1945 a person charged in Northern Ireland with the commission of indictable offences may be proceeded against in any county or place in which (a) he is apprehended (b) he is in custody for the offence or (c) he appears to answer a summons lawfully issued charging the offence. When the applicant was brought before the Downpatrick Magistrates' Court when the Article 47(4A) application was to be made he was at that stage in the physical custody of the Prison Service and subject to the oversight of the Downpatrick Magistrates' Court. When the power under Article 47(4A) was exercised he was taken into police custody for questioning. There seems to be no reason in principle why the applicant should not be considered to have been "apprehended" by the police at that stage and he was taken to Bangor Police Station within the Division of Ards. We are reinforced in this view by the decision in R v Pentonville Prison ex p. Ecke [1974] Crim LR 102 in which it was held that a person arrested on a previous extradition warrant may be "apprehended" a second time for the purposes of section 8 of the Extradition Act 1870. By virtue of the deeming provisions of section 7 the applicant could be deemed to have

committed the offence where he was apprehended, that is to say within the County Court Division of Ards and, thus, subject to the jurisdiction of the Downpatrick Magistrates' Court.

[26] For these reasons the PSNI and the Prison Service were in error in concluding that there were legal and practical difficulties rendering it inappropriate to proceed in reliance on Article 47(4A) of the 1981 Order and more appropriate to proceed in reliance on section 16 of the 1953 Act. Accordingly they were in error in purporting to exercise the section 16 power. In view of these conclusions the other grounds relied upon by the applicant do not arise for consideration.

[27] We will hear counsel on the question of the wording of the appropriate order to be made and on the issue of costs.